

Ombudsman's Determination

Applicant	Mr X
Scheme	The Robins Davies and Little Group Pension & Life Assurance Scheme (the Scheme)
Respondent	20-20 Trustees Ltd (the Trustees)

Complaint Summary

Mr X complains that the Trustees wrongly decided not to award him interest on the extra pension payment available to him from the Scheme of £18,779.28 after his pension was recalculated during the Scheme's assessment period for entry into the Pension Protection Fund (**PPF**).

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against the Trustees because Mr X has no absolute entitlement to interest under the Scheme Rules or at law on his additional pension payment. All members of the scheme in a similar position have been treated in the same way, the trustees' approach was reasonable, and I do not consider that an injustice has been caused such as to require a direction for interest.

Detailed Determination

Material facts

1. The Scheme entered its PPF assessment period on 3 April 2013 following insolvency of its Principal Employer.
2. In 2014, the PPF (via Capita) carried out a review of the Scheme's governing documents including the Trust Deed and Rules (**the Scheme Rules**) and checked whether the members' benefits had been calculated correctly in the past. The PPF also adjusted pensions already in payment to PPF compensation levels from 3 April 2013.
3. The outcome of the review was that:
 - a. the Trustees had taken appropriate steps to comply with the legal requirement of equalising normal retirement ages (**NRAs**) from 17 May 1990 for male and female members in the Scheme as a consequence of the Barber judgement; but
 - b. they had failed to carry out the amendment properly on 1 December 1994 to equalise NRAs at age 62 because the relevant announcement dated 19 August 1994 from the Principal Employer and the Trustees had been signed by the Company Secretary who did not have the authorisation to do so (according to the Scheme Rules, a Director's signature was required);
 - c. the announcement was therefore technically inadequate for this purpose and the "Barber Window" (i.e. the period between 17 May 1990 and the date on which the equalisation of NRAs took place) was not closed properly until 26 April 1999, the effective date of the third definitive Scheme Rules which contained the same information about equalisation of NRAs as the August 1994 announcement but had been signed off properly by the Directors;
 - d. as the amendment to NRAs could not be made retrospectively, for male members who had accrued benefits in the Scheme between 1 December 1994 and 26 April 1999 (such as Mr X), their NRA therefore had to be enhanced to correlate with the lower NRA for women of 60 during this period
4. Mr X retired on 30 November 1999. In 2014, prior to the review, Mr X was in receipt of a pension (including AVC benefits) of £23,259.12 pa from the Scheme.
5. Based on PPF Rules and allowing for the extension to the "Barber Window", the Trustees calculated that Mr X's pension (including AVC benefits) should be £24,804.36 pa from 1 January 2015. They also calculated that up to 31 December 2014 Mr X had been underpaid by £18,779.28 in pension since his retirement.

6. The Trustees paid this shortfall to Mr X with his January 2015 pension instalment slightly late, i.e. 12 days after its due date of 1st January. Mr X says that this late payment resulted in his bank account being overdrawn and charges being applied.
7. Mr X was unhappy that the Trustees did not also award him interest for late payment of the pension arrears.
8. The Trustees did not uphold Mr X's complaint but during the course of my investigation, offered him £1,000 in compensation as a gesture of goodwill in order to try settling his complaint on an amicable basis.
9. Mr X considered that the Trustees' offer for non-financial injustice to be acceptable but should be payable in addition to his claim for the lost interest on his pension arrears.

Summary of Mr X's position

10. As the "Barber Window" was not closed properly on 1 December 1994, he is legally entitled to both the pension arrears and the loss of purchasing power/interest on it.
11. As the Trustees had failed to pay his pension arrears on time, they had improperly withheld this amount from him and benefitted from the accrued interest on it for 15 years whilst it remained in the Scheme.
12. The Trustees did not inform him of this problem on a timely basis. It was not until December 2014 that they drew to his attention that his pension had been calculated incorrectly as a consequence of the extension to the "Barber Window".
13. It is irrelevant that the Scheme Rules are silent on interest payments because his current circumstances could not have been envisaged at the time they were drafted.
14. The pension arrears were paid to him by the Trustees as a lump sum with "no regard and no discussions with him as to tax implications." He had to subsequently resolve a tax issue with HMRC himself and feels that the Trustees should pay him £100 in compensation for the time and effort which he had to spend dealing with this matter.
15. The Trustees should have professional indemnity insurance in place to cover the interest payment which he is seeking.

Summary of the Trustees' position

16. They have a duty to act fairly between different classes of beneficiary (i.e. pensioners, active members and deferred pensioners) and also to act fairly between individuals.
17. Before deciding whether or not to award interest on the additional pension payments available to those affected by the extended equalisation period, they therefore had to consider the wider membership and how such payments would detrimentally impact on their entitlement and the overall funding level of the Scheme (which has limited

assets and no sponsoring employer to support it). This was particularly important because they were also assessing at the time whether the Scheme could afford to purchase benefits on the open market at a higher level than those available in the PPF.

18. They also have a duty to act in accordance with the Scheme Rules which make no allowance for payment of interest. They have received legal opinion that they are consequently under no obligation to award interest on the additional pension payments.
19. They are pretty certain that documentation to close the “Barber Window” properly on 1 December 1994 exists but since they cannot find it, decided to accept PPF’s view that it was not closed until the effective date of the revised Scheme Rules dated 26 April 1999.
20. Having carefully considered how the pension arrears had arisen and the interests of all the members in the Scheme, they decided that they were not in a position to make any discretionary interest payment to Mr X. It was not a unilateral decision taken against Mr X though. There is a whole cohort of members affected by the extension of the “Barber Window” none of whom have been granted interest on their additional payments.
21. They are prepared to reimburse Mr X’s overdraft bank charges if he submits the relevant evidence for examination.
22. They provided Mr X with the necessary information about his pension arrears in order for him to resolve the tax issue with HMRC.
23. At the time of Mr X’s retirement, they had been administering the Scheme in line with the “Barber Window” having closed on 1 December 1994 and calculated his pension payable from his retirement date on this basis. The additional benefits available to Mr X were unexpected and did not arise from a miscalculation of his pension but as a result of an administrative error which was subsequently rectified in favour of the Scheme members.

Conclusions

24. Having examined the available evidence carefully, I am satisfied that the Principal Employer and the Trustees did try to close the “Barber Window” properly on 1 December 1994 and had thought that the announcement which they made in August 1994 would be sufficient for this purpose. Indeed it was still the Trustees’ opinion that they had equalised NRAs at age 62 on 1 December 1994 correctly when the third definitive Scheme Rules came into force on 26 April 1999 and they calculated Mr X’s retirement benefits due from 30 November 1999 on this basis.

25. It transpired, however, following the review undertaken by the PPF of the documents governing the Scheme that the announcement was technically inadequate to close the “Barber Window” correctly which left the strict legal position that members had an uplifted retirement age of 60 up to 26 April 1999 (and not 1 December 1994).
26. The Trustees accepted the PPF’s view in order to provide the Scheme members with a “robust and favourable outcome”. This was effectively an additional unexpected benefit for Mr X because the Trustees had clearly intended for the Scheme’s NRA to be equalised on 1 December 1994, and if there had not been error in documenting this then his original retirement benefits would have been correct.
27. With regard to the issue of interest, Mr X has no absolute entitlement to interest under the Scheme Rules or at law. The Trustees’ failure to close the “Barber Window” properly on 1 December 1994 does not engage a right to interest.
28. Looking at the circumstances of his complaint, Mr X received benefits from the Scheme that he had no expectation of and would not have been due to him but for a failure to properly implement a decision of the Trustees. He was expecting (and received) a lower amount of benefit than that which he eventually was paid after the new extended “Barber Window” was used to calculate his pension entitlement.
29. When deciding whether to award interest to Mr X, the Trustees considered that:
 - a) the Scheme is currently in PPF assessment with no recourse to an ongoing sponsor for additional contributions;
 - b) any payment from the Scheme over and above Mr X’s core entitlement (which now included his uplifted pension for extended equalisation purposes) could have a detrimental impact on the entitlement of the remaining membership; and
 - c) the Scheme Rules made no reference to adjusting payments for interest
30. Furthermore the Trustees treated all members in a similar situation to Mr X in the same way.
31. I consider that the Trustees’ approach was entirely reasonable and I do not consider that an injustice has been caused to Mr X such as to require a direction for interest.
32. As Mr X has not suffered any injustice, his complaint should not be upheld and the Trustees are not required to take any further remedial action.

Karen Johnson
Deputy Pensions Ombudsman
27 July 2016