

Ombudsman's Determination

Applicant	Ms D
Scheme	Euler Trade Indemnity Pension Scheme (the Scheme)
Respondents	Euler Hermes Services UK Limited (the Company), Mercer Limited and the Trustees of the Euler Trade Indemnity Pension Scheme (the Trustees)

Outcome

1. I do not uphold Ms D's complaint, and no further action is required by the Company, Mercer Limited and the Trustees.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms D's complaint against the Company, Mercer Limited and the Trustees is that:

(1) her deferred pension under the Scheme is being revalued at a different rate than the Company and Mercer Limited advised her in 1993 and 2002, respectively; and

(2) on behalf of the Trustees, Mercer Limited told her, in 2002, that she would be able to draw her pension from age 60 without any reduction for early payment, or receive an uplifted pension from age 60 to age 63, but the Trustees have subsequently said that she will not be entitled to receive an unreduced pension until age 63.

Background information, including submissions from the parties

4. Ms D joined the Company on 1 December 1989, and left its employment on 30 April 1993, aged 37. The Company sent her a letter on 15 June 1993 (**the 1993 Letter**), enclosing a statement of her preserved benefits under the Scheme. This referred to:

"A deferred pension payable from Normal Retirement Date of 2 December 2018 which is estimated to be:

Pension accrued at date of leaving: £2,913.48 p.a.

Plus revaluation on the Guaranteed Minimum Pension [GMP] over the period from date of leaving to Normal Retirement Date, at a fixed rate of 7.50% p.a. £1,624.48 p.a.

Plus a part of the pension will increase from date of leaving up to Normal Retirement Date, at a rate based on the Retail Price Index with a maximum of 5% p.a. Assuming the rate is actually 5%, the increase will be: £6,097.60 p.a.

Total estimated pension at Normal Retirement Date: £10,635.56 p.a."

5. In 2002 Ms D asked Mercer Limited (the Scheme administrator at that time, acting on behalf of the Trustees), to provide her with a transfer value quotation. This information was contained in a letter from Mercer Limited (**the 2002 Letter**), which also listed her alternative

preserved benefits. It said that her basic pension at the date of leaving was £2,913.48 a year. Under the heading “Benefits payable from normal pension age, i.e. 63 – revaluation to be applied” it said that:

“The benefits in excess of GMP will increase at 5% per year compound, or by the rise in the retail prices index (RPI) if less, between the member’s date of leaving and age 63.

The benefits for the period from 1 December 1989 to [no date specified] will be further increased between age 60 and 63 so that they are not less than the amount which would have been paid if the member’s normal pension age had remained 60.”

6. When Ms D queried the calculation of her pension benefits, Mercer Limited told her on 21 November 2002 that:

“The actual increase to apply for the term between your date of leaving to normal retirement age is the lesser of the rise in the Retail Prices Index or 5% per annum compound. As the rise in the Retail Price Index has been considerably less than 5% per annum the pension available at normal retirement would be lower than that quoted of £10,635.56.”

7. In 2011, the deferred members of the Scheme, including Ms D, were told by the Trustees that the revaluation of their deferred pensions (exceeding any GMP) would be calculated by reference to increases in the Consumer Price Index (CPI) instead of RPI.
8. On 14 June 2011 Ms D invoked the Scheme’s internal dispute resolution procedure (**IDRP**). She complained that the Trustees’ decision to switch revaluation from RPI to CPI would give rise to a lower revaluation amount than she had been expecting. She said that she was never warned by the Trustees that RPI could be replaced by an index that would provide smaller increases, and that she had used the information provided to her by the Trustees to evaluate whether or not to transfer her benefits from the Scheme to another pension arrangement, and to plan for her retirement.
9. Ms D also asked the Trustees to confirm when she could draw her pension with no penalty, bearing in mind what Mercer Limited had told her in 2002.
10. Buck Consultants, the Scheme administrator acting on behalf of the Trustees, told Ms D, on 27 July 2011, that in the 2002 Letter the sentence about further increases applying between ages 60 and 63 should have been removed “as it is not applicable to you. Based on the Scheme’s Rules, which are overriding in this case, your benefits are payable unreduced from age 63.” Buck Consultants also said that the first stage of Ms D’s IDRP claim would be reviewed by Miss Hanoman, the Company’s head of human resources.
11. Ms D then complained that the statement in the 2002 Letter that implied that she would receive a full pension from the age of 60, with increases until age 63, was a significant factor in her decision not to transfer her benefits from the Scheme to another pension arrangement.
12. In October 2011 Miss Hanoman rejected Ms D’s complaints. Miss Hanoman said that the references to RPI increases in the 1993 Letter and the 2002 Letter were correct at the time those letters had been written, but CPI had subsequently been introduced to replace RPI. Miss Hanoman also said that the Trustees’ statements were effectively overridden by the trust deed and rules (**the Trust Deed and Rules**) which governed the Scheme.

13. Miss Hanoman also said that the Trust Deed and Rules clearly stated that Ms D's normal retirement date was her 63rd birthday, so no uplift was appropriate in respect of the period from age 60 to age 63. She added:

"I have also reviewed the correspondence you have received from Mercer and have concluded that this is template documentation which has not been updated to reflect your individual pension arrangements. Whilst this is an unfortunate error, the Mercer letter does not confer any rights over and above those contained in the Trust Deed and Rules. The fact that the Trust Deeds and Rules will prevail is a well-established legal precedent."

14. In 2012 Ms D complained to the chairman of the Trustees, under the second stage of the IDR, that the Trustees had given her inaccurate information about pension revaluation which she had relied upon, and this had resulted in her future pension arrangements and her retirement being penalised. She said that "I have also planned my retirement finances on the basis that I would receive a benefit from delaying my drawing until the age of 63." Ms D requested revaluation calculated by reference to RPI increases, and an uplifted pension from age 60.
15. The chairman of the Trustees rejected Ms D's appeal on 28 June 2012, saying that the leading case of *Steria Limited v Hutchison [2006]* confirmed that a pension scheme's trust deed and rules effectively overrode communications sent to scheme members, and that the rules of the Scheme provided for revaluation to be calculated in accordance with pensions legislation; in 2011 legislation had changed the reference index from RPI to CPI. Therefore Ms D was not entitled to further increases on her deferred pension.
16. Ms D sought the help of The Pensions Advisory Service (**TPAS**) in 2013 and 2014. After they concluded that Ms D's complaints would be unlikely to succeed Ms D contacted us in 2015.

Adjudicator's Opinion

17. Ms D's complaint was considered by one of our Adjudicators, who was of the opinion that as an existing compensation offer by Mercer Limited was still on the table no further action was required by the Company, Mercer Limited and the Trustees. The Adjudicator's findings are summarised briefly below.
- Ms D's membership of the Scheme was governed by the Trust Deed and the Rules in force from time to time. The first part of Ms D's complaint related to the change from RPI to CPI in the revaluation of her deferred pension (excluding the GMP). Rule 9.9.2 of the Rules, adopted on 24 August 1992, before Ms D left the Scheme, provided that under the heading "Revaluation of Deferred Benefits":

"Benefits payable under the Scheme to the Member, or to any other person in respect of the Member, on the Member's death after Normal Retirement Date, shall be revalued in accordance with Part I of Schedule 1A to the Pensions Act [meaning the Social Security Pensions Act 1975] until the earliest of: the Member's Normal Retirement Date; the commencement of payment of the pension to the Member before that date; and the Member's death."

- The Rules were amended by a deed dated 9 May 2011. Rule 23.6 "Revaluation" was in broadly similar terms to Rule 9.9.2 above, but was updated to refer to the Pension Schemes Act 1993 which replaced the earlier legislation.

- It was clear that the revaluation provisions in the Rules relied on the requirements of pensions legislation. The revaluation provisions did not refer specifically to the RPI, and therefore did not entrench the RPI as the only reference index that should be used. The legislation originally provided for revaluation to be calculated by reference to the increase in RPI, subject to a maximum increase of 5% p.a. (later 2.5% p.a.). In July 2010, the Government announced that it intended to use CPI instead of RPI for revaluation purposes and accordingly the Pensions Act 2011 amended the Pension Schemes Act 1993. Therefore, the Scheme's change of reference index from RPI to CPI was consistent with the Rules. The change had been announced to the deferred members of the Scheme.
- Ms D said that she based her retirement planning on the wording of the Scheme literature regarding RPI increases that she had received, as she had not seen the Trust Deed and Rules. However, the 1993 Letter also stated that "At retirement or on death, the benefits will be paid in accordance with the Rules of the Scheme." Case law has established that a scheme's trust documentation usually prevails over the explanatory literature issued, to the extent that there may be any inconsistency between the two. Under statutory disclosure regulations, scheme members are not required to receive a copy of the Trust Deed and Rules automatically but they can request a copy. Ms D could have asked to see copies but did not do so.
- Ms D also said that because she relied upon the Scheme's explanatory literature, when deciding to remain in the Scheme, it would be unfair not to award her increased benefits. After receiving a transfer value quotation in 2002 Ms D did not take a transfer to another pension arrangement. However, the Adjudicator was not convinced that Ms D's decision not to proceed with a transfer out of the Scheme was based mainly upon her (mistaken) understanding that her deferred pension (exceeding the GMP) would always be revalued in accordance with the RPI. He pointed out that many members' requests for a transfer value are made for information purposes only and do not result in a transfer being made.
- The Scheme provides comparatively generous benefits calculated on a defined benefit basis, with guaranteed increases, so it would have been a big decision to transfer from the Scheme to another pension arrangement such as a defined contribution (money purchase) scheme. Ms D suggested that any transfer she made would most probably have been made to such an arrangement, as she was no longer in active membership of a defined benefit scheme. However, there was no guarantee that if a transfer payment had been made from the Scheme it would ultimately have produced a more generous pension than the Scheme would otherwise have provided, so that Ms D would effectively have lost out by not taking a transfer out.
- Furthermore, Ms D had not demonstrated that in reliance on the information contained in the 2002 Letter she had changed her position, e.g. incurred expenditure that she would not otherwise have incurred. Her Normal Retirement Date was her 63rd birthday and in the meantime, unless she elected to receive her deferred pension early, it would continue to be revalued in the Scheme each year. Therefore, the Adjudicator did not think that the Pensions Ombudsman would uphold this part of Ms D's complaint.
- The second part of Ms D's complaint related to whether her (revalued) deferred pension should be increased further in respect of the period from age 60 to age 63, as she inferred from the wording of the 2002 Letter.
- Both the 1993 Letter and the 2002 Letter made clear that Ms D's Normal Retirement Date was her 63rd birthday. In the 2002 Letter, the sentence regarding an uplift from age 60 to age 63 clearly had a missing date immediately after the words "the period from 1 December 1989

to". A period of time needs both a start date and an end date. This sentence was not completed properly. That was most likely to have occurred because it was a draft wording; it should either have been deleted or completed before the 2002 Letter was issued. The sentence would have been appropriate for a member whose Normal Retirement Date had been changed from age 60 to age 63. However, that did not apply to Ms D as her Normal Retirement Date was not changed.

- In Rule 1 of the Trust Deed and Rules, as adopted on 24 August 1992, "Normal Retirement Date" was defined as "the 63rd birthday or such other date as the Principal Company, in consultation with the Trustees, may agree with the Member...". There was no evidence that the Company and the Trustees ever reached an agreement with Ms D that her normal retirement date should be earlier than age 63.
- Furthermore, the Scheme's explanatory booklet dated 1 January 1989, which presumably was given to Ms D when she joined the Scheme, said that the Scheme was governed by the Rules, which could be inspected at any reasonable time, and that:

"Normal Retirement Date is your 63rd birthday. If you were a member of the Scheme or in the Company's service on 1st January 1986 you are given the option on joining the Scheme of retiring at 65 if male or 60 if female."

- The explanatory booklet was consistent in this respect with the Trust Deed and Rules. As Ms D joined the Company in 1989 she should have known that her Normal Retirement Date for Scheme purposes was always age 63. Ms D had not put forward any technical reason to explain why an additional uplift should be awarded to her in respect of the period from age 60 to age 63.
- The retention of the incomplete sentence in the 2002 Letter was incorrect and this amounted to maladministration. However, the Adjudicator did not consider that this drafting error had caused Ms D any injustice as in his view it was unreasonable for Ms D to have relied upon the uncompleted sentence. The missing date should have alerted her to the fact that something was wrong with the wording, but she did not query it at that time, or within a reasonable period afterwards. For the reasons set out above the Adjudicator did not expect the Pensions Ombudsman to uphold this part of Ms D's complaint.
- The Adjudicator noted that in June 2015 Mercer Limited admitted that it had made a documentation error in the 2002 Letter, and offered to pay Ms D compensation of £500 for the distress and inconvenience that this had caused. On the basis that this offer was still available, the Adjudicator would not expect the Pensions Ombudsman to make any further award to Ms D for her distress and inconvenience.

18. Ms D did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Ms D provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Ms D for completeness.

19. Firstly, Ms D noted that the Opinion did not comment on the inconvenience, time, effort, disappointment and embarrassment that she had been caused because of the manner in which the Trustees had responded to her complaints. However, Ms D did not raise those issues in her application form of 12 May 2014 (amended on 14 April 2015). Our letter of 27 October 2014 expressed her complaints as being about the revaluation rate applicable to her deferred pension and the early payment terms, and Ms D did not object at the time to our description of her complaints. Therefore, it was appropriate for the Opinion to focus on those issues, not other points that were not raised until later. However, it is only fair that I address the major points that Ms D has raised.

20. To support her recent comments, Ms D submitted a detailed chronology of the correspondence on her complaints from March 2011 to June 2012.
21. This shows that after several exchanges of emails with the Company's human resources department Ms D was informed on 9 May 2011 that she could invoke the IDRP. Her application forms were received by Miss Hanoman on 17 and 25 August 2011, and formal replies were issued to Ms D on 10 and 31 October 2011. This was close to the expected time frame of two months. Ms D's appeal application was posted on 12 March 2012. Unfortunately, that application appears to have gone astray, as Ms D had to email another copy to Miss Hanoman on 24 April 2012. Ms D's appeal was determined on 28 June 2012. This was slightly outside the normal time frame of two months. I do not consider that these delays were critical.
22. With regard to the tone of the responses that Ms D received, Buck Consultants' letter of 27 July 2011, on behalf of the Trustees, said "Please accept my apologies for any confusion caused." Miss Hanoman's letters of 10 and 31 October 2011, were business-like and to the point, but did not contain any further apology for the mistake that had been made in the 2002 Letter, which was described as "an unfortunate error". Although that error was made by Mercer Limited, and not the Trustees, I agree that it would have been helpful if the Trustees had worded their letters to Ms D more apologetically. However, I do not consider that the tone of the Trustees' responses was offensive.
23. Ms D said she was particularly upset by the Trustees' comment that "Being still married 13 years on, it would not have been clear cut in 2002 [Ms D] would have decided to transfer in 2002 assuming she would buy a single annuity." In my view this was a rather inelegant way of saying that Ms D could not have been sure in 2002 whether, at a later date, she would prefer to buy a single life annuity or a joint live and survivor annuity from a defined contribution pension arrangement. That would be an investment decision to be made at the relevant date. However, I do not think the Trustees were seeking to comment on Ms D's future marital status.
24. Ms D said that in addition to the 1993 Letter and the 2002 Letter (mentioned in her application form), she received other correspondence from the Trustees that referred to RPI increases. Ms D did not provide copies to support her complaint. Ms D also said that she did not receive a copy of the Scheme's explanatory booklet. I accept that point. However, that does not alter the fact that, as a member of the Scheme, the calculation of Ms D's benefits should be governed by the wording of the Trust Deed and Rules, not the explanatory literature, unless Ms D can show a "change of position". The Adjudicator has explained this legal concept to Ms D in recent correspondence. I agree with the Adjudicator that Ms D has not shown a change of position.
25. Ms D said that she was considering whether to transfer from the Scheme to a defined contribution arrangement, not a defined benefit scheme. As there is no guarantee of receiving RPI increases under a defined contribution arrangement, that weakens the argument that Ms D's decision whether to transfer turned on whether the Scheme would provide RPI or CPI increases.
26. Ms D objected to the statement in the Opinion that she should have known that her Normal Retirement Date was her 63rd birthday, but this was set out in the statement enclosed with the 1993 Letter.
27. With regard to the Scheme's governing documentation, I have seen a copy of the Trust Deed and Rules dated 24 August 1992, which were in force when Ms D left service. Members of the Scheme are entitled to ask the Trustees for a copy of the Trust Deed and Rules, although Ms D did not ask them for a copy. I am satisfied that Rule 9.2.2 provides

for the revaluation of deferred pensions to be in accordance with relevant legislation from time to time, as set out in the Adjudicator's Opinion; therefore the Rule does not entrench RPI increases indefinitely.

28. In conclusion, Ms D has suffered a loss of expectation, but not an actual financial loss, because of the 2002 Letter.

29. I agree with the Adjudicator that, in these circumstances, Mercer Limited's offer of £500 compensation sounds reasonable. I note that TPAS warned Ms D in 2014 that any compensation that I would award for "loss of expectation" would be likely to be a modest amount. I consider that in view of Mercer Limited's offer, which is consistent with the minimum award that I currently make in cases of non-financial injustice, no further award is merited.

Ombudsman's decision

30. Therefore, I do not uphold Ms D's complaint.

Anthony Arter

Pensions Ombudsman
17 November 2016