

Ombudsman's Determination

Applicants	Mr D, Mr R & Mr J (the Applicants)
Scheme	The Unite Pension Scheme (the Scheme)
Respondents	Unite the Union (the Union) & the trustee of the Scheme (the Trustee)

Outcome

1. I do not uphold Applicants' complaints and no further action is required by the Union and the Trustee.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. The Applicants' complaints against the Union and the Trustee concern the refusal to award an increase in 2013 on that part of their pension accrued prior to 6 April 1997.

Background information, including submissions from the parties

4. Following the negotiations of a 24 month wage agreement for 2012/13, the Union made an offer to the three bargaining units (i.e. Officers, Organisers and Staff) to increase salary by 4.75% over a 24 month period. This offer was accepted in November 2012 by the bargaining units.
5. An extract from the December 2012 minutes of the meeting of the Executive Council for the Union reads:

"5.2 Unite Employees – National Pay Negotiations

The General Secretary reported that following negotiations with the representatives of the Officers, Organisers and Staff national bargaining groups, the offer made to increase salaries by 4.75% over a 24 month period with an increase in London Weighting from £3,105 to £3,500 was accepted.

The endorsement of the Council was sought to pay the increases, where appropriate, with December salary payments.”

6. A Joint Statement (the **Statement**) was issued to the employees of the Union informing them of the pay offer, part of which was an increase in salaries and salary related benefits of 4.75% for the 24 month period from 1 January 2012 to 31 December 2013. The Statement added that in the event the Retail Price Index averages 4.5% or more for three consecutive months in the first half of 2013, it was agreed that negotiations would be re-opened and a negotiation meeting would take place within four weeks of the trigger being reached.
7. In an email dated 13 September 2013, to Mr E, a pensioners’ trustee representative, the National Officers’ Representative said:

“As far as I can remember, at no point was the format of the offer described as an offer for 2012 with a salary freeze in 2013. At every stage it was described as an offer covering two years, with the payment being front loaded due to lateness of the negotiations. This is demonstrated by the fact that the offer of 4.75% was in excess of RPI at the time, and the January 2013 RPI figure that followed. I do not believe we would have achieved the figure of 4.75% for a one year deal.

[The Finance Director] did not raise the potential issues that might be caused for OSSF pensioners. If he had, we would have objected to the form of words he is now putting forward as it was not our intention to disadvantage any group of people through reaching an agreement.”

8. The rules of the Scheme (the **Rules**) say that no increase shall be paid in respect of benefits accrued pre-1997 in a calendar year in which there is no salary increase.
9. Following a telephone conversation with the Trustee, on 15 October 2013, the solicitors, Nabarro LLP, sent the Trustee an email saying:

“You asked us to confirm whether the OSSF Board of Trustees have a unilateral power to change the pension increases paid in respect of pre 1997 Contributory Service. Our advice is set out below.

Increase of Pensions rule

The Rule itself (Rule 1(C)(1) of Part VI) states that no increase shall be paid in respect of benefits accrued pre-1997 in a calendar year in which salaries are not increased. This is an absolute requirement and there is no scope for Trustee discretion to change this within the Rule itself.

Augmentation power

If the Trustees wanted to pay increases for pre-1997 benefits in a year when no salary increases are granted, then the most appropriate way to do this would be by using the augmentation power to pay a one off increase to affected pensioners. However, the OSSF augmentation power (Rule 8 of Part V) requires Union consent to any such augmentation so the Trustees could not unilaterally decide to do this.

Amendment power

If the Trustees wanted to permanently change the pension increase Rule (rather than just making a one-off augmentation) then the amendment power could be used in order to change the Rule itself. The amendment power is a Trustee power so Union consent would not be required. However the Trustees would need to agree by majority to change the pension increase Rule (with the Chairman having the casting vote in the event of an equality of votes) – see rule 4(5) of Part 1.”

10. On 16 October 2013, the General Secretary of the Union wrote to Mr E saying:

“I am aware of your meeting with [the Finance Director]...and the outcome of those discussions in which [the Finance Director] outlined the Union position in line with Rule (C)(1)(C),

“An increase shall be made only in a calendar year in which salaries are increased”

Thus, it is clear that the interpretation [the Finance Director] has made is clearly in line with the Rule.

...

The position of the Union remains the same and no discretionary increases for pre-97 service can be awarded as per the rule outlined above and I do not believe a further meeting with you will alter the above facts which support the stance of the Union.”

11. On 29 October 2013, an announcement was issued to the Scheme pensioners informing them that in respect of the 2013 calendar year there would be no increase in pension for pensionable service prior to 6 April 1997, but increases would be given in respect of pensionable service after that date. A breakdown of the increases between 6 April 1997 and 31 December 2013, was provided.
12. In an email on 19 November 2013 to the Trustee, another firm of solicitors – CMS Cameron McKenna LLP, say:

“We have reviewed the letter you sent to OSSF Pensioner Members dated 29 October 2013 regarding pension increases and the responses you have received to that letter. We have also reviewed the letter that the General Secretary sent to Mr E regarding the pension increases.

As you are aware, Rule C(1)(c) of Part VI of the OSSF Rules states that an increase in respect of Contributory Service on and before 5 April 1997 *“shall only be made in a calendar year in which salaries are increased”*.

I understand that no salary increase has been made in the calendar year 2013, therefore in not providing an increase to pensions in payment relating to pre 6 April 1997 service the Scheme Rules have not been breached. I appreciate that the concern of the affected OSSF members is based on the fact that a 2 year pay deal was made in 2012 which effectively front loaded a salary increase in 2012 in the knowledge that no salary increase would be payable in 2013.

Not awarding a pension increase is entirely within the Scheme Rules, and as far as I’m aware there is no suggestion that the two year pay deal was deliberately introduced to prevent pensioners getting an increase in 2013 (if this were the case, members might be successful in arguing that Unite had breached its duty of good faith to the members).”

13. The Applicants complained to the Trustee that they were not awarded an increase in 2013, in respect of their pre-1997 pensionable service. Their complaints were dealt with under the Scheme’s internal dispute resolution procedures (**IDRP**). The Trustee’s IDRP decision is set out below.

- The pensioner members were written to in October 2013, outlining what increases would be applied for that year. In this case 0% was awarded in respect of pensionable service prior to 6 April 1997, in strict compliance with the relevant pension increase Rule on the basis that salaries were not increased in the 2013 calendar year.
- Mr E and Mr S, the pensioners’ trustee representatives, raised the issue of increases to pension in payments in 2013, at the July 2013 meeting; the issue was discussed and a collective decision made.
- It may, from time to time, request the view of the Union, as sponsoring employer. In this case it correctly applied the relevant pension increase Rule which governs the Scheme without referring to the Union on how the Rule should be applied.
- The minute of the meeting, recording the discussion at the OSSF-Trustee meeting, contains numerous statements and conversations. Irrespective of Mr E’s interpretation of the Rules, the matter was fully discussed and the pension increase Rule was applied.

- The relevant pension increase Rule was changed in May 2014 to: 'In a calendar year in which Employee salaries are not increased, the rate of increase shall be the increase in the Consumer Prices Index in the 12 month period to the end of August (as is published in September) subject to a maximum of 2.5% per annum'.
 - The legal advice it received was: 'The Rule itself (Rule 1(C) (1) of part VI) states that no increase shall be paid in respect of benefits accrued pre-1997 in a calendar year in which salaries are not increased. This is an absolute requirement and there is no scope for Trustee discretion to change this within the Rule itself'.
14. The Applicants were not able to resolve the matter, so they brought their complaints to us.
15. The Applicants' response to our enquiries is set out below.
- They have been refused an increase in their pre-1997 pension on the basis that there was a salary freeze for employees in 2013. This is despite the fact that a 24 month pay deal for 2012/13 was agreed.
 - A salary rise covering a 24 month period means that there had been a rise, no matter how it is distributed, covering each year of that period.
 - While accepting that the 2012/13 wage agreement was not specifically designed to deny pensioners an increase, they do not accept that it was not subsequently exploited when the opportunity arose.
 - They enclosed wage slips for an employee of the Union for the months ending November 2012, December 2012 and March 2013. They say that the wage slips for November and December 2012 shows the employee basic rate of pay to be £3,673.17; however, the wage slip for March 2013 shows a new basic monthly pay rate of £3,847.67. They argue that this supports their contention that there was a salary increase in 2013 and therefore, they are entitled to an increase in their pension for that year.
16. The response from the Union to our enquiries is set out below.
- It acknowledges that a 24 month wage agreement was negotiated covering the calendar years 2012 and 2013, but do not accept that it had presented the agreement, which was reached with employee representatives, as a one year deal for 2012 and a salary freeze for 2013.
 - In compliance with the 24 month wage agreement, there was an increase in salary in the 2012 calendar year but no increase in the 2013 calendar year.

- It is not accepted that because pensioners received no pension increases on pre-1997 pensionable service, this means that they are denied their legitimate entitlement to a pension increase in 2013. The pension increases are paid in accordance with the pension increase Rule. The Union does not have a power to exercise under this part of the Rules.
- The 2012/13 wage agreement was not designed to deny pensioners a pension increase on their pre-1997 pensions, nor was it exploited as an opportunity to do that. Its legitimate purpose was to give the Union greater control over its wage costs for a longer period of time when the Union needed a level of certainty.

17. The response from the Trustee to our enquiries is set out below.

- It says that it has complied with its responsibility and obligation, as set out in the Rules, to pay an increase on pensions attributable to pensionable service from 6 April 1997, and not to pay an increase on pensions attributable to pensionable service before 6 April 1997.
- The 2012/13 wage agreement might have been presented as including a salary increase offer which covered the 2012 and 2013 calendar years. Employees might have viewed this effectively as a salary increase in 2012 followed by a salary freeze in 2013. However, this does not seem relevant to its consideration. What is relevant is whether there was a salary increase in 2013.
- There was no salary increase in 2013 and it was therefore not obliged to pay an increase on the pre-1997 pension. The legal advice it had received confirmed that its application of the pension increase rule is an absolute requirement and without discretion.

Adjudicator's Opinion

18. Applicants' complaints were considered by one of our Adjudicators who concluded that no further action was required by the Union or the Trustee. The Adjudicator's findings are summarised briefly below.

- It is up to the Trustee, taking into account the provisions of the Rules, to decide whether or not post-retirement increases are granted; the level of those increases; and which parts of a pensioner's pension should be increased and by how much. The Union has no role to play in this decision. Therefore, there is no maladministration on the part of the Union.
- The Rules clearly state that if there was no salary increase in a calendar year, then pensioners' pensions in respect of pre-1997 pensionable service are also not increased in that particular year. Therefore, the Trustee has interpreted the Rules correctly.

- The legal advice the Trustee took confirms the provisions of the Rules and that the Trustee has no discretion in the matter.
 - A wage slip for an employee of the Union, provided by the Applicants, shows that a 4.75% increase was calculated on the employee's gross basic salary for the calendar year 2012 and paid as a lump sum to the employee in December 2012. Other wage slips for the same employee for the months ended 31 December 2012 and 31 March 2013, show the gross monthly basic salary for the latter to be higher than the former by 4.75%; the reason for this is because the salary increase for the 2012 calendar year was not paid until the end of December 2012. If the salary increase for 2012 had been paid earlier, the gross monthly salary figure for both March 2013 and December 2012, would have been the same.
19. The Applicants did not accept the Adjudicator's Opinion and the complaints were passed to me to consider. The Applicants provided their 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 the Applicants for completeness.

Ombudsman's decision

20. The Applicants' comments, in response to the Adjudicator's Opinion, is set out below.
- The Union has taken conflicting positions throughout. The minutes of the Trustee's meeting of 16 October 2013, records the General Secretary and Finance Director noting that the three bargaining groups had agreed an increase for 2012 and a salary freeze for 2013. The manager of the Scheme, Mr N, says that the increase to pay of 4.75% was for the 24 month period from 1 January 2012 to 31 December 2013. Therefore, how can it be claimed that there was no increase for 2013?
 - The decision to withhold pension increases for pensioners was taken before the July 2013 meeting by the Union's Director of Finance, before any decision was taken or considered by the Trustee. The Trustee has never been consulted on the matter and only had an opportunity to discuss the issue subsequently.
 - If an employer offers its employees a multi-year deal, no matter how long and in what format, it represents a salary increase covering each year of the deal.
 - It is incorrect to say that the entire increase was paid as a lump sum in December 2012. What was paid in December 2012 was a lump sum based on 4.75% of employees' salary calculated from January to December 2012, inclusive. This was followed by an uplift of 4.75% in employees' salary grades to be paid throughout 2013. This, by anyone's interpretation, must represent an increase in each of the two years.

- In the Statement, issued by the employees' side of the bargaining committee, it says that in the event that RPI averaged more than 4.75% or more for three consecutive months in the first half of 2013, wage negotiations would be re-opened. The question must therefore be asked as to why wage negotiations should be re-opened in a year when there is no salary increase already agreed?
 - They are not claiming that the Trustee had misinterpreted the Rules. Their claim is that the particular rule was inapplicable and inappropriate in the prevailing circumstances. The rule would only have had relevance in the event that no salary increases were given to employees throughout 2013.
 - The legal advice sought by the Trustee did not address the most important and apposite point, which was whether the Trustee was right to conclude that there were no salary increases to employees in 2013. The legal adviser was not asked for an opinion on this question.
21. The decision as to whether pensioners' pensions should be increased, and if so by how much, lies with the Trustee. The Trustee would decide the matter having regard to the Rules. The Applicants say that they do not dispute that the Trustee had interpreted the Rules correctly. They say, however, that the particular Rule would only have relevance if there were no salary increases given to employees for the 2013 calendar year. Rule 1(C)(1)(c) of the Rules says that pension increases in respect of pre-1997 pension can only be awarded in a calendar year in which salaries have been increased, therefore, I cannot agree that it is only relevant if there was no salary increase.
22. It is not my role to consider whether or not there was a salary increase in the 2013 calendar year. My role is to decide whether the Trustee, in considering the matter, followed the correct process (i.e. asked itself the right questions, took into account the legal advice received, and came to a reasonable decision).
23. During our enquiries, the Union appears to have provided conflicting views by stating, on the one hand, that they did not present the wage agreement as a one year deal for 2012 and a salary freeze for 2013, and, on the other hand, that salaries were increased in the 2012 calendar year and no increases were provided for 2013. There is, however, the letter of 16 October 2013, from the General Secretary to Mr E, which confirms the Union's position that no discretionary increases for pre-97 service can be awarded for 2013. Therefore, on balance, I would have to say that the Union's view is the same as the Trustee's.
24. The questions that the Trustee needed to ask itself was: whether there was a salary increase in the 2013 calendar year; and it had interpreted the Rules correctly in deciding not to award a pension increase for 2013. It sought legal advice, from both Nabbaro LLP and CMS Cameron McKenna LLP. The advice it received was that under the Rules no pension increase shall be paid in a calendar year in which there is no salary increase; and that this was an absolute requirement; there was no scope for

discretion. Given the advice it had received, the Trustee's decision not to grant an increase to pensions for pensioners' pre-1997 pensions in the 2003 calendar year, was not unreasonable and, therefore, I am unable to find maladministration on its part.

25. I accept that according to employees' pay slips, their 2013 gross monthly basic salary was higher than the 2012 figure. However, I do not agree that this means that they had received a salary increase in 2013. As previously explained, the salary increase for the 2012 calendar year was paid as a lump sum in December 2012. If this increase had been paid earlier, for example, in June or July 2012, the gross monthly basic salary figure towards the end of 2012 would be the same as the 2013 figure.
26. For the reasons given above, I do not uphold the Applicants' complaints.

Anthony Arter

Pensions Ombudsman
21 February 2017