

Ombudsman's Determination

Applicant	Mr N
Scheme	NatWest Group Pension Fund (formerly Royal Bank of Scotland Group Pension Fund) (the Fund)
Respondents	NatWest Group Pension Fund Trustee (the Trustee) NatWest Group (the Bank)

Complaint Summary

1. Mr N has complained that, in April 2022, the annual increase to his pension was capped at 3%, when the Fund had previously provided for annual increases of the lower of 5% and the increase in the Retail Prices Index (**RPI**).
2. He says the higher 5% cap was confirmed in a communication introducing a separate pensionable earnings limitation, acceptance of which was a condition of getting that year's salary increase. The communication explained there might be a contradiction with the pension scheme rules, which it might not be possible to amend. However, the communication was said to take precedence, and that accepting the salary increase would override the rules.
3. He says he subsequently became aware from other pensioners that a decision had been taken to revert to the previous cap of 3% and, when he checked his pension statement, he found that this was the case. Mr N says the 5% cap was one of the terms of the pensionable salary limitation agreement.
4. As a result, Mr N has requested that either:
 - 4.1. the 5% cap be re-instated; or
 - 4.2. the cap on pensionable salary be removed, resulting in the re-calculation of his pension and the payment of the revised pension backdated to when it commenced in 2011.

Summary of the Ombudsman's Determination and reasons

5. The complaint should not be upheld because the Trustee is required to pay the pension increases specified in the Fund's governing documentation (such increases being capped at 3%, subject to any overriding statutory underpin) and in accordance with pensions legislation. Furthermore, I have found no evidence of a direct link between the introduction of the cap on pensionable salary and any promise to pay pension increases capped at 5%.

Detailed Determination

Material facts

6. Mr N was employed by the Royal Bank of Scotland Group (**RBS**) and he was a member of the Royal Bank of Scotland Staff Pension Scheme (**the Staff Scheme**). The Staff Scheme was governed by a Supplemental Trust Deed dated 23 March 1988 (**the Staff Scheme Rules**), an extract from which can be found in Appendix 1.
7. On 5 April 2002, following the merger of Royal Bank of Scotland and National Westminster Bank, the Staff Scheme merged into the Fund under a Transfer Agreement dated 5 April 2002 (**the Transfer Agreement**), and the Fund was renamed the Royal Bank of Scotland Group Pension Fund. The Fund later became the NatWest Group Pension Fund. I shall refer to the merger of the two funds as the **Merger**.
8. The Fund is currently governed by a Definitive Trust Deed dated 13 April 2021 (**the 2021 Rules**), an extract from which can be found in Appendix 3. The Definitive Trust Deed dated 5 April 2006 (**the Fund Rules**) governed the Fund before the 2021 Rules became effective. Rule 10.4 of the Fund Rules (**Rule 10.4**), provided for increases to pensions in payment at least annually of RPI (over a reference period ending not more than three months before the increase date) capped at 3%. An extract is provided in Appendix 2. In these documents, Mr N's benefits are covered by Schedule 04 – 'Former Members of First and Second Schedules to Rules of The RBS Staff Pension Scheme'.

Introduction of a cap on pensionable salary

9. On 25 August 2009, RBS's Group Head of Human Resources (the **Head of HR**), issued a letter to members, announcing "Changes to your pension arrangements", (**the Initial Announcement**), which were stated to be "essential to ensure the Group can afford to sustain the plan" and keep it open for existing members. One of the changes proposed was the introduction of a limit on the proportion of any salary increase which would count for pension purposes (**the Pensionable Salary Cap**). The announcement said:

"Your salary will continue to be reviewed in April each year, but there will be a limit on the amount of any increase that will count for pension purposes. The maximum yearly increase in pensionable salary will be 2% or the rate of

inflation, whichever is lower. Any increases in your Salary Element that exceed the 2% or inflation maximum will not be pensionable and will not be included in your pensionable salary.”

10. The Initial Announcement enclosed questions and answers to address any immediate questions members might have about the changes and how they might impact them. It said that more detail about the proposed changes and more information to help members consider their options would be provided over the next few months.

11. This communication was followed by a further letter from the Head of HR, (**the Purple Letter**), which confirmed that, following consultation with the Unite union, changes would be made to pension arrangements to ensure the Group could afford to sustain the plans and comply with new legislation. The three “essential” changes being made were:

11.1. Introduction of the Pensionable Salary Cap (as explained in paragraph 12 below);

11.2. Change to redundancy options for early retirement, under which a member who was made redundant on or after 1 December 2009 and who chose to receive their pension immediately on redundancy prior to normal pension age would receive a lower severance lump sum than they would have had they been made redundant prior to 1 December 2009; and

11.3. The change in the minimum pension age, from age 50 to 55, which reflected changes to statute taking effect from 6 April 2010.

12. In relation to the Pensionable Salary Cap, the Purple Letter stated:

“There is now a limit on the amount of any salary increase that counts for pension purposes. The maximum yearly increase in your pensionable salary will be 2% or the rate of increase in the UK Consumer Price Index (CPI), whichever is lower.

...

- Increases to pensionable salary will only take effect on 1 April, and
- The cap on increase in pensionable salary will apply...

More details of how this works can be found on the Your Retirement pages of Insite > Human Resources > Retirement Savings.”

13. At the end of the letter, members were told that they would be provided with further information over the next few months, via:

“

- Online retirement training modules
- A retirement planner, and

- Updated retirement intranet pages.”

Members were also invited to start thinking about the following options:

“

- Keep your pension savings as they are;
- Boost your existing pension by making additional contributions through RBSelect;
- Opt out of your current plan and use some, or all, of your pension funding to make contributions via RBSelect to The Royal Bank of Scotland Group Retirement Savings Plan (RSP). If you choose to opt out of your current plan, you won't be able to opt back in and will automatically become a member of the RSP.”

14. Mr N has also provided a copy of a supplement (**the Supplement**) which contained “the important terms and conditions attached to accepting any salary increase from 1 April 2011”. It confirmed that the maximum increase to pensionable salary on 1 April 2011 would be 2% and that accepting any increase to salary would mean acceptance that pensionable salary would be limited in this way.

15. The Supplement stated:

“The pensionable pay restriction applies in spite of any contrary provisions in the trust deed and rules governing your pension arrangements. Be aware that in some cases the amendment power would prevent the trust deed and rules being amended to implement this change. Your acceptance of the salary increase and its attaching terms and conditions will override this. Where necessary this acceptance will be deemed to amend the Rules. [...]

Please also note that all references to pensionable salary in your plan booklet or other member communications regarding the plan should be read as subject to the terms and conditions attaching to the salary increase.”

It concluded with the statement, “Further information and FAQ can be found on Insite > Reward > Retirement Savings.”

16. The Fund Rules, at schedule 4, define ‘pensionable salary’ as follows:

“Pensionable Salary means in respect of any Member his basic annual salary received from the Employers plus the yearly average of such other earnings as the Employer by which he is employed may decide received from the Employers during the three preceding years (or during the shorter period in which they were received).”

17. As it was a condition of accepting an increase in pay that some of it might not be pensionable, Mr N agreed that the Fund Rules would be overridden to the extent required to give effect to the agreement. Therefore, although Mr N's annual salary

increased by 4.5% in April 2010, applying the Pensionable Salary Cap meant that the increase in his pensionable salary was limited to 1.1% as Consumer Price Index (**CPI**) inflation in September 2009 had only been 1.1%. In April 2011, Mr N's annual salary increased by 1.1%. As this increase was lower than the maximum increase that would have been allowed by the Pensionable Salary Cap (CPI inflation which, in September 2010 was 3.1%, capped at 2%), Mr N's pensionable salary also increased by 1.1% in April 2011.

18. In late 2011, Mr N left employment and his pension from the Fund commenced.

Calculating the increase of pensions in payment

19. In February 2020, the Trustee wrote to Mr N concerning the annual pension increases that had been applied to his pension. It said:-

- 19.1. He had received pension increases that were not in line with the Fund's Rules.
- 19.2. His pension earned for service from 6 April 1997 had been increased in line with increases in the RPI capped at 5%.
- 19.3. Increases based on RPI capped at 3% should instead have been applied, subject to the application of the underpin introduced by Section 51 of the Pensions Act 1995 (**Section 51**) for service between 6 April 1997 and 5 April 2005 (**the Underpin**).
- 19.4. His pension would not be reduced, and he would not be asked to repay any overpayments he had received. However, from the April 2020 increase, the correct increase method would be applied.

Statutory increases under the Pensions Act 1995

20. Section 51 introduced a requirement to increase pensions in payment which were attributable to pensionable service accrued from 6 April 1997, in summary as follows:

- (a) the percentage increase in the RPI, or
- (b) 5% pa,

whichever is the lesser.

21. It applied if, apart from this section, the annual rate of the pension under the scheme rules would not be increased each year by at least as above. Where schemes already provided for annual increases in line with the above, or were more generous, Section 51 did not apply. Therefore, it provided an 'underpin' to the increases set out in the governing documentation of the Fund.

22. Section 51 was later amended so that the requirement applicable to pensions in payment attributable to pensionable service from 6 April 2005 was to provide annual increases capped at 2.5% per annum.

23. Since 2012, statutory pension increases in relation to any pensionable service from 6 April 1997 have been calculated by reference to the CPI, rather than the RPI, and the revaluation Orders issued under Schedule 3 of the Pension Schemes Act 1993 have set out the revaluation percentages which are applied under Section 51 by reference to the CPI rather than RPI.
24. However, notwithstanding these changes to the statutory underpin, the Trustee continued to award annual increases subject to the rate cap which applied to pensionable service from 6 April 1997 to 5 April 2005, that is, subject to a cap of 5%. This was the case even though, from 6 April 2005, the statutory underpin had been reduced to 2.5%, which was lower than the 3% cap provided for in Rule 10.4. Therefore, while the underpin was not engaged where the rate of inflation was below 3%, where it was above 3%, pension increases continued to be paid subject to a 5% limit, even though this was no longer a statutory requirement. This practice continued until 2020.
25. For pensionable service between April 1997 and April 2005, the Trustee applied increases calculated using the January RPI capped at 5% until 2020. However, the statutory requirement was based on:
 - 25.1. the September RPI capped at 5% up to and including 2011; and
 - 25.2. the September CPI capped at 5% from 2012.
26. As a result, while the underpin applied the same 5% cap that the Trustee applied, in practice, some differences arose from the use of a different reference month for inflation and from the use of CPI rather than RPI from 2012. The Trustee has confirmed that, where these issues resulted in an overall underpayment of pension for any member, corrective actions have been taken, and the underpayment made good.
27. The Trustee says it identified the discrepancy between the application of increases to pensions in payment for former members of the Staff Scheme and the provisions of Clause 10.4 in 2018. It then obtained the advice of Leading Counsel, Nicholas Stallworthy QC, as he then was, (**Counsel**) about what increases to pensions in payment applied as a matter of interpretation of the current and previous governing trust deeds. Counsel was also asked to consider whether as a matter of interpretation the Transfer Agreement had amended the governing provisions to provide for escalation capped at 5% to post-1997 pension accrual. Counsel advised the Trustee, in an opinion dated 18 December 2019 (**the Opinion**). A copy of the Opinion has been provided to The Pensions Ombudsman (**TPO**).
28. Counsel advised that the Fund Rules provided for increases capped at 3%, subject to the default percentage cap of 5% required by Section 51, which applied to accrual from 6 April 1997 to 6 April 2005. After that, the default percentage required by Section 51 had been reduced, with effect from 6 April 2005, to 2.5%, which was lower than the cap provided for under the Fund Rules, and so the default percentage did not apply to accrual from 6 April 2005.

29. Counsel also considered the position under the Staff Scheme Rules, which had applied before the Merger, and advised that these also provided for increases to pensions in payment by the percentage increase in the Index up to a cap of 3%.
30. Counsel was referred to the note of a Staff Scheme trustee board meeting on 6 March 1997 (**the Board Meeting**). The minutes of the Board Meeting included the following note:

“Limited Price Indexation

The Trustees noted that benefits accruing from 6 April 1997 will carry a guarantee of post-retirement increases of Limited Price Indexation (5% per annum or RPI if less). [the Staff Scheme Actuary] confirmed that in his actuarial assumptions for the Scheme, allowance was already made for 5% per annum increases and therefore this would not have an adverse impact on the funding of the Scheme.

There would need to be a rule amendment in due course.” (emphasis added).

31. In Counsel’s opinion, at the Board Meeting, the Trustees were simply noting the then impending overriding effect of Section 51, which would operate as an underpin to the escalation otherwise required by the Staff Scheme Rules. Counsel’s view was that the Trustees had not effected a rule change at that meeting, otherwise the words “a rule amendment in due course” would not have been used.
32. Counsel was also instructed that no intervening deed of amendment had been executed, as would have been necessary pursuant to the amendment power in Rule 16 of the Staff Scheme Rules. Therefore, at the time of the 2002 Transfer Agreement, the right of members under the governing provisions was to increases capped at 3%, albeit subject to the overriding statutory underpin under Section 51 in respect of post-1997 accrual.
33. In relation to the Transfer Agreement, Counsel considered the provisions of Clause 3, under which the benefits of active transferring members were stated to be as follows:

“In respect of pensionable service under the [Staff Scheme] before the Transfer Date, benefits which are the same as those which would have been provided under the [Staff Scheme] except as otherwise set out in this Agreement or as set out in the announcements attached to the Agreement in Schedule A;

for pensionable service under the [Fund] immediately after the Transfer Date, benefits on the basis previously notified to the Transferring Members in the announcement attached to this Agreement at Schedule A (but subject to the power to amend or terminate the [Fund]).

In particular but without limitation,

the provisions of the [Staff Scheme] Deed and Rules in relation to the rate of increase to pensions in payment and preserved pensions shall apply for and in respect of Transferring Members.”

34. Counsel stated that the scheduled announcement had informed members that “your benefits will remain unchanged apart from some improvements”. The improvements listed on page two of the announcement did not include any improvements to increases to pensions in payment. Therefore, as a matter of interpretation, Counsel’s view was that the Transfer Agreement had not effected any amendment to the 3% cap.
35. Counsel also considered the provisions and announcements relevant to deferred pensioners and pensioners and reached the same conclusion as for active members. He examined an announcement relevant to pensioner members which referred to a Q&A sheet with further information. Question six on the Q&A sheet provided:
- “**How will my pension increase be calculated in future?** That part of your pension which is in excess of the Guaranteed Minimum Pension is guaranteed to increase in line with inflation up to a maximum increase of 3% a year for service up to April 1997 and 5% a year for subsequent service this guarantee is not changing in the group fund ...”.
36. In Counsel’s opinion, the description of the escalation was “an entirely apt summary” of the overriding effect of Section 51 as it operated at the time. Counsel did not consider that the description detracted from the prior clear indications that no amendment or improvement was being made from the escalation previously provided, which “was not changing”.

The Section 48 Administration of Justice Act 1985 Order

37. The Trustee has stated that it was confident that it could and should proceed to apply increases in accordance with the rules once the error came to light and discontinue the more generous practice of escalation up to that point. However, it decided to apply to the High Court, for a ‘Section 48 order’, permitting it to do this prospectively. It has explained that it did this to provide reassurance, to affected members, that it was applying the correct rate of pension increase going forward.
38. The matter was decided by Mr Justice Nugee, as he then was (**Nugee J**). There was no hearing and scheme members were not party to these proceedings. Nugee J permitted the Trustee’s proposed approach, ordering as follows:

“The Trustee is authorised to administer the Fund in reliance on the Opinion of Nicolas Stallworthy QC dated 18 December 2019 by hereafter, pursuant to Clause 10.4 of [the Fund Rules], increasing the pensions in payment of former members of the Royal Bank of Scotland Staff Pension Scheme (and beneficiaries entitled through such members) by the increase in the Retail Price Index (as defined in that deed) up to a cap of 3% p.a. (subject to any underpin required by sections 51 to 55 of the Pensions Act 1995), rather than up to the higher cap of 5% p.a. which to date has been treated as applicable under the Fund’s governing provisions for increases to any part of their pension which is attributable to pensionable service on or after 6 April 1997.”

39. He went on to say:

“The only question which really arises, given the history of the relevant provisions, is whether the Q&A Sheet for Pensioners, enclosed with the Announcement scheduled to the Transfer Agreement dated 5 April 2002, had the effect of conferring an entitlement to 5% LPI increases on those pensioners. By clause 2 of the Transfer Agreement their benefits from the Fund were to be the same as those which would have been provided under the Transferring Scheme (the Staff Scheme) except as set out in the Announcements attached. The relevant Announcement provided that their benefits “will remain unchanged, apart from some improvements”. So the question is whether the reference to pension increases in the Q&A sheet (which referred to a guaranteed increase in line with inflation up to a maximum of 5% a year for service from April 1997) was one of those improvements. For the reasons given in Mr Stallworthy’s Opinion at paragraphs 28 to 30, I agree that it was not.”

40. Nugee J said, “I have no hesitation in saying that I agree with the views expressed in the Opinion.” For ease of reference, I have set out below the relevant paragraphs of the Opinion, which Nugee J endorsed:

28. Within the Q&A sheet, question 6 said:

“How will my pension increase be calculated in future? That part of your pension which is in excess of the Guaranteed Minimum Pension is guaranteed to increase in line with inflation up to a maximum increase of 3% a year for service up to April 1997 and 5% a year for subsequent service. This guarantee is not changing in the Group Fund ...”

The final sentence quoted, stating that “This guarantee is not changing in the Group Fund” is entirely consistent with my interpretation of the body of the announcement as not describing any substantive amendment or improvement from the escalation previously provided by the Staff Scheme. Far from there being any amendment or improvement, escalation “is not changing”.

29. Further, the description of the escalation which the pensioners would continue to receive (underlined above) is an entirely apt summary of the overriding effect of s.51(2) (as it operated at that time), which operated as an underpin to the escalation otherwise required by the Rules. Indeed, it is a summary description of the overriding effect of s.51(2) in similar terms to the terms in which the trustees noted the impending effect of s.51(2) in their minutes in March 1997: “benefits accruing from 6 April 1997 will carry a guarantee of post-retirement increases of Limited Price Indexation (5% per annum or RPI if less).” Such a description of the overriding effect of s.51(2) does not detract from the prior clear indications that no amendment or improvement was being made from the escalation previously provided, which “is not changing”.

30. Standing back from such textual analysis, it additionally seems wholly improbable that the parties would have intended to improve escalation for such

Pensioners alone, and not for Deferred Pensioners or Active Members. By definition, such pensioners were unlikely to remain employees whom the Bank had any financial incentive to favour over Active Members. Still less likely is it that the parties would have intended to improve escalation for Pensioners alone without expressly identifying the improvement so as to get credit for it."

41. The Bank has also informed TPO that, in parallel with the investigations that the Trustee carried out, as detailed in paragraphs 27 to 40 above, it carried out its own investigations into the correct rate of increase to pensions in payment when the issue came to light. This process included "reviewing the governing documentation for [the Staff Scheme] and the Fund, Trustee minutes and a wide range of member communications, and reviewing electronic and hard copy files held by the Group". It also considered the information that the Trustee had compiled, took "extensive professional advice" and obtained advice from leading counsel, who was a different individual from that consulted by the Trustee.
42. The outcome of the Bank's process was that it concluded (as the Trustee had done separately) that: the correct rate of increase for pension earned on or after 6 April 2005 was RPI capped at 3% per annum, subject to any overriding statutory requirements; and no clear indication that either the Bank, the Trustee or the trustee of the Staff Scheme had intended to increase and hardcode a cap of RPI capped at 5% per annum, or to do anything more than apply statutory requirements.

Mr N's Complaint

43. On 14 January 2023, Mr N wrote to the Fund's administrators, Willis Towers Watson (**WTW**). He said that there was an error in his latest pension increase notification, which referred to a maximum increase of 3%. He maintained that the maximum rate had increased to 5% some years ago. Mr N asked WTW to confirm that the increase basis was the lower of 5% and the increase in the RPI.
44. On 23 January 2023, WTW responded to Mr N. It said:-
 - 44.1. The information it had provided was correct.
 - 44.2. An error had been discovered, which affected members of the particular section of the Fund Mr N was a member of. This error was a result of the interpretation of the Fund's governing documentation relating to pension increases.
 - 44.3. The Trustee had made an application to Court on 19 December 2019 under section 48 of the Administration of Justice Act 1985 (**Section 48**). This was a process by which the Court could be asked to interpret a scheme's governing documentation and issue an order to authorise trustees to take steps in light of that interpretation. A Court Order (the **Court Order**) was granted, endorsing the Trustee's decision to correct future pension increases by capping them at 3%. So, Mr N's pension increase had also been corrected, from the cap of 5% that had been applied in the past, to 3%.

- 44.4. The Trustee and the Bank had taken steps to ensure that the correct increase was applied to all Fund members. This was in line with the Trustee's obligation to comply with the Fund's governing documentation and the Bank's approach to treating all members fairly. The Fund Rules applicable to former Staff Scheme members provided for increases in line with RPI capped at 3%.
 - 44.5. While past communications might have stated that Staff Scheme members were entitled to increases capped at 5%, such communications did not override the Fund Rules.
 - 44.6. The Fund had also incorrectly applied increases in line with RPI capped at 5% in the past. This did not mean that members were entitled to such increases going forward.
 - 44.7. In February 2020, letters were sent to affected members informing them of this error.
45. On 5 February 2023, Mr N complained to the Trustee under stage one of the Fund's Internal Dispute Resolution Procedure (**IDRP**). He said:-
- 45.1. He was not aware of the Court Order and could not find any communication relating to it.
 - 45.2. He wished to know whether the Court had been made aware that the information regarding the 5% cap on pension increases had been included in a general communication about pensions, which was referenced from a letter introducing the Pensionable Salary Cap. The same materials had been used to communicate both the Pensionable Salary Cap and the higher cap of 5% on pension increases.
 - 45.3. The letter communicating the Pensionable Salary Cap had explicitly stated that the salary increase for that year was dependent on acceptance of the revised conditions. Further, it had specifically mentioned the Pensionable Salary Cap and the effect on pensionable earnings. He said that it had also referred to the 5% cap on pension increases.
 - 45.4. The communication had also made it clear that the information provided might be in conflict with the Fund's governing documentation and had confirmed that the communication took precedence.
 - 45.5. Around the time that he had been sent the Supplement in April 2011, the 5% cap on pension increases was being described as one of the benefits of the Fund in meetings.
46. With his IDRP stage 1 application, Mr N provided a copy of the Supplement and of a benefits comparison schedule (**the Fund Factsheet**), which he says he obtained via a link provided to further information. The Fund Factsheet that Mr N has provided set out options that were presented to former members of the Staff Scheme who had transferred into the Fund under the Merger, and the terms that would apply in relation

to each option. Those options were: to retain the then current normal pension age under the Fund, of age 60; or to change the normal pension age to age 65. Under a heading 'Increases to pension in payment' the Fund Factsheet says as follows in relation to both options, indicating that there would be no change:

"Guaranteed increases:

Your pension will increase each year by the lower of:

- The increase in an index agreed between the Bank and Trustee (currently Retail Price Index); and
- 3% for Pensionable Service before 6 April 1997 and 5% for Pensionable Service after that date."

47. Mr N relied on the above to argue that the same materials were used to communicate both the cap on pensionable earnings and the higher cap of 5% on pension increases.
48. The Trustee's policy regarding complaints of this nature was to escalate them to stage two of the IDR. On 16 March 2023, the Trustee responded to the complaint under stage two of the IDR and, in summary, it said:-
- 48.1. Until 2020, the Fund had been awarding increases on pensions in payment in respect of pensionable service earned from 6 April 1997 in line with the RPI, up to a maximum of 5% for former Staff Scheme members, such as Mr N.
- 48.2. However, the Trustee was obliged to pay benefits (including pension increases) in accordance with the Fund Rules, which only provided for pension increases in line with RPI up to a maximum of 3% (subject to certain minimum increases required by legislation). Consequently, the Trustee had to change its practice to apply increases in line with the Fund Rules going forward. The practice of paying pension increases in line with RPI up to a maximum of 5% was not in line with the Fund Rules and was therefore incorrect.
- 48.3. The Trustee had received legal advice to confirm that past practice was not in line with the Fund Rules. The Trustee was therefore required to correct practice to bring it in line with the Fund Rules. The Court Order confirmed the Trustee's actions were appropriate.
- 48.4. The Trustee was only able to amend the terms set out in the Fund Rules with the agreement of the Bank. The Bank had been made aware of this issue and it had informed the Trustee that it did not believe it appropriate to amend the Fund Rules to enable the Trustee to continue to follow the previous practice of paying pension increases of RPI capped at 5%.
- 48.5. While the Trustee acknowledged that the Fund and the Bank had issued member communications over the years, which had incorrectly described the

pension increases for Staff Scheme members, those communications had not changed the increases which Staff Scheme members were entitled to receive under the Fund Rules.

- 48.6. Members who were immediately affected by this change had been informed in early March 2020. Most Staff Scheme pensioners would have received an overpayment resulting from the incorrect pension increases being applied. Where this was the case, the Trustee would normally be entitled to recover the overpayment, but the Bank and the Trustee had decided not to do so. As such, no pension in payment had actually reduced in amount.
 - 48.7. Mr N's complaint also related to a failure to provide him with information which he had requested about this matter. The Trustee apologised for the fact that he had not received a direct response to some of his questions about the way that increases were calculated and the Court process. The Trustee noted that the Fund had been through an extensive communications exercise in relation to this issue in 2020. This included contacting affected members, making a detailed FAQ document available on the Fund website, and setting up a dedicated helpline allowing members to raise questions with the Fund's administration team. The Trustee was satisfied that the communications issued by the Fund contained all the information necessary to understand this issue.
 - 48.8. The Trustee understood that Mr N and other affected members would be disappointed by the change of practice, and that future pension increases might be lower than members may have been expecting. However, it could not uphold Mr N's complaint.
49. With its IDRPs response, the Trustee provided an appendix in which it detailed a number of the points that had been raised by members of the Fund, as set out in the sub-paragraphs below.
- 49.1. *Whether the Fund Rules were incorrect, so that they needed to be rectified.*
 - 49.1.1. The Trustee said it had considered this when the error came to light. It said it found no clear evidence of an intention on the part of the Trustee or the Bank to amend the Fund Rules or the Staff Scheme Rules. This had been confirmed by two specialist counsel who had considered the evidence available. So, the Trustee said that there was no basis for rectification. The Trustee advised that, as part of its investigation, it had given particular consideration to:
 - 49.1.1.1. documentation around the time of the Board Meeting, during which pension increases had been discussed;
 - 49.1.1.2. documentation around the time of the Merger; and

- 49.1.1.3. documentation around June 2005, when a deed of amendment had been executed, making changes to pension increases for new joiners from 1 July 2005.
- 49.1.2. In relation to the Board Meeting, the Trustee additionally commented that at that time, the Staff Scheme Rules had provided for pension increases capped at 3%. This had not met the requirements of Section 51 and so the legislation had overridden the Staff Scheme Rules and the statutory minimum increase applied for pensionable service built up between 6 April 1997 and 5 April 2005.
- 49.1.3. Because the Underpin was overriding, there had been no requirement to change the Staff Scheme Rules. The Trustee said that it believed that the reference to an “amendment” in the minutes of the Board Meeting referred to an intention to reflect the Underpin in the Staff Scheme Rules, as that would have been regarded as good practice.
- 49.1.4. The Trustee said that there was no evidence that the Staff Scheme Trustee had intended to entrench a 5% cap in the Staff Scheme Rules, irrespective of the level of the Underpin in the future.
- 49.2. *Questions in relation to the Section 48 proceedings, such as: why the intention of the parties and member communications had not been considered during the proceedings; and why there had been no member representation at the proceedings.*
- 49.2.1. The Trustee said that the application to the Court was purely on the question of what benefits members were entitled to under the Fund Rules. However, earlier advice it had received from two KCs was wider in scope and covered the intentions of the parties and the member communications that had been issued. While acknowledging that not every communication issued to members relating to pension increases was part of the review by the KCs, the Trustee said that it was satisfied that evidence of further communications would not have altered their advice.
- 49.2.2. The Trustee also said that Section 48 applications do not involve a hearing, unless the court decided that one was required. Interested parties were not invited to give representations and there was no defendant. It advised that, as such, it was correct that members were not directly represented during the Section 48 proceedings.
- 49.3. *Whether the Trustee had a moral or ethical responsibility to provide pension increases capped at 5%.*

49.3.1. The Trustee said that its duty was to pay benefits in accordance with the Fund Rules. It also noted that the Bank did not consider it appropriate to change the Fund Rules, when the error was discovered, to allow the Trustee to continue paying increases capped at 5%.

49.4. *The status of the erroneous communications to members.*

49.4.1. The Trustee said that the communications issued to members had been correct up to 6 April 2005 because they reflected the position under the underpinning legislation. Thereafter, the Trustee conceded that inaccurate communications had been issued. It said that its position was that these communications were issued for information purposes only and did not confer an entitlement on members to receive pension increases capped at 5%. It said that both KCs had advised that, in the absence of a clear intention to amend the Fund Rules, this was the case regardless of whether or not a disclaimer was present in the communications.

49.5. *The relationship between the Pensionable Salary Cap and the cap on increases to pensions in payment.*

49.5.1. The Trustee said that these were separate issues and the Pensionable Salary Cap, implemented by contractual agreement, was not invalidated by the latter item.

49.6. *The Trustee's failure to administer the Fund in accordance with the Fund Rules and a possible breach of the Trustee's duties.*

49.6.1. The Trustee conceded that there had been governance failures, but stated that there was no financial loss to members because most members of the Fund affected by this issue had been overpaid and the overpayment was not being recouped. In addition, their pensions were not being reduced to the correct level going forward. Those who had been underpaid had had their pensions reassessed and the necessary adjustments had been made.

50. On 25 March 2023, the Bank sent an email to Mr N, who had contacted the Bank's Chief Executive to raise his concerns. In summary, the Bank said:-

50.1. Mr N's concerns were about the arrangements for increases to pensions in payment and about the Pensionable Salary Cap for Fund members introduced in 2009.

50.2. It understood that Mr N had already raised the issue of the arrangements for increases to pensions in payment under the IDRP, and that Mr N had

received a response. So, if he remained dissatisfied, he had the right to refer his complaint to TPO.

- 50.3. Regarding the Pensionable Salary Cap, the Bank said that this applied only to active Fund members. These were employees who were a Fund member and were building up benefits on or after August 2009. This change had been implemented following a formal consultation on the matter. The application of the Pensionable Salary Cap, and its impact on pensionable salary, took place via the annual pay process. So, it was a condition of accepting an increase in pay that some of that increase might not be pensionable.
 - 50.4. It explained how the Pensionable Salary Cap had been applied to Mr N's salary (see paragraph 17 above).
 - 50.5. Mr N had subsequently left active membership in late 2011 and his Fund benefits would have been calculated using the pensionable salary figures derived from the above increases. Any member wishing to object to the application of the annual limit to the increase in pensionable salary was free to do so. However, this had to be done shortly after the time that annual pay was confirmed, which was around March each year.
 - 50.6. The Pensionable Salary Cap remained in place and those members who remained in service would have had this limit applied up to 14 times over the period 2010 to 2023. The Bank did not plan to remove this limit for any member retrospectively. So, the Bank could not agree to Mr N's request in that respect.
51. Following the complaint being referred to TPO, Mr N and the Trustee made further submissions that have been summarised below.
 52. Mr N made the following additional submissions:-
 - 52.1. The Initial Announcement and the Purple Letter were either null and void in their entirety, in which case the Pensionable Salary Cap was incorrectly put in place, or they were valid, in which case the cap on pension increases remained at 5%.
 - 52.2. The Bank's response of 25 March 2023 did not include any evidence that the same rigour had been applied to its investigation as that undertaken by the Trustee. It also did not provide any rationale for not continuing the 5% cap on increases to pensions in payment. This was insufficient, given it was originally communicated as part of a package of documentation that was a change of terms, with pay rises being conditional on the acceptance of those terms.
 53. CMS Cameron McKenna Nabarro Olswang LLP (**CMS**) made the following additional submissions on behalf of the Trustee:-

- 53.1. The Initial Announcement had stated that the Rules should be deemed to be amended to reflect the Pensionable Salary Cap. The letter had made no explicit reference to increases to pensions in payment. It had given no indication that accepting the Pensionable Salary Cap would entitle members to pension increases in line with RPI capped at 5% in respect of all post 5 April 1997 service.
 - 53.2. The Fund Factsheet had incorrectly referred to pension increases in line with inflation capped at 5% in respect of service after 5 April 2005. The Trustee did not dispute that this, or that certain other communications issued after 5 April 2005, contained an error.
 - 53.3. The Fund Factsheet did not override the Fund Rules, or form part of the terms and conditions attached to accepting the Pensionable Salary Cap.
 - 53.4. When the Pensionable Salary Cap was first introduced in 2009, the Fund Factsheet did not exist.
 - 53.5. The Trustee's investigations had found no evidence of an intention to amend the Fund Rules to allow for the higher pension increases. It had also found no clear evidence that the Rules did not reflect what the Trustee and Bank intended.
 - 53.6. By the time that the error was discovered in 2020, Mr N had been overpaid by £345.04 (gross). At that time, he was in receipt of an annual pension of £15,004.32. Had the increases been applied correctly, his annual pension would have been £14,889.48.
54. I issued a Preliminary Decision (**PD**) on 26 September 2024. Mr N, the Trustee and the Bank made further representations in response to that Decision, as detailed in paragraphs 55 to 85 below.

Mr N's representations

55. He considered that the evidence of communications provided by the Trustee and the Bank was incomplete and misleading. As a result, the Pensions Ombudsman had incorrectly concluded that the Fund Factsheet was not relevant to his submission that the 5% cap on pension increases formed part of the terms under which he accepted the Pensionable Salary Cap. However, he had been unable to locate a copy of the Fund Factsheet, or similar document, that was in place prior to his retirement in 2011.
56. He referred to the Bank's comment that its clarification in relation to the Fund Factsheet was not directly relevant to his complaint (see paragraph 83 below). He considered this comment to be incorrect and misleading, as the Fund Factsheet was directly relevant.
57. The date of production of the Fund Factsheet was irrelevant as it contained reference to the 5% cap on pension increases. So, either the 5% cap was erroneously introduced in 2012, which he considered to be unlikely, or the Fund Factsheet

accurately reflected content that was available at the time of the pay rises that included the Pensionable Salary Cap and the 5% cap.

58. The Bank had referred to a cover letter which noted “the overriding nature of the Trust Deed”. If the Bank was relying on cover letters as a definitive statement of contractual commitment, then he had received a letter stating that the contents of that letter overrode the provisions in the Trust Deed.
59. The tone of the Respondents’ responses to the PD was that the Pensionable Salary Cap was communicated in 2009 to be implemented in 2010, while the letter he sent related to a pay rise from 1 April 2011, so was unrelated. He could not remember what pay rise he received in 2010 or how it was communicated. However, the 2009 communication said that further information would be available internally from early 2010, so it was possible that the implementation was delayed, and 2010/11 pay rises were the first time that the Pensionable Salary Cap was formally applied.
60. He had asked the Bank what information was on its website that constituted “further information”, together with a request for information on the communications issued relating to salary and pension. It had responded that it no longer held this information due to its data retention policy, which involved keeping data for seven years after his leaving. However, when he had initially raised a complaint with the Bank, its reply in March 2023 had referred to details of the pay rises he had received in April 2010 and April 2011. Therefore, the Bank had held information in March 2023, 12 years after his leaving.
61. The Trustee’s actions suggested a bias against former members of the Staff Scheme. It had a responsibility to all Fund members, regardless of their heritage. It had protected its failure to uphold the interests of members and had also protected the Bank when it reneged on its commitments.
62. In its annual returns, the Bank had provided forecasts of pension increases, a summary of which can be found in Appendix 4. If it never intended to cater for a 5% cap from April 2005, then the data should show a dip in or shortly after 2005. Instead, with the exception of 2021, the forecasts continued to track closely to the actual pension increases. In 2021, the decision was made to pay increases in line with the Fund Rules, resulting in the forecast being higher than the actual figure.
63. From 2000, the Bank had rationalised terms and conditions, including pension provisions, for all staff regardless of their RBS or NatWest heritage. Brief communications had been issued to staff which referenced online resources for further information. During the first 10 years, the Bank linked these changes to annual pay increases, establishing an explicit link between receipt of the pay rise and acceptance of the new terms and conditions. It also said that these communications superseded other documentation, specifically making reference to the Fund Rules. This behaviour indicated a clear intent to apply all the benefits indicated in these communications.

64. Furthermore, the Bank's annual report of 2009 demonstrated its intent to provide good pension benefits when referring to the impact of changes to benefits on its ability to retain existing and attract new staff. This illustrated that the Bank intended to provide consistent and attractive benefits to all employees.
65. The Bank established a pattern of behaviour in which changes were communicated via a brief letter, which referred employees to "internal sources of online information which provided more details."
66. Over time, the online resources were enhanced and updated, "to the point where they were hosted on externally available sources, in the form of the Fund Factsheet. The point that the Factsheet I attached previously was a version which was not available in 2009 simply confirms this situation".
67. The version of the Fund Factsheet provided by Mr N with his stage one IDR application had a reference on the side of the first page of RBS4_76579 and a further version had a reference of RBS5_76579. So, the four and the five appeared to be revision numbers. The revision number five presumably came "a year after the other, and yet contains the same statement providing a 5% cap". Given that changes were generally made annually, it would be reasonable to assume that three earlier versions existed, dating back to 2009. Given that it is highly improbable that the Bank would have a factsheet that did not reference the 5% cap, and then subsequently introduce a reference to it in later revisions, it is equally reasonable to assume that the version of the factsheet issued with the communication on the Pensionable Salary Cap also contained the 5% cap, and that it continued the practice established in the previous decade, of issuing brief letters referencing changes to Terms & Conditions, which were tied to pay rises.
68. A later version of the Fund Factsheet had been amended to represent what the Bank maintained was always the case in relation to pension increases. However, updating this document did not enable the Bank to rewrite history.
69. While Mr N understands the general point that, in law, the provisions of the Fund's trust deed and rules take priority, he hopes that the above illustrates that "the Bank adopted an unwise practice of communicating changes in Terms and Conditions in what I understand now the law would regard as an informal manner. However, it was presented to employees as being formal and superseding or overriding other sources such as the Trust Deed and Rules. The Bank then compounded the problem [...] by neglecting to ensure the formal changes were applied to the Trust Deed and Rules, leaving an opportunity for later management to exploit in the years leading up to 2020, where they could reduce actual funding for pensions, and therefore save cost at a time when cost saving had become critical for the Bank and for the new round of Executives leading the Group, who came from a NatWest heritage."
70. The 2021 Rules show that Fund members from a NatWest heritage have a 5% cap on pension increases whereas those from an RBS heritage have a 3% cap. The Trustee said that it needed the Bank's approval to adjust the cap for RBS heritage

members. However, the Trustee had the ability to make discretionary enhancements to members' benefits. It had the opportunity, on a number of occasions, to use these powers.

71. The minutes of the Board Meeting stated that: "There would need to be a rule amendment in due course". This could be interpreted as an acknowledgement of the Trustee's duty to request such an amendment.

The Trustee's representations

72. The Trustee accepted my PD, while making certain observations which it believed would assist with clarity for the benefit of any reader of this Determination, as summarised below:-
- 72.1. Communications and factsheets issued to Fund members, which incorrectly referred to increases of RPI capped at 5% as opposed to 3%, confer no entitlement to members to the higher rate of increase, and do not override the Fund Rules.
- 72.2. It provided further information on how pension increases had been calculated between April 1997 and April 2005. This information has been incorporated into my Determination.
- 72.3. The Trustee observed that "a Court can only give an order under Section 48 where it is satisfied that there is no dispute which would make it appropriate to hold a hearing".
- 72.4. The Trustee has emphasised that its legal and fiduciary duties take precedence over any moral obligations that members might perceive it as having.
73. Mr N's assumptions regarding the dates of different versions of the Fund Factsheet were incorrect. It agreed with the Bank's statement that the first version of the Fund Factsheet had been produced in 2012 and that it had not existed prior to this date. Mr N could not, therefore, argue that he placed any reliance on this document when making decisions prior to 2012.
74. The Trustee was "not responsible for the introduction of the limit on pensionable salary increases. This was done by the Bank by way of extrinsic contract, outside the Rules (albeit that the Rules were subsequently updated to reflect the change), and it was therefore up to the Bank how it wanted to respond to any complaints about the way in which this was introduced."
75. It did not agree with Mr N's allegation that it had shown bias to any group of members or that it had failed in its duty to uphold the interest of members. Its core duty was "to uphold the terms of the Fund's governing documentation, which meant paying the correct benefits as they fell due. The Trustee has acknowledged that incorrect benefits were paid to some members. However, all underpayments have now been rectified and steps have been taken to ensure that correct pension increases will be

paid going forward. The Trustee does not have a duty to ensure that members receive the highest possible benefits, and it is not able to award increases different from those set out in the Rules. The Trustee does not agree that it has shown bias towards any group of members, or that bias played any part in this matter.”

76. Mr N referred to a 5% cap on pension increases applying to heritage NatWest members, compared to a 3% cap for heritage RBS members. The Trustee has confirmed that the position in the 2021 Rules reflected the position that had been in place since the Merger.
77. The Trustee noted that Mr N’s argument that it should have applied discretionary pension increases to heritage RBS Fund members, which he had raised in his submissions following the PD (see paragraph 70 above) was a new one, which had not formed part of his original complaint. However, the Trustee has also noted that Mr N’s suggestion, that it could have done this unilaterally, was incorrect; Clause 7.7 of the 2021 Rules, which contained a discretionary increase power of the Trustee’s, was modified by Clause 7.15 in respect of former RBS Staff Scheme members who had joined the Fund in 2002, to require the Bank’s consent. Therefore, the Trustee would have required the consent of the Bank in order to award any discretionary increase in respect of Mr N. Furthermore, the Trustee could not be compelled to exercise its discretion to award increases higher than those set out in the Fund Rules, in the absence of a clear promise that it would do so.
78. It did not accept Mr N’s submission that it had failed to take steps to protect members (see paragraph 61 above). When the error was noticed, the Trustee took a number of steps to protect the interests of members. The Trustee considers that Mr N has overlooked the fact that it requested (and the Bank agreed) that members be allowed (a) to keep any net overpayments that resulted from the error; and (b) to retain their current pension in payment without reduction (even when it was higher than their correct entitlements). As a consequence, many members had benefited from the error in this case. The Trustee also undertook an extensive communications exercise to explain the impact to members, and rather than correcting pension increases immediately, sought a court order before making the changes to make sure that they were acting in accordance with the law.
79. It disagreed with Mr N’s interpretation of the phrase: “There would need to be a rule amendment in due course” in the minutes of the Board Meeting (see paragraph 71 above). It was under no duty to request such an amendment, and Mr N’s reading of this statement was not a natural one.

The Bank’s representations

80. It disagreed with Mr N’s suggestion that the Bank’s response of 25 March 2023 did not include any evidence that the same rigour had been applied to its investigation as that undertaken by the Trustee. It said that it had carried out its own extensive investigations in parallel with the Trustee (see paragraphs 41 to 42 above).

81. It was satisfied that its investigation into the correct level of pension increases had been “appropriately wide-ranging and rigorous”.
82. In relation to Mr N’s more general comment that its response to his complaint at IDRП was insufficient, this appeared to be based on the incorrect premise that communications about the introduction of the Pensionable Salary Cap had referenced the 5% per annum cap, and so further information should have been provided about the decision not to maintain it. This was not correct. For completeness, the Bank has noted that most of Mr N’s IDRП complaint had been addressed by the Trustee in its responses, with which the Bank agreed, and the Bank had only been asked to respond on limited points.
83. While not directly relevant to Mr N’s complaint, the Fund Factsheet was produced in connection with changes to pension introduced in October 2012 and at that time was provided under cover of a letter from the Group, which provided additional context and noted the overriding nature of the Trust Deed.
84. The pensionable salary restriction applied to all salary increases from 25 August 2009. It was communicated in 2009 and then again as part of each annual salary review from 2010 onwards. Members were notified of any proposed salary increase and that it was conditional on them accepting the pensionable salary restriction.
85. The Fund Factsheet did not exist until 2012. No similar factsheet was issued as part of annual salary review communications in 2010 or 2011 (and indeed it does not currently form part of those communications).

Conclusions

Governing documentation and pensions legislation

86. I am satisfied that, under Rule 10.4 of the Fund Rules, the annual rate of increase to pensions in payment is capped at 3%.
87. There are augmentation provisions in the Fund Rules (at Rule 9), under which the Trustee, with the agreement of the Bank, had the discretion to apply additional increases to pensions in payment. However, this requires evidence of an agreement to exercise the discretion. I have not been provided with any evidence that such an agreement was ever entered into.
88. In his response to the PD, Mr N raised a new argument that the Trustee should have used its augmentation powers to provide additional increases to pensions in payment. While I note the Trustee’s response to this point, which is supported by the provisions of the 2021 Rules that the Trustee has referred to (see paragraph 77 above), this was not part of Mr N’s original complaint to TPO. It would not be appropriate to add new claims, which have not been raised with the Respondents at IDRП or equivalent, at this late stage of the investigation.
89. I have also reviewed the 2021 Rules that are currently in force (see Appendix 3) and the governing documentation of the Staff Scheme, which Mr N was previously a

member of (see Appendix 1). These documents also specify a 3% cap on annual pension increases.

90. I have found no evidence of either the Staff Scheme's or the Fund's governing documentation referring to a 5% cap on the increases relevant to Mr N's pension.
91. Although, from 6 April 1997, Section 51 introduced the Underpin, which required pensions in payment attributable to pensionable service accrued from 6 April 1997 to 6 April 2005 to be increased by the lesser of the percentage increase in the RPI and 5% per annum, I have found no evidence that the Fund Rules were amended at any point in time to 'hard code' the 5% cap introduced by the legislation for some periods of service.
92. I have considered the three key events in the Staff Scheme's history, which have been considered by the Trustee and Counsel as points at which this could have happened:
 - 92.1. following the Board Meeting in 1997;
 - 92.2. upon the Merger in 2002; and
 - 92.3. as a result of the July 2005 deed of amendment.
93. I have seen no evidence that the Fund Rules were amended following the Board Meeting. The Staff Scheme Rules required any amendment to those Rules to be effected by deed, having obtained the Bank's approval. Although the minutes of the Board Meeting imply that a discussion took place and it was noted that "the rules would need to be amended in due course", I have seen no evidence that the Bank's approval to such an amendment was sought or obtained, or that any deed putting in place such amendment was executed to entrench the statutory cap within the Rules.
94. As I have explained above, Section 51 explicitly applied if, apart from that section, the annual rate of the pension under the scheme rules would not be increased each year by at least as provided for in the legislation. Where schemes already provided for annual increases in line with, or more generous than, the legislation, Section 51 did not apply. Therefore, the override was automatic. The scheme rules did not need to be changed to give effect to the statute. Consequently, there did not need to be a rule amendment to give effect to Section 51 in relation to the Staff Scheme, whatever the view expressed at the 1997 Board Meeting, and even though there appears to be no record of a later decision *not* to amend the rules in light of what was said at the Board Meeting.
95. I do not need to decide this point because the Staff Scheme Rules were not changed, but even if the view at the 1997 Board meeting had been that the Staff Scheme Rules would need to change to reflect the statutory underpin, there is no indication that this would necessarily have been a permanent change. If the comment at the Board Meeting was motivated by the impending change in the legislation, as it appears to have been, it seems logical that the Staff Scheme Rules would have been changed

again to reflect the 2.5% cap when it was introduced in 2005, or that any such amendment would have been made by way of an express reference to the provisions of Section 51 in force from time to time.

96. Regarding the Merger, in the Opinion, Counsel considered the communications that had been issued to Staff Scheme members at the time of the Merger in 2002, and whether those communications guaranteed increases to pensions in payment capped at 5%, particularly given that some of those communications referred to the pension increase as being “guaranteed”. However, as these communications were sent at a time when the statutory requirement for pension accrued from April 1997 was to apply increases based on inflation capped at 5%, in my view they were not incorrect. In addition, the announcements at the time did not indicate that there would be an improvement in the terms upon which pensions in payment would be increased for inflation. I agree with Counsel’s view that the announcements accurately reflected the legal position at that time, as the statute overrode the rules. Finally, in 2005, the amendment deed, explicitly, only changed the position for new joiners with effect from 1 July 2005. As Mr N had joined the Staff Scheme prior to 1 July 2005, increases to his pension were not within the scope of the deed of amendment.

Other documentation

97. The Trustee has acknowledged that both it and the Bank issued other member communications, including booklets, which incorrectly described the pension increases for legacy RBS members. I do not agree that these communications override the Fund Rules. Therefore, I find that they do not confer an entitlement on members to pension increases capped at 5%.
98. Mr N has referred to the Bank’s annual returns which provided forecasts of future pension increases. He said that he would have expected to see a drop in the forecasted figures around 2005 if the Bank had never intended to cater for a 5% cap on pension increases. I do not agree with this argument. It has been acknowledged that, between 2005 and 2019, an incorrect cap of 5% had been applied when calculating pension increases. It follows that any information in the annual returns would have reflected the application of that rate of pension increase. It was not until 2018 that the Bank and the Trustee became aware of this error.
99. I note Mr N’s comments in relation to the additional information he had requested from the Bank, and its data retention policy. If and to any extent that Mr N intended these comments to form new allegations for TPO’s investigation, it would not be appropriate for me to comment in that regard, as that is a matter between Mr N and the Bank, and should be dealt with by another forum, such as the Information Commissioner’s Office, in the event that the matter cannot be resolved between Mr N and the Bank.

Rectification

100. The Trustee has explained that, when the matter of the continued practice of capping increases at 5% came to light, it considered whether the Fund Rules were incorrect

and needed to be amended by rectification. With the benefit of legal advice (not all of which has been disclosed to me, as the Trustee relies on legal privilege) and following the Order of Nugee J, the Trustee concluded that there was inadequate evidence of an intention to change the rules, so rectification was not required.

101. Even though members may disagree with the Trustee about this, rectification is a remedy which can only be achieved through court proceedings and is outside my jurisdiction, so I have not considered this point further.

Section 48 Court proceedings

102. Mr N and other members have expressed dissatisfaction with the conduct of the Section 48 Court proceedings, on the basis that they were not given notice of them and were not allowed to participate. The effect of the Order is to protect the Trustee, from the time of the Order, from complaints that it is wrongly administering the Scheme by applying increases capped at 3%, as this approach has been sanctioned by the Court. However, it does not prevent members who were not party to those proceedings from challenging the opinion on which the Trustee relies, and which was presented to the Court in seeking the Section 48 order. I note that Section 48 does not require a hearing to take place in which scheme members may participate. Furthermore, the Court can only give an order under Section 48 without holding a hearing where it is satisfied that there is no dispute which would make it appropriate to hold a hearing. In any case, I would not have the power to make any Determination concerning the process followed under Section 48; this would be a matter for the courts.

103. The evidence I have seen indicates that, apart from at the 1997 Board meeting, amendment of the Rules was only canvassed after the practice of capping annual pension increases at 5% was discovered to be wrong, whereupon the Bank withheld its consent. For these reasons, I do not consider there is any basis on which to differ with the Counsel's opinion, which was accepted by Nugee J. Therefore, in the absence of evidence of amendment of the Fund Rules, I find that, as a matter of construction, the pension increases paid to Mr N since April 2020, that is, subject to a cap of 3%, are in line with the terms in the Fund's governing documentation and pensions legislation in force at the time.

Mr N's agreement to the Pensionable Salary Cap

104. Mr N says the same materials were used to communicate both the introduction of the Pensionable Salary Cap and the cap on increases to pensions in payment and that those communications included the commitment to an increase in the cap on pension increases, from 3% to 5%. Mr N has submitted that: the Initial Announcement stated that the salary increase for that year was dependent on accepting the revised conditions, and that it referred to the Fund Factsheet as a source of further detail; and at page seven of the Fund Factsheet, increases to pensions in payment capped at 5% were stated to be "guaranteed". On that basis, Mr N argues that the Fund

Factsheet is part of the contractual documentation containing promises that override the escalation provisions in the Fund Rules.

105. I have considered these documents. The Initial Announcement set out three proposed changes: a limit on increases to pensionable salary; change to redundancy options for early retirement; and the change to the minimum pension age as introduced by statute. These three changes were confirmed in the Purple Letter following the consultation process. Neither document referred to any proposal to amend the annual rate of increase to pensions in payment.

106. The Supplement Mr N has provided relates to any salary increase from 1 April 2011, which was after the Pensionable Salary Cap was introduced. It appears to be a document issued to Fund members alongside their respective pay letters for that year. I have not been provided with a copy of a similar document for the previous year, but Mr N's pay increase in 2010 had also been subject to the Pensionable Salary Cap, as detailed in paragraph 17 above. The Supplement explicitly states that it contains the important terms and conditions attached to accepting any salary increase from 1 April 2011 and that the salary and ValueAccount displayed on the member's pay letter is subject to accepting the terms and conditions set out in the Supplement. Under the heading "What does this mean to me?", the Supplement states:

"Your pay letter will tell you if you're being offered an increase to your total salary from 1 April 2011. Increases to your pensionable salary are based on all increases to your total salary between 2 April 2010 and 1 April 2011 inclusive. There is a cap on increases to your pensionable salary of 2%. What this means is that if your total salary increase is:

- 2% or less, you'll receive whichever is lower as an increase to your pensionable salary;
- more than 2%, you'll receive the maximum increase to your pensionable salary of 2%."

It then sets out the available options as follows:

- 106.1. to accept any salary increase detailed in the pay letter;
- 106.2. not to accept it (by notifying the line manager by the stated date); or
- 106.3. to opt out of the final salary plan and join the Retirement Savings Plan.

Finally, it details the effect of the pensionable salary restriction described above under "Other considerations":

- (i) *impact on other benefits*
Your lump sum death in service benefit is **unaffected** by the restriction on pensionable salary described above. All other benefits under your pension arrangement will be **affected**.

(ii) *The earnings cap*

When you retire or leave, your pension is calculated by reference to your final pensionable salary. For most members who joined their current arrangement on or after 1 June 1989, final pensionable salary is restricted to the earnings cap which is currently £124,960 (2010/11). If the earnings cap applies to you it is a condition of accepting the salary increase that you also agree that the earnings cap will not increase by a greater percentage than pensionable salary in any year. For 2010/11 this will be 2% so the earnings cap from 1 April 2011 will be £127,460. Please note that this condition applies whether or not you currently earn more than the earnings cap.

(iii) *The state pension deduction*

To the extent that a State Pension Deduction forms part of your pension calculations, this State Pension Deduction will increase by 2% (which is less than the forecasted increase applying to the Basic State Pension on that date) from April 2011. The amount of the State Pension Deduction will be reviewed annually.

107. It is clear that the terms and conditions contained in the Supplement relate to pensionable salary alone and do not incorporate any change to the rate at which pensions in payment are increased annually. I have not seen any communication which purports to incorporate into that agreement a condition that annual pensions in payment will be subject to a higher cap than the 3% cap provided in the Fund Rules. The pre and post consultation correspondence – the Initial Announcement and the Purple Letter - are evidence of the remit of the changes consulted upon. All three documents, including the Supplement, are consistent about the changes proposed and subsequently confirmed. Although members were referred to “Insite”, this was not explicitly stated to be a source of the terms and conditions of the agreement to accept the restriction to pensionable salary.

108. I shall consider now Mr N’s submissions that the Fund Factsheet contained terms and conditions that related to his acceptance of the Pensionable Salary Cap. Mr N appears to have obtained the Fund Factsheet some years after the introduction of the Pensionable Salary Cap (and after he had retired). The Fund Factsheet is a comparison document provided to illustrate benefit differences depending on the choice made by the member to maintain their normal retirement age or change it to 65. The Bank has confirmed that the requirement for members to make this choice did not arise until 2012, which was after Mr N’s acceptance of the Pensionable Salary Cap in relation to his 2010 and 2011 pay rises. Mr N had retired from the Fund by the time members were presented with the choice to maintain or alter their normal retirement date. The Fund Factsheet does not, from the evidence I have been provided with, relate to the Pensionable Salary Cap agreement, and it cannot have related to Mr N’s acceptance of the Pensionable Salary Cap in 2010 and 2011, given that it did not exist at that point. It is not expressed to have contractual effect and thus differs from documents such as the Supplement, which explicitly says that it contains terms and conditions. Further, the cover letter that was sent with the Fund Factsheet

when members were invited to choose whether to retain or alter their normal retirement date included a statement that the provisions of the Trust Deed and Rules would prevail.

109. The Trustee has also confirmed that the Fund Factsheet did not exist in 2009, when the limit on pensionable salary increases was first introduced, and it would not have been enclosed with the correspondence that Mr N has provided. Therefore, even though the Trustee has accepted that what the Fund Factsheet said about increases to pensions in payment was incorrect after 6 April 2005, this document is not relevant to Mr N's submissions that the 5% cap on pension increases formed part of the terms under which he accepted the Pensionable Salary Cap.
110. Mr N has referred to a reference number on the Fund Factsheet, suggesting that it was the fourth version of this document, with previous versions dating back to 2009. I do not agree that this reference number is adequate to prove that: previous versions of this document had been in circulation; and any such previous versions dated back to 2009. Further, even if any earlier versions of the Fund Factsheet had been in circulation, without seeing these earlier versions, one could only speculate as to what, if anything, they may have said in relation to pension increases. Mr N has acknowledged that he has been unable to locate a copy of the earlier documents, which he alleges must have been issued. Even if, despite not having actually seen any earlier version, I were to accept that earlier versions of the Fund Factsheet: had been issued; dating back to 2009; and referring to the 5% cap on pension increases, this would not in itself have been sufficient for me to conclude that there was a link between such documents and the terms under which the Pensionable Salary Cap was introduced.
111. Mr N has also referred to the Bank's approach to communications from 2000, which he has submitted, involved the Bank issuing brief communications that referred to online resources for further information. He said that the Bank had established an explicit link between receipt of pay increases and the acceptance of new terms and conditions which superseded the Fund Rules. I do not agree that any general approach suggested by Mr N is adequate to evidence that, when the Pensionable Salary Cap was introduced, there was an explicit link with the 5% cap on pension increases.
112. Mr N has also submitted that "management" had stressed at the time that the annual increase to pensions in payment capped at 5% was a benefit that potentially compensated for the limit to pensionable earnings. Mr N has not provided any further detail about, or evidence of, this. However, given that increases were already being applied on that basis to the whole of a member's pensionable salary at the time, it is not clear how it could be regarded as compensatory to only apply such increases to a proportion of his salary.
113. I have found no evidence of any commitment by the Bank to raise the cap on inflation increases to pensions in payment from 3% to 5% at the time of the introduction of the Pensionable Salary Cap, and I do not consider there to be any basis on which Mr N

can claim a contractual entitlement to annual pension increases capped at 5%. Further, I have not seen sufficient evidence to conclude that Mr N's decision to accept the limit to his pensionable salary was influenced by the practice of applying annual increases to pensions in payment capped at 5%. I find that, by accepting the Pensionable Salary Cap, Mr N agreed that the Fund Rules would be overridden only to the extent necessary to give effect to the Pensionable Salary Cap.

Ethical/Moral responsibility

114. For completeness, I note that the appendix to the IDRPs addresses whether the Trustee has any moral or ethical responsibility to provide pension increases capped at 5%.
115. My role is not to make decisions on what is fair or reasonable. Rather, it is limited to a consideration of whether, or not, the Fund Rules and any relevant legislation have been followed properly by the Trustee. The Trustee's obligation is to act in accordance with its legal and fiduciary duties, and these duties take precedence over any moral obligations which members might perceive the Trustee as having.
116. Mr N said that the Trustee's actions suggested a bias against legacy RBS members. I have seen no evidence that this was the case. While a 5% cap on pension increases was in place for legacy NatWest members at the time of the Merger, I do not agree that the Trustee was obliged to adjust the provisions for legacy RBS members to increase the cap which, at the time, was 3%.
117. Mr N has referred to the Bank's annual report of 2009 which he said demonstrated its intention to provide consistent and attractive benefits to all of its employees. The statements made by the Bank in this report are general in nature and I do not find that they amount to a promise of a 5% cap on pension increases.

Conclusion

118. I find -
- 118.1. Mr N does not have an entitlement to pension increases at a higher rate than that provided for under the Fund Rules, subject to the Underpin; and
 - 118.2. the Trustee's actions in both paying an incorrect rate of pension increase and providing misinformation relating to the rate of pension increases, amount to maladministration.

Financial loss

119. While maladministration has taken place, I do not find that Mr N has suffered a financial loss as a result of the Trustee's actions, because he has received more than he was entitled to under the Rules, over a number of years, and the Trustee has not sought to recover the overpayments, nor reduced his ongoing pension to the correct level.

120. When Mr N was notified of the error in February 2020, he had been overpaid by £345.04 (gross). Furthermore, at that point, he was in receipt of an annual pension that was £114.84 higher than he was entitled to. Since then, he has received this higher pension annually, with the correct pension increases applied, and he will continue to benefit from this for the remainder of his life.

Non-financial injustice

121. For the same reasons as stated in paragraph 119 and 120 above, I do not consider that an award for non-financial injustice is appropriate in this case.

122. The overpayment represents a windfall to Mr N, and is more than sufficient to address any non-financial injustice he has suffered in connection with this matter. As a general principle, I will take into account any overpayment that is written off or otherwise not reclaimed when deciding whether or not to make an award for distress and inconvenience.

123. I do not uphold Mr N's complaint.

Dominic Harris

Pensions Ombudsman
23 December 2024

Appendix 1

Extract from the Supplemental Trust Deed of the Royal Bank of Scotland Staff Pension Scheme 1985 dated 23 March 1988

“SCHEDULE 1

DEFINITIONS [...]

“Index” means the All Items Index of Retail Prices published by H.M. Government or such other index as may from time to time be agreed for the purposes of the Rules by the Commissioners of Inland Revenue.

[...]

ALTERATION OF TRUST DEED AND RULES

16. (a) THE Trustees may by deed make any amendment to the Trust Deed or the Rules; PROVIDED THAT no such amendment shall:-

- (i) take effect without the sanction of the Bank; or
- (ii) affect prejudicially the accrued rights in the Scheme of any Member (or wife or children of such Member) or Annuitant at the date of such amendment without his written consent; or
- (iii) vary the main purpose of the Scheme as set forth herein; or
- (iv) result in the payment of any part of the Fund to the Bank or other Participant except a surplus remaining after the winding up of the Scheme in accordance with the Rules.

[...]

THE FIRST SCHEDULE TO THE RULES [...]

COST OF LIVING INCREASES IN PENSIONS

10. The Bank and the Trustees shall on the 31st December in each year, or on such other fixed date annually as they shall determine, review the amounts of all pensions then in course of payment out of the Fund [...] in relation to any increase which shall have occurred between the Index published three Months or thereabouts prior to the current review, and shall in the case of the Scheme and if they think fit in the case of the No. 2 Scheme with immediate effect increase all such pensions by whichever is the lesser of:-

- (a) three per centum; and
- (b) any such increase in the Index expressed as a percentage;

CAS-102084-N1D3

or by such larger percentage not exceeding the percentage referred to in (b) as the Bank and the Trustees having regard to the advice of the Actuary in their discretion decide.”

Appendix 2

Extract from the Definitive Trust Deed of the Royal Bank of Scotland Group Pension Fund dated 5 April 2006, as amended

“1 Definitions

RBS Scheme means The Royal Bank of Scotland Staff Pensions Scheme

[...]

9 Augmentation

9.1 Authorised Member Payments and Augmentation of benefits

The Trustees at the request of the Bank shall in relation to any Eligible Employee, Member or Beneficiary:

9.1.1 augment any Uncrystallised Rights or Pensions in payment; [...]

provided that the Trustees are satisfied, after taking the advice of the Actuary, that the Fund Assets are sufficient to allow the proposed action to be taken or otherwise a special contribution is made by the Bank of an amount certified by the Actuary as sufficient to finance the benefit augmentation or provision and for the avoidance of doubt the benefit augmentation or provision may be financed partly by a special contribution by the Bank and partly from the Fund Assets;

[...]

10 Increases to Pensions and Preserved Pensions

[...]

10.4 Trustees' Duty to Increase Pensions for Members who transferred from the RBS Scheme

In respect of Members who joined the Fund from the RBS Scheme under the Transfer Agreement, the Trustees shall increase with effect from such date as the Trustees decide being not more than 12 months since the date of the immediately preceding increase the annual rate of every Pension in excess of the GMP by the lesser of:

10.4.1 3%; and

10.4.2 the increase in the Retail Price Index over such period as the Trustees decide, being a period ending not more than three months prior to the date of the increase, [...]"

Appendix 3

Extract from the Definitive Trust Deed of the NatWest Group Pension Fund dated 13 April 2021

“1 Definitions

RBS Scheme means The Royal Bank of Scotland Staff Pensions Scheme [...]

7 INCREASES TO PENSIONS AND PRESERVED PENSIONS

[...]

7.5 Trustee’s Duty to Increase Pensions for Members who transferred from the RBS Scheme

In respect of Members who joined the Fund from the RBS Scheme under the 2002 Transfer Agreement, the Trustee shall increase with effect from such date as the Trustee decides, being not more than 12 months since the date of the immediately preceding increase, the annual rate of every Pension in excess of the GMP by the lesser of:

7.5.1 3%; and

7.5.2 the increase in the Retail Price Index over such period as the Trustee decides, being a period ending not more than three months prior to the date of the increase, [...]

Appendix 4

Data drawn from the Bank's annual returns by Mr N

RBS Pension cap	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
RPI	3.0%	2.8%	3.2%	4.3%	4.0%	-0.5%	4.6%	5.2%	3.2%	3.0%	2.4%	1.0%	1.8%	3.6%	3.3%	2.6%	1.5%	4.1%	11.6%	9.7%
Actual increase	2.7%	2.6%	2.8%	3.2%	2.7%	3.5%	3.3%	2.8%	2.6%	2.9%	2.8%	2.8%	3.0%	2.9%	2.9%	2.8%	3.0%	2.5%	2.5%	2.4%
Provision in Annual Returns	2.6%	2.6%	2.8%	3.1%	2.7%	3.5%	3.1%	3.0%	2.6%	2.9%	2.7%	2.8%	3.0%	2.9%	2.9%	2.8%	2.7%	3.7%	2.5%	2.4%
Approximate page number in Returns	19	23	41	46	95 sho	263	148	333	231 no	not incl	193	168	319	106	88	222	278	323	328	325

Mr N said that the RPI data was taken from the Office for National Statistics' website.