

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mrs Yvonne Spillett
Scheme	Marks and Spencer Pension Scheme (the Scheme)
Respondent(s)	Marks & Spencer Pension Trust Ltd (the Trustee)

Subject

Mrs Spillett complains that the Trustee has incorrectly applied the state benefit deduction from age 60.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against the Trustee because there has been no maladministration. The Trustee has dealt with Mrs Spillett pension in accordance with the Scheme rules, which states that her state pension age is her 60th birthday. However, the Trustee did provide her with inaccurate or misleading information and she has suffered non-financial injustice as a result.

DETAILED DETERMINATION

Material Facts

1. Mrs Spillett's date of birth is 3 December 1953. She was employed by Marks and Spencer (the **Company**), but left their employment on 29 April 1989. During this time she was a member of the Scheme. Once Mrs Spillett left employment, she became a deferred member of the Scheme.
2. The Scheme rules (the **Rules**) have been revised on a number of occasions over the years. At the time when Mrs Spillett left employment in 1989, the Rules then in force were set out in a Trust Deed and Rules dated 7 August 1984 (**the 1984 Rules**).
3. Rule 5(a) of the 1984 Rules said that on retirement at or after normal Retirement Date, a member would be paid a pension equal to 1/45 of their final pensionable salary for each year of service "less the State Pension Deduction".
4. The State Pension Deduction was defined as

"an amount equal to 1/40th of the full yearly rate... of the basic component of the Category A retirement pension described in the Social Security Act 1975 payable from pensionable age for a single person who fully satisfies the relevant contribution conditions."
5. Rule 5(a) also said that the total amount to be deducted

"... shall not exceed the yearly rate... of the basic component of the Category A retirement pension described in the Social Security Act 1975 payable from pensionable age for a single person... and provided further that the reduction in the amount of the yearly pension due to the State Pension Deduction shall be ignored until the Member reaches pensionable age."
6. Under Rule 15, a deferred member with more than five years' service was entitled to a deferred pension when they reached Normal Retirement Date or pensionable age, whichever was earlier. This would be calculated in the same way as if Rule 5 applied, but with reference to their final pensionable salary at the date of leaving employment (though with a deduction for early payment).
7. The Normal Retirement Date under the Scheme was age 65 for men and age 60 for women.

8. The effect of the Rules was that where a member received their pension under the Scheme before reaching state pension age (**SPA**) they would receive their pension in full, but once the member started to receive their state old age pension, the amount of state old age pension received by them would be deducted from the pension paid to them under the Scheme.
9. The 1984 Rules were amended by a Supplemental Deed date 25 November 1988 (**the 1988 Rules**), but those amendments did not affect Rule 5 or the definitions set out above.
10. The Social Security Act 1975 defined “pensionable age” as

“in the case of a man, 65; in the case of a woman, 60.”
11. Mrs Spillett was sent a certificate on 6 July 1989 from the Trustee setting out her entitlement on leaving the Scheme. The certificate stated that her normal retirement date was 31 December 2013 and her state retirement date was 3 December 2013. The certificate informed her that when she reached normal retirement date she would be entitled to a pension of £335, which “takes into account the deduction to be made when you reach state retirement age”.
12. In a letter dated 22 March 2007 the Trustee gave details of Mrs Spillett’s estimated pension; a full pension of £3,689 payable from 1 May 2007 or a reduced pension of £2,439 plus a lump sum of £16253. The letter advised that the pension would be reduced by the state pension deduction on 31 July 2017; the amount of the reduction was currently £1,300, but would increase in line with the increases applied to the pension.
13. In a letter dated 16 April 2007 the Trustee informed Mrs Spillett that she would receive pension of £2,110 a year was payable from 1 May 2007. It added that the pension will reduce when she reached SPA, on the first payment date after 1 August 2017, which at the time was £1,158.23.
14. On 8 August 2011 the Trustee wrote to Mrs Spillett stating that when she retired she was advised that her pension would be reduced by £1,310 from 6 July 2017. The Trustee added that as a result of the Government’s proposal to change SPA, it had recently reviewed how the state pension deduction is applied to her pension. The result of the review was that the state pension deduction should be applied when she reached age 60 and not 6 July 2017 as previously

advised. The letter offered an apology for having provided incorrect information regarding the timing of the deduction.

15. By a Deed dated 20 September 2011 (**the 2011 Rules**), the Trustee modified the Scheme Rules, replacing the existing definition of “State Pension Age” with a new definition:
 - i. for members who left service before 17 May 1990, pension age means, for a woman her 60th birthday, and for a man, his 65th birthday;
 - ii. for members who left after 17 May 1990 but before 1 January 1997, pension age means

for service before 17 May 1990, for a woman her 60th birthday and for a man his 65th birthday

for service after 17 May 1990, the meaning given in the Pensions Act 1995 as originally enacted; being for a man, his 65th birthday and for a woman, an age between her 60th and 65th birthday, depending on her date of birth, as set out in a table;
 - iii. for members who left service after 1 January 1997, the same meaning as in paragraph ii above;
 - iv. for a member who falls within paragraph ii and has service both before and after 17 May 1990, the Trustee may, with consent of the Company, make such estimates as they think appropriate in respect of each such period.
16. The change was expressed to be by way of clarification, and to have effect only as consistent with the power to change the Scheme within the Rules and so as not to adversely affect any subsisting rights pursuant to section 67 of the Pensions Act 1995.
17. The explanatory booklet for the Scheme dated April 1997 states, under the section headed “Retiring Early”: ‘Your retirement income will be worked out on your salary and service when you retire. Remember there will be no deduction for the State Basic Pension until you reach State Pension Age’.

18. Mrs Spillett took her complaint to the Pensions Advisory Service (**TPAS**). On 27 February 2014, TPAS on behalf of Mrs Spillett made a complaint under the Scheme's internal dispute resolution procedures (**IDRP**).
19. The Trustee wrote to TPAS on 13 March 2014 requested further information from Mrs Spillett about whether she had relied on the information she received and the actual financial loss she has suffered. It asked for details of specific financial transactions she had entered into at the time of or in anticipation of when she intended to take her pension from the Scheme.
20. Mrs Spillett responded stating that she did not see why she had to justify the reason why she believed the Trustee is wrong in its decision to apply the state pension deduction before she reached her actual SPA. In her view, the Trustee had caused this problem and it would be wholly wrong to allow their decision to go unchallenged. None of this was her fault and she continued to feel very strongly about it. She saw no point in explaining her financial loss as it is obvious that her pension was now lower than it was before the state pension deduction was applied. She relied on this information especially as she knew her pension would be very meagre and therefore every penny would count. She saw the request to demonstrate reliance as just another hoop the Trustee has set up for her to jump through.
21. On 23 April 2014 the Trustee wrote to TPAS confirming that Mrs Spillett was receiving the correct entitlement under the Rules. The Trustee said that it accepted that the provision of incorrect information regarding the state pension deduction amounted to maladministration and was therefore prepared to offer her £500 compensation in recognition of this. However, she had not provided any specific information to show how she relied on the incorrect information. Even if she had relied on the incorrect information, she had not given any evidence of actual financial loss. It recognised that her expectations will not be met, and she may as a result of the correction of the position need to adjust her lifestyle. This was not in itself actual financial loss for which it ought to compensate her.

22. Mrs Spillett declined the Trustee's offer of compensation and decided to bring her complaint to me. Her view is that since December 2013 her meagre pension was reduced by £75 per month and the compensation that was offered was nowhere near her loss, which she assessed to be at least £4500.

Summary of Mrs Spillett's position

23. Although at the time she left the Scheme, in April 1989, her SPA was 60 and it was expected that the state pension deduction, applicable under the Rules, would also be made from age 60, the Rules were amended by a deed dated 6 May 1998 (the **1998 Rules**).
24. Under the 1998 Rules the definition of SPA was amended and this together with the provisions of rules 16.2 and 16.5 meant that the state pension deduction would not be applied until she reached her revised SPA, i.e. 63 years and seven months, as originally envisaged by the Pensions Act 1995.
25. This was consistent with the Scheme explanatory booklet dated April 1997 which, although by that date she had left the Company, applies equally to her as it was stated to be a guide to permanent staff engaged up to and including 31 December 1995. The booklet informed members that if they retired before SPA, there would be a gap between the start of their pension from the Scheme and start of their state basic pension. Members were advised that *"The Scheme will bridge this gap by paying you your M&S pension without any reduction for the Basic State Pension until you reached State Pension Age"*.
26. The booklet also advised members that the SPA would eventually be age 65 for everyone and suggested women born after 6 April 1950 should check with the local DSS to find out what their revised SPA would be.
27. She is of the view that there is only one definitive SPA, and that is the one as set by the government. It does not seem right that the Trustee should be able to redefine SPA as set down by the government. SPA cannot have two different definitions at the same time.
28. She believed that all documents she received conferred an entitlement. As a lay person she felt that it was quite understandable for her to believe this.
29. In a letter dated 22 March 2007 she received an illustration of the benefits payable to her from 1 May 2007. The letter advised that the state pension

deduction would be applied from 31 July 2017 which was her revised SPA under the Pension Act 1995 and the 1998 Rules.

30. With regard to the letter of 8 August 2011 it is clear that prior to the review referred to in that letter the Trustee believed that the deduction would only apply from her revised SPA.
31. Since the 1998 Rules there have been several deeds completed but the only deed which specifically affects the date from which the state pension deduction would be applied is the deed dated 20 September 2011. This deed introduced by way of clarification a new definition of "Pension Age" which if applied to her would mean the state pension deduction would be applied in part from age 60 (in 2013). She believes that the terms of the 1998 Rules gave her a subsisting right for the state pension deduction not to be applied until her revised SPA of 6 July 2017, and to apply part of that deduction before that date would be in contravention of clause 4 of the 2011 Deed and would breach her subsisting right.
32. In 2014 the Trustee offered her compensation of £500 if she were to drop her complaint. It was at this point that she declined the offer and instructed TPAS to refer her case to me. However it was not clear to her that in doing so, if her complaint did not succeed, any subsequent compensation would be less than that offered by the Trustee.

Summary of the Trustee's position

33. Mrs Spillett's benefits are governed by the Trust Deed dated 7 August 1984 and the Supplemental Deed dated 25 November 1988. These provide that the state scheme deduction should be applied at pensionable age (the final paragraph of rule 5(a) of the 1984 Deed). This is to be read by reference to the Social Security Pensions Act 1975. Therefore her "pensionable age" will be 60.
34. The 1984 Deed does contain provisions by virtue of which references to legislation are deemed to be references to modifications and re-enactments. However, there is no statutory reference included in the reference to "pensionable age" and this does not apply here.
35. It acknowledges that she was provided with correspondence which stated that the state scheme deduction would be applied from August 2017.

36. It is well established that the provision of incorrect, incomplete or misleading information does not in itself give rise to any entitlement in excess of that which applies under the Rules. All the documents sent to her are summary documents and not documents which could reasonably be expected to confer any such entitlement.
37. It has no powers to confer benefits in excess of those under the Rules. The Company did have such power, via discretionary benefits/augmentation provisions. However, there is no evidence that the Company has used such power in her case. Therefore, it does not agree that the provision of incorrect information on retirement amounts to a contractual obligation which it is obliged to honour.
38. It acknowledges that in some cases, a member may be able to demonstrate that he or she acted upon information provided, that it was reasonable for the member to do so and that the member has suffered actual financial loss in respect of which it may be liable to compensate the member. This does not, however, amount to a requirement for it to honour the information given.
39. Mrs Spillett was invited to provide any evidence supporting her claim to have acted in reliance upon the information provided. She has declined to provide any evidence to support this claim or of any actual financial loss suffered.

Conclusions

40. This is one of a number of complaints brought by female members of the Scheme about the date when the state pension deduction will be made.
41. Although not referred to as a bridging pension in the Rules, the way pensions are paid under the Scheme is in effect a form of bridging pension – an additional amount is paid to members who retire and start receiving a pension from the Scheme before reaching SPA. When they become entitled to their state pension an amount equivalent to the basic state pension is then deducted from their Scheme pension, so that they continue to receive the same amount of pension overall.
42. The position under the Scheme is that a deduction is made from the member's Scheme pension when they reach SPA (as defined in the Scheme Rules), which is referred to as the "State Pension Deduction". For members who left service

before 17 May 1990, this happens at age 60 for women and 65 for men. That is because those were the respective SPAs in force at that time and it was then permissible to have different pension ages for men and women.

43. As a result of the decision in the Barber case, from 17 May 1990 it was unlawful to have different retirement ages for men and women. All pension schemes were required to equalise the retirement age for male and female members. But they did not have to do this immediately – schemes were allowed a period of time (known as the ‘Barber window’) to equalise the retirement ages for men and women.
44. For members who left service before 17 May 1990, the Scheme applies the state pension deduction at age 60 for women and 65 for men.
45. What was not foreseen at the time was that there would be further changes to SPA; the government has made – and is continuing to make – changes to the state retirement age, which will continue to increase (indeed it has recently announced that SPA will increase to 67 on a date between 2026 and 2028 and it will continually review the retirement age in light of the increase in people's life expectancy).
46. The outcome of these changes is that the definition of SPA for the purposes of the Rules has not kept pace with changes in the statutory SPA. So Mrs Spillett now has a SPA of 65 and will receive her basic state pension on December 2018, but she continues to have a SPA under the Rules of 60 because she left service before May 1990. The result of this is that her state pension deduction for this period will be taken in 2013 when she reaches 60. So there will be a gap of five years when her Scheme pension will be reduced but she will not yet be receiving her basic state pension.
47. Mrs Spillett has not alleged that she is the victim of unlawful discrimination. However, I have received a number of complaints from members of the Scheme about the state pension deduction, each raising different but related issues. During the course of the investigations into these complaints a number of issues arose, including the question of whether there was unlawful discrimination between men and women. I considered that point in another case, where my determination was issued on 10 October 2013 (PO-304 Thew). My conclusions

are set out in detail in that published determination and there is no need for me to go through them again in detail.

48. It follows from my conclusion in Mrs Thew's complaint that Mrs Spillett has not suffered unlawful sex discrimination, but there remains the question of whether her pension has been dealt with in accordance with the Rules.
49. This question turns on the definition of SPA and, thus, the date at which the state pension deduction should be applied. Mrs Spillett says that the definition of SPA should be the one set by the government. Understandably she took this to mean the age at which she would actually receive her state pension. However, the starting point for determining a member's benefits is always the Rules, so the definition must be that set out in the Rules.
50. In the 1984 Rules, it is clear that the deduction only comes into effect when the member reaches the age at which they become entitled to their state pension – Rule 5 states that the deduction "shall be ignored until the Member reaches the "pensionable age".
51. There was clearly an intention to smooth pension income – the purpose of the Rule is to ensure that the amount of pension received stays the same regardless of whether any state pension is being paid; no deduction is to be made that is greater than the actual state pension. Although amended by subsequent Deeds, there is nothing in the later Deeds that specifically overrides this. Indeed, the 2009 Rules again say that for members in Mrs Spillett's situation, the deduction is not to be taken until the member reaches SPA.
52. That leads to the next question, which is what her SPA is.
53. The Trustee says that the reference should be interpreted as being to the state pension arrangements in force at the time of the 1984 Deed – in other words, age 60. The Trustee relies on Rule 5(a) of the 1984 Rules, which refers to a member reaching pensionable age. "Pensionable age" is defined in accordance with the Social Security Act 1975 as, for a woman, age 60.
54. That ignores the clear intention of the Rules to ensure that the deduction only applies to money payable through the state pension. The clear intention is to maintain a level pension both before and after the state pension comes into payment. Otherwise, there would be no point having this Rule at all. The

language of this Rule itself does therefore suggest a contrary intention – it says the deduction should be ignored until the member is entitled to their state pension and should then be deducted to reflect the amount of pension they will receive. Looked at in this way, the language of the Rules is clear in saying the deduction is specifically designed to reflect the state pension a member receives. Accordingly, it should only be deducted when they receive their state pension.

55. However, Mrs Spillett left service in 1989. She then became a deferred member and her benefits crystallised then. She was entitled to a deferred pension under Rule 15, which would be paid to her when she reached Normal Retirement Date or pensionable age, whichever was earlier. At that point, her pensionable age was defined in Rule 5 of the 1984 Rules – in other words the pension payable from pensionable age under the Social Security Act 1975. That Act defined pensionable age for a woman as age 60.
56. So, the 1984 Rules make it clear that her pensionable age is 60 as defined by the Social Security Act 1975. It follows that the point Mrs Spillett left and became a deferred member in 1989 her pensionable age – both for the state pension and for the purposes of this Scheme – was 60. It was not, at that point, discriminatory to have different pension ages for men and women.
57. The effect of all of this is that, although there was an intention to ‘smooth’ pensions, this was designed to take effect from the date at which members became entitled to their state pension. Mrs Spillett became entitled to this at age 60. Accordingly, the Trustee is correct to say that is the relevant age.
58. Mrs Spillett says that 1998 Rules gave her existing right for the state pension deduction not to be applied until July 2017, and to apply part of the deduction before that date would be in contravention of clause 4 of the 2011 Rules and would breach her subsisting right.
59. The 2011 Rules say that the relevant meaning is as originally enacted in the Pensions Act 1995. On that basis, Mrs Spillett’s SPA would again be 60. However, those Rules were to be for clarification only and to have effect only so far as they do not adversely affect any subsisting rights. So what were her existing rights?

60. Mrs Spillett's existing right under the 1984 Rules was to have the state pension deduction made when she would become entitled to her state pension; which at that point would be when she reached age 60.
61. The fact that the state retirement age has subsequently changed does not mean that the Rules are no longer valid. The legislation changing SPAs does not automatically extend to all references in the Scheme documents; the state pension deduction is not written in terms that require it automatically to track any later changes in the state pension.
62. The complaint as put to me by Mrs Spillett is that her SPA, through no fault of her own, has been changed from age 60 to age 63 and a half, and then again to age 65. There has not, however, been a change to her entitlement under the Rules. The position is that her SPA for the purposes of the Scheme is, and always has been, age 60. The 2011 Rules did not change this; they merely clarified what her entitlement was. The only thing that has changed is the information that has been provided to her. Up to 2011 that information was not sufficiently clear, but since 2011 the information provided has been correct.
63. I therefore find that the Trustee has dealt with Mrs Spillett's pension in accordance with the Rules; her pension should be reduced from the date when she would reach state pension age, as defined in the various Scheme Rules. This is the clear intention of the Rules.
64. The explanatory booklet to the Scheme refers to state pension deduction taking effect from the date the member reaches SPA.
65. Mrs Spillett says that the information given in the documents she received conferred an entitlement. The Trustee is correct that misleading or inaccurate information does not in itself create a legal entitlement; a member is only entitled to the pension due to them in accordance with the rules of their scheme. But the provision of inaccurate or misleading information is maladministration.
66. If Mrs Spillett can show that she relied on the information to her detriment, she may pursue a claim in respect of any loss she has suffered as a result. The Trustee considered this point but Mrs Spillett has not provided any evidence to

show that she acted to her detriment in reliance on the incorrect information provided to her.

67. There is no doubt that the information provided to Mrs Spillett has been incomplete. References were made to the deduction being taken from her pension when she reaches SPA, with little explanation of what that term meant. She was initially told that would be in December 2013 and on other occasions that it would be in July/August 2017. It was only in 2011 that the correct position was explained. Mrs Spillett could have worked her way through the various Scheme Rules to try to work out for herself what that meant for her. Bearing in mind, however, that the Scheme Rules had been changed over the years, it would be unreasonable to expect her to have done that. I would not have expected her to waded through trust deeds and legal jargon to try to understand what it all meant. I have no doubt that she took the term SPA to mean the age at which she would receive her state pension. In the absence of adequate definition or explanation that would be a reasonable approach for her to take. The members' handbook said the deduction would not be more than the state pension, but also included the statement that, for women, they would receive their state pension at age 60. So there was an indication that the deduction would apply from age 60. At the time that information was given, it was accurate; the Trustee would not have known at that time of the changes subsequently introduced by the government. It was not until 2011 that the position became clear.
68. Taken together, the information provided was inconsistent and unclear. It is easy to see how Mrs Spillett might not have been clear whether the deduction would apply when she reached age 60 or when she actually received her state pension.
69. The next question, therefore, is whether she acted on the statements made to her detriment.
70. The Trustee says that Mrs Spillett has not provided specific information to show that she had relied to her detriment on the incorrect information. It says that even if it does, she has not supplied any evidence sufficient to demonstrate loss for which she ought to be compensated.
71. The Trustee was right to ask for details of Mrs Spillett's financial transactions she may have entered into at the time she decided to take her pension from the Scheme. Mrs Spillett responded saying that she did not intend providing any

details about her financial situation and that her pension from the Scheme was so meagre and every penny counted.

72. Although Mrs Spillett refers to a loss in the difference between the pension she expected to receive and the pension is receiving, she was never entitled to the higher level of income; what she has suffered is therefore not a loss of income but a loss of expectation.
73. In my judgment, Mrs Spillett has not demonstrated that she did rely on the incorrect information provided to her when deciding to retire or that she has suffered a loss of income. However, from her point of view, her income for five years, between 2013 and 2017, will be considerably lower than she thought it would be. She has undoubtedly suffered some distress at learning that the pension she is entitled to receive will in future is less than she was expecting. I shall therefore direct the Trustee to make a payment to reflect the distress caused.
74. The process of deciding on a payment for distress can never involve a simple calculation as it would for a financial loss; by its nature, it is not an exact science. I will look to take into account the particular circumstances of the individual, but will also take a wider view and ask whether a reasonable person (with those characteristics) would have reacted in the same way. It is a matter of judgement. The individual circumstances of those making these complaints are not identical, but in each case the crux of the matter is that they were given an expectation for some time of a certain level of retirement income only to find that in fact they will be living on a lower income and will have to adjust their finances accordingly. There will be considerable distress for anyone who finds themselves in that situation.
75. Mrs Spillett was offered compensation £500 by the Trustee which she rejected. The amount of such awards may range from £150 to £750 (and very occasionally more). Awards within the range of £400 to £750 might be where there are emotional issues or cumulative effects rather than a simple issue of poor customer service. In my view, this case does not fall within that bracket and the award I have made is appropriate remedy in this case.

Directions

76. I direct that within 28 days the Trustee make a payment to Mrs Spillett of £200 in respect of the distress and inconvenience caused to her.

Jane Irvine

Deputy Pension Ombudsman

12 December 2014