

## Ombudsman's Determination

<b>Applicant</b>	Mrs Sandra Davies
<b>Scheme</b>	Marks and Spencer Pension Trust Limited
<b>Respondent(s)</b>	Marks and Spencer Pension Trust Limited

### Complaint summary

Mrs Davies complains that the Trustee will be incorrectly applying the state pension deduction (the **Deduction**) from her 60<sup>th</sup> birthday, in 2015.

### Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against the Trustee because there has been no maladministration. The Trustee has dealt with Mrs Davies' pension in accordance with the Scheme rules, which states that her state pension age is her 60<sup>th</sup> birthday.

## DETAILED DETERMINATION

### Material Facts

1. Mrs Davies' date of birth is 30 November 1955. She was employed by Marks and Spencer (the **Company**), but left their employment on 1 October 1983. During this time she was a member of the Scheme. Once Mrs Davies 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 Davies left employment in 1983, 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 1/40<sup>th</sup> 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. On 20 April 2009 the Trustee wrote to Mrs Davies informing her of the retirement benefits payable to her from 31 May 2009. The letter stated that the pension figure would reduce by the Deduction when she reached SPA and the current figure for the Deduction was £881.24.
12. The Trustee wrote to Mrs Davies on 20 May 2009 informing her of the estimated benefits payable to her should she retire on 30 November 2019. Once again, she was informed that the pension would be reduced by the Deduction when she reached SPA.
13. Mrs Davies took her pension from the Scheme as at 1 June 2009. The Trustee wrote to her on 15 June 2009 confirming the pension she would receive and informing her that her pension would be reduced when she reaches SPA, on the first payment date after 1 December 2020.
14. On 9 August 2011 the Trustee wrote to Mrs Davies stating that when she retired she was advised that her pension would be reduced by £909 from 30 November 2020. The Trustee added that as a result of the Government’s proposal to change SPA, it had recently reviewed how the Deduction is applied to her pension. The result of the review was that the Deduction should be applied when she reached age 60 and not 30 November 2020 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 60<sup>th</sup> birthday, and for a man, his 65<sup>th</sup> 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 60<sup>th</sup> birthday and for a man his 65<sup>th</sup> birthday  
  
for service after 17 May 1990, the meaning given in the Pensions Act 1995 as originally enacted; being for a man, his 65<sup>th</sup> birthday and for a woman, an age between her 60<sup>th</sup> and 65<sup>th</sup> 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”: ‘There will be no deduction for the State Basic Pension until you reach State Pension Age’.

18. Mrs Davies complained to the Trustee. The Trustee said that following the proposed changes by the government to SPA, it conducted a review of the Rules and how these changes would affect members. It had taken legal advice as to the correct date for the Deduction to be applied under the Scheme and was advised that for female members who left service prior to 1 January 1997 and had service before May 1990 the Deduction should be applied from age 60. It had a legal duty to administer the Scheme in accordance with the Rules which meant that the Deduction for her must be made at age 60.
19. Mrs Davies took her complaint to the Pensions Advisory Service (**TPAS**). On 27 February 2014 TPAS on behalf of Mrs Davies made a complaint under the Scheme's internal dispute resolution procedures (IDRP).
20. The Trustee wrote to TPAS on 13 March 2014 requested further information from Mrs Davies 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.
21. Mrs Davies stated that she relied on the forecast she was given in May 2009 to top up her wages when she had to reduce her working hours. She reduced her weekly working hours from 32 to 21.5 hours. If she had been told in May 2009 that her pension would reduce in 2015 and not 2020, she would have taken the lump sum and used it until her SPA in 2020. She was not able to reduce her working hours straightaway, but that was her plan. By the same token she could not increase her working hours. In addition, she is not physically able to work more hours because of her health and her husband's ill health. Her standard of living would fall considerably at 60 if her pension reduced.
22. On 9 June 2014 the Trustee wrote to TPAS confirming that Mrs Davies was receiving the correct entitlement under the Rules. It accepted that she had been provided with incorrect information regarding the Deduction and this amounted to maladministration. Therefore it was prepared to offer her £500 compensation in recognition of this. It had carefully considered what Mrs Davies said about her decision to reduce her working hours in reliance of a specific level of income until

her statutory SPA. However, on balance it did not accept that her decision was so closely linked to the information about the Deduction. A decision to change working hours is generally a complex one and not linked solely to expected income.

23. Mrs Davies accepted the compensation of £500 offered by the Trustees and payment has been made to her. However, she continued with her complaint.

#### **Summary of Mrs Davies' position**

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. 65, 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. This is also consistent with the advice she received during a telephone conversation in April/May 2009 when she queried the date from when the Deduction would be applied.
27. A letter dated 15 June 2009 which was issued following her decision to take her pension confirmed that the Deduction would not be applied until the first payment after age 65 on 1 December 2020.
28. It is clear that prior to the review referred to in the Trustee's letter dated 8 August 2011, the Trustee believed that the deduction would only apply from her revised SPA.

29. Since the 1998 Rules there have been several deeds completed but the only deed which specifically affects the date from which the 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 Deduction would be applied in part from age 60, and in part from May 2018. She believes that the terms of the 1998 Rules gave her a subsisting right for the Deduction not to be applied until her revised SPA of 30 November 2020, and to do so would be in contravention of clause 4 of the 2011 Deed and would breach her subsisting right.

**Summary of the Trustee’s position**

30. Mrs Davies’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 “State Pension Age”, which is defined as age 60 for women.
31. 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.
32. Its position is that the state pension deduction should be applied at the age which is her SPA for the purposes of the Rules. In respect of pension attributable to pensionable service before 17 May 1990, this is age 60.
33. It acknowledges that she was informed during a telephone conversation in 2009 that the Deduction would be made in December 2020. In addition she received a letter dated 20 April 2009 which stated that the Deduction would be at SPA and another letter she received, dated 15 June 2009 stated that the Deduction would be applied from 1 December 2020.
34. 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.

35. 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.
36. Mrs Davies has not provided evidence to show that the information provided to her in 2009 had a sufficiently close link to her decision to reduce her working hours in reliance on an expected level of pension income. Although she has not provided any supporting medical evidence, she has previously asserted that she cannot work increased hours due to her health and her husband's ill health. This suggests that non-financial factors may have been a consideration at the time of her decision to reduce her working hours.
37. Mrs Davies claims that she would not have reduced her working hours had she been told in 2009 that the Deduction would be applied from age 60. However, her hours were only reduced in March 2011 and she was told in August 2011 that the Deduction would apply from age 60. She has provided no evidence that she has attempted to mitigate her alleged loss (for example, by asking her employer whether she could increase her working hours back to the previous level or by seeking alternative or additional employment to supplement her income). She has provided no evidence to show that her employer had turned down a request to increase her hours.
38. Mrs Davies says that she would have taken a tax free lump sum instead and a reduced pension had she been given the correct information about her pension. However, she has provided no evidence to support this assertion. Even if she did make such a decision, there is no financial loss as it is likely that she has received a better value from drawing her pension than taking a lump sum, in light of the commutation rates used by the Scheme.
39. While the incorrect information given to Mrs Davies may have given her an expectation that will not be met and may require her to adjust her lifestyle, that is no actual financial loss itself for which she should be compensated.



## 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 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 Davies now has a SPA of 65 and will receive her basic state pension on December 2020. The result

of this is that the Deduction will be made in 2015 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 Davies 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 Davies 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 Davies understandably says 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 Davies'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 Davies left service in 1983. 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 reaches 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 Davies left and became a deferred member in 1996 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 Davies became entitled to this at age 60. Accordingly, the Trustee is correct to say that is the relevant age.
58. Mrs Davies says that 1998 Rules gave her existing right for the Deduction not to be applied until May 2018, 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 Davies'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 Davies'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. There has been no change to Mrs Davies's 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 Davies'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. It states that SPA is 60 for females and 65 for males.
65. The only letter from the Trustee that states that the Deduction will be made from December 2020 is the letter of 15 June 2009. This letter was sent to her after she had made her decision to take her pension from the Scheme. All the letters prior to this stated that the Deduction will be made from SPA, but did not specify what this date is.
66. 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.
67. There is no doubt that the information provided to Mrs Davies 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. It was only in 2011 that the correct position was explained. Mrs Davies 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 Davies 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 information given to her detriment.
70. If Mrs Davies 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 the points she made, but could not agree that there was evidence to show that her decision to reduce her working hours was based on an expected level of pension income. In addition, it did not agree that she had suffered a financial loss as a result of her decision not to take a tax free lump sum when she retired.
71. Mrs Davies says that she would not have reduced her working hours if she had been given correct information in 2009. Her decision to take her pension from the Scheme was based on the information given to her in the Trustee's letters of 20 April and 20 May 2009. Both these letters stated that the Deduction would be made at SPA, but did not say what this date is. The letter of 15 June 2009 incorrectly stated that the Deduction would be made from December 2020, but this was after she had made her decision to take her pension.
72. Any decision to reduce working hours would have to be made in the knowledge that the reduction income would be sufficient to live on. However, I agree that such a decision may involve non-financial factors. Given both her own and her husband's health issues, I cannot say that on balance she would not have decided to reduce her working hours had she been informed prior to deciding to take her pension that the Deduction would be made in December 2020.
73. Furthermore, Mrs Davies has not provided any evidence to show that she approached her employer, after she was informed in August 2011 that the Deduction would be made from age 60, to request an increase in her working hours. Therefore, there is no evidence to show that she had tried to mitigate her loss.

74. I agree that if she had taken a tax free lump sum when she started to take her pension from the Scheme, the lump sum could be used to finance the shortfall in her pension between age 60 and 65. However, by not doing so she is receiving a higher pension and will continue to do so for the rest of her life. Therefore, in my view, she has not suffered any financial loss as a result of not taking the lump sum.
75. In my judgment, Mrs Davies has not demonstrated that she did rely on the information provided to her when deciding to retire or that she has suffered a financial loss. However, from her point of view, her income for five years, between 2015 and 2020, will be 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. The Trustees have offered Mrs Davies compensation of £500, which she has accepted. I therefore do not need to consider this matter further.

**Jane Irvine**  
Deputy Pensions Ombudsman

26 January 2015