

Ombudsman's Determination

Applicant	Mr S
Scheme	UPM - Kymmene (UK) Pension Scheme (the Scheme)
Respondents	Trustees of the Scheme (represented by Capita Employee Benefits (Capita)).

Ombudsman's Determination and reasons

1. I do not uphold Mr S' complaint and no further action is required by Capita and the Trustees.
2. My reasons for reaching this view are explained in more detail below.

Complaint summary

3. Mr S has complained that the Trustees of the Scheme incorrectly amended the equalisation date, which resulted in a reduction in his annual pension. The Trustees have amended his pension by revising the increases that were due in order to cover the overpayment.

Background information, including submissions from the parties

4. Mr S retired in 2005. His pension was based on an equalisation date of 23 March 1993. In 2009, the Trustees carried out a review of the equalisation date and took legal advice. They amended the equalisation date to 1 January 1992. The Trustees say that this was the intended equalisation date.
5. In 2012, they notified the members affected and this resulted in many members, including Mr S, having their pension reduced. Mr S was unhappy with this and says that the Trustees cannot change the equalisation date retrospectively. The Trustees have reduced the pension that Mr S was receiving by adjusting the increases he received and they have stated that they do not intend to recover the overpayment they made as a result of using the wrong equalisation date.
6. The Trustees rely on following documents as justification for changing the equalisation date:
 - a) Extracts from the minutes of Pension Fund Trustees Meeting 18 November 1991:

“DR [one of the Trustees] mentioned that the Trustees should seriously look at equalising normal retirement age within the scheme at 65. He believes that this is the only logical option and asked CB how many companies have actually been taken to court for discriminating against men where the men’s normal retirement age was 65, but the equivalent women’s was 60. CB replied quite a few, but made the point that with most companies 40 years service would be needed before reaching the maximum pension available...

CB stressed once again to the Trustees that RHB and Norwich Union can only give advice on the current situation, and that at the end of the day it was up to the Trustees and the Companies to make a decision...

NPW asked what would happen if they changed the rules to a common age of 65 just before a woman was due to retire on her 60th birthday. PJ mentioned that in that particular instance, it would be likely that the rules would be changed after the female retired as it would be plainly unfair [sic] change her contract with such short time to go before retirement.”

- b) RHB, who were the then Scheme Advisers, on 25 November 1991 sent a fax to Norwich Union, who were the Administrators, which stated the following:

“It has been agreed at the recent Trustees Meeting that women’s retirement ages should be changed from 60 to 65 (both existing and new employees), at the same time introducing widowers pensions. Would you please confirm for me that the Trust Deed allows such a change of retirement age to be made and could your legal department (or anyone else) give me a suggested wording for a letter to the employees informing them of the decision and asking for their confirmation that they accept it.”

- c) An announcement was made to the members, dated 25 February 1992 and sent with a covering letter asking members to complete the consent form, in which it said:

“With effect from, 1st January 1992, the terms and conditions of the Fund have been amended. In due course you will receive a revised member’s pension guide booklet, but until then the main alterations to the existing booklet are outlined below:

- 1) The Normal Retirement age has been amended to age 65 (men and women).

The announcement ended by stating:

“Please signify your agreement to the above changes by the completion \and return of the enclosed consent form.”

7. Mr S in his initial submission to this Service said that:

“During 1991, it was brought to the Trustees attention ...that as a result of the “Barber” case [sic] would mean that the Finnmap Scheme would have to equalise its retirement ages for men and women. After much discussion, it was decided that this would be 65 (60 to 64 being too costly). Accordingly, a letter was sent to all members of the scheme by the Trustees...dated 25/2/1992 [sic] outlining the proposals. Needless to say it took ages for all members to respond. The men did not have much of an issue as they were not really affected by the end result. However, the women in the scheme were not very happy, especially the women who at the time were over 50 and coming up for retirement, they thought, at 60...

The three MD's, after some delay, decided that they would allow women who were over 50 at 01/01/92 [sic] to retire at 60 on full pension. It was some time later that it was pointed out to them by the Actuary (possibly at the next Trustee meeting) that this would necessitate getting approval of the male members of the scheme and this [sic] affect the proposed equalisation date of 1/1/92[sic]...

By this time we have moved into the new year and this is where the revised equalisation date of 23rd March 1993 comes into play...

In 1995, the Finnish Paper Mills Association broke up and the employees of the three Companies were split between United Paper Mills (later to become UPM-Kymmene UK Ltd) and Metsa-Serla....All transfer values were calculated on an equalisation date of 23rd March 1993.”

Adjudicator's Opinion

8. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Capita and the Trustees. The Adjudicator's findings are summarised briefly below:

- There is no definitive evidence why 23 March 1993 was adopted and also why 1 February 1992 was not implemented. The Adjudicators view was that Equality Act 2010 would grant the Trustees authority to amend the equalisation date.

9. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his/their further comments many of which were not new. Essentially I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman's decision

10. Mr S did not accept the conclusions drawn in the Opinion. He maintains that it is not possible for the Trustees or Capita to change the equalisation date. He says that

whilst there is no record for why 23 March 1993 was used as the equalisation date, likewise there is no evidence why 1 January 1992 was not implemented as the equalisation date, so the 'benefit of the doubt' should be accorded to the previous trustees and administrators. He considers it is incumbent upon the Trustees to look further than the Company Board minutes for material evidencing a decision to equalise at the 1993 date (and offers to do it himself). He says that in July 1993 a letter was sent by Varma Services to members explaining to members that the handbook had now been corrected and this timing supports his view that March 1993 was the adopted date.

11. The power to amend the retirement date was exercisable by the scheme employer. The Trustees' deliberations whether to equalise and their decision to do so are well documented. The decision about the date from which the employer chose to equalise is evident only from a letter sent to members in February 1992.
12. There is no categorical evidence as to why 1 January 1992 was not implemented as the equalisation date. Likewise there is no evidence as to why 23 March 1993 was adopted.
13. Against that background the current Trustees obtained legal advice and amended the administrative practice of the scheme in accordance with it. This had the impact, some 20 years later of reducing Mr S benefits because the increases paid were adjusted to take into account the fact that the Barber window (during which he was treated as if he had a retirement age of 60 rather than 65) had closed earlier than had been used in the original calculations.
14. My understanding of the Trustees' position is that the scheme has been equalised at a date in past, and that date is and always has been 1st January 1992. Mr S argues that the date which was actually implemented by the administrators was the date of equalisation, and the practice itself is best evidence of the employer's eventual election. It is a contest between two alternative dates rather than an argument that the Scheme has not been equalised at all.
15. There was says Mr S, a period after the February 1992 letters when some female members objected and the male members were consulted on a proposal to permit certain women to retain a retirement age of 60. He says this process held up the implementation of the amendment. I accept that evidence, but I cannot infer from that delay that the date itself must have changed, such that the Trustees' refusal to continue to look for evidence of a later date of election is unreasonable.
16. I have no jurisdiction to decide what the correct date is in fact, because that would affect large numbers of scheme members not represented on this complaint. The narrow issue for me is whether the trustees erred in law or were responsible for maladministration, when they decided that in fact, it was proper to administer the Scheme on the basis it had been equalised at 1st January 1992, and if so, did that cause injustice to Mr S which requires a remedy?

17. The Trustees were bound to administer the Scheme according to its rules which required them to make an assessment of when the Barber window closed. In 2009 they took advice which told them from the 1992 letter 'we can conclude that active female members who received this letter effectively had their NRD changed from 60 to 65 with effect from 1st February 1992.' That conclusion was not contingent on understanding what happened during the member consultation which took place in 1992 and 1993. I therefore conclude it was reasonable for the Trustees to draw a line under enquiries at that point.
18. In any event the Trustees say that they have subsequently searched all the records in their possession and found nothing substantive relating to 23 May 1993.
19. The Trustees have also remedied any injustice that their past conduct could have caused to Mr S by deciding not to recover past overpayments.
20. Therefore, I do not uphold Mr S' complaint.

Karen Johnston

Deputy Pensions Ombudsman
17 May 2016