CAS-44597-S2Z6

Ombudsman's Determination

Applicant	Mr S
Scheme	Svenska UK Retirement and Death Benefits Scheme (**the Scheme**)
Respondents	Trustees of the Svenska UK Retirement and Death Benefits Scheme (**the Trustee**) Capita Employee Benefits (**Capita**)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by the Trustee or Capita.

Complaint summary

2. Mr S has complained about the method used to calculate the accrual of his Scheme benefits by the Trustee and Capita, including whether the method is consistent with the preservation requirements (**the Preservation Requirements**) of the Pension Schemes Act 1993 (**the 1993 Act**).

Background information, including submissions from the parties and timeline of events

3. The sequence of events is not in dispute, so I have only set out the key points. I acknowledge there were other exchanges of information between all the parties.

4. The Scheme Rules applicable to Mr S are dated 17 November 1988 (**the 1988 Rules**). The sections from the 1988 Rules that are relevant to this complaint can be found in Appendix 1.

5. In March 1989, the Joint Office of Inland Revenue Superannuation Funds Office and Occupational Pension Board issued Memorandum 99 (**the Memorandum**). The Memorandum described the proposed changes in the tax rules for retirement benefit schemes, together with their proposed commencement dates and transitional effects. The sections from the Memorandum that are relevant to this complaint can be found in Appendix 2.

6. On 20 September 1989, Mr S began employment with Svenska UK and became a member of the Scheme.

7. On 16 July 1993, Mr S left the employment of Svenska UK.

8. On 21 June 1994, Mr S started employment with Svenska UK again. He has said that his offer of employment when he re-joined Svenska UK was for his earlier pensionable service to be continuous, as provided by the Scheme Rules.

9. On 10 October 1995, Mr S left the employment of Svenska UK.

10. On 24 September 2018, Mr S submitted a complaint to the Trustee under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). The issues raised by Mr S in his complaint are summarised in paragraphs 11 to 24 below. In the course of his complaint, some issues have been resolved to Mr S' satisfaction.

11. **Continuous service –** When he re-joined Svenska UK in 1994, Mr S claims that his offer of employment was for his earlier pensionable service between September 1989 and July 1993 to be continuous, in accordance with Section A6(B) of the 1988 Rules.

12. However, in February 2018, Capita provided a calculation of his Scheme benefits on the basis of two separate periods of service. He disputed this but the Trustee would not consider the matter.

13. **The pensionable salary calculation –** If his Scheme benefits were to be calculated as two separate periods of service, he disputed his final pensionable salary for the first period, which was used in Capita's calculations. In 1992 and 1993, Mr S received a basic salary comprising Sterling and non-Sterling amounts, yet only the Sterling amounts were used in the calculations. This was in contradiction to his second period of service, where he received a non-Sterling basic salary in 1994, which was fully recognised by Capita and the Trustee as pensionable salary.

14. He did not have a "dual contract", as Capita had alleged. He was 100% employed by Svenska UK during his whole period of service.

15. His remuneration letters in 1992 and 1993 showed employer contributions of 17% of salary. However, in the letter of 1992, the Sterling amount was not 17% of £42,000 (his salary). The letter in 1993 also said "averaged across the company at 17%". So, the implied notional amount was unclear in both letters. There was no expectation, on his part, of a direct 17% link between basic salary and employer contributions given that, as a Post-89 Scheme member, he did not have Continued Rights under Inland Revenue legislation (**Continued Rights**). Instead, he was subject to the earnings cap, whose value he knew to be less than his basic salary.

16. In a defined benefits pension scheme there was no direct link between employer contributions and pensionable benefits. Neither should there be an overriding expectation on the employee to ensure that the employer contributions were correct and in accordance with the Scheme Rules.

17. By comparison to his basic salary of £85,000, on returning to work for his employer in London, in the same role and less than a year later, the Sterling denominated amounts of £42,000 and £48,000 were clearly significantly less than appropriate.

18. By not recognising the Hong Kong Dollar basic salary as pensionable, for the reason of it not being a UK salary, the Trustee was contradicting its agreement at its meeting on 14 December 2017. The Trustee agreed that Mr S' later period of service, when he received his basic salary in US Dollars, while on secondment to New York, was pensionable.

19. Capita had used the term 'Enhanced Salary'. The remuneration letters of 1992 and 1993 clearly stated both Sterling and non-Sterling amounts as 'Basic Salary'. Mr S did receive enhanced salary benefits for working abroad, in addition to the Sterling and non-Sterling basic salary amounts. However, these amounts were additional to the basic salary, just as non-basic salary benefits were not listed in remuneration letters when he was based in London.

20. He regarded the omission of the non-Sterling parts of his basic salary in 1992 and 1993 as a "manifest error". His Scheme salaries for 1992 and 1993 should not have been £42,000 and £48,000 respectively but should have included the amounts of £46,112 (a basic salary of HKD 670,000) and £66,505 (basic salary of HKD 780,000). These were subject to the relevant earnings caps of £71,400 for 1992 and £75,000 for 1993.

21. **NRA –** In a letter dated 6 September 2018, Capita used a normal retirement age (**NRA**) of 65 for his service during the Barber Window (between 21 June 1994 and 30 June 1995) (**the Barber Window**). In his view, such a levelling down of the NRA rather than levelling up to an NRA of 60 exceeded the Trustee's powers under current legislation and the Scheme Rules. He regarded an NRA of 60 for his services during the Barber Window to be the correct one.

22. **The earnings cap –** Capita had used an incorrect earnings cap of £75,000 in its calculation of his 1994 salary. The correct amount should have been £76,800.

23. **The benefit accrual method –** He disputed the method of accrual used to calculate his preserved benefits. Capita used a uniform accrual method rather than the fixed accrual rates of 1/40th (for a lower part of his pensionable salary) and 1/30th (for the higher part of his pensionable salary) stated in the definition of Formula Pension in the 1988 Rules. For employees with Continued Rights, this method might calculate short service benefit on the same basis as long service benefit, as required by section 74(1) of the 1993 Act. This was because HMRC legislation applicable at the time capped accrual rates to a maximum of 1/60th. However, new legislation introduced prior to Mr S' employment removed that accrual cap, 'in return' for the introduction of an earnings cap.

24. As an employee without Continued Rights, his Scheme salary was subject to the earnings cap but not the accrual cap of 1/60th. The use of a uniform accrual method to calculate his short service benefits was no longer on the same basis as that for

long service benefits. Such a method unfairly subjected his earnings to both an accrual cap and an earnings cap.

25. On 26 October 2018, Mr S responded to a letter Capita had sent him on 22 October 2018. He was pleased that Capita had confirmed that the correct value for the relevant earnings cap was £76,800. He also said:-

    25.1. The NRA was in Part III of the 1988 Rules and not in Part II, as Capita had stated. With the different ages for the NRA for men and women set out solely in Part III, Clause 23 (ii) required any alteration of these ages to be undertaken by Deed and not resolution of the Principal Employer. Without such a Deed, it would appear that the NRA for women remained at 60. Consequently, due to the Barber Ruling, the NRA for men was required to be retrospectively levelled up to 60.

    25.2. He was surprised that the legal opinion on this matter did not appear to recognise this requirement. He required to be provided with documentation that showed whether there was a sound basis to an alteration of the Scheme Rules without recourse to a Deed of Amendment.

26. On the same date, Mr S informed the Trustee that Capita had agreed with the figure of £76,800 regarding the earnings cap for his pensionable service after he rejoined the Scheme in 1994. On the face of it this resolved the 'earnings cap' complaint (although the figure was later increased further – see paragraph 28.1 below). So, this particular point no longer needed to be addressed in the response to his complaint under the IDRP.

27. On 17 April 2019, the Trustee wrote to Mr S and apologised that a response to his complaint under the IDRP had not been issued within four months of receiving it. This was due to the Trustee seeking legal advice before responding. In the letter, the Trustee responded to some of the points Mr S had raised in his complaint and said:-

    27.1. Even though Mr S had said that, in 1994, he was offered continuous employment when he re-joined Svenska UK, no written evidence of this offer had been provided. No other Scheme member with two separate periods of employment had been granted continuous service. There was also no evidence in the minutes of any meeting or in the membership records of any such benefit ever being granted. So, Mr S' claim that his two periods of employment should be treated as continuous was rejected. This concluded the 'continuous service' issue.

    27.2. The Scheme Rules continued to require that the accrual cap (i.e. the requirement that his Formula Pension should accrue in a uniform accrual basis from date of joining to NRA) would apply even after HMRC rules had changed. While the Trustee appreciated the legislative position and that the requirement to continue to adopt the accrual method had ceased, the limitations to accrual and the earnings cap were both applicable and set out

in the Scheme Rules. The Trustee's duty was to ensure that benefits were calculated in accordance with these Rules.

27.3. It acknowledged that the issue regarding the correct earnings cap amount had been resolved.

28. On 21 August 2019, the Trustee responded to the remaining points of Mr S' complaint under the IDRP. It said, among other things:-

28.1. The issue of the earnings cap used to calculate Mr S' Scheme benefits had been resolved. However, upon further review, it was the Trustee's view that the Scheme should apply the HMRC Maximum Benefits Test as at the date of leaving pensionable service rather than the salary date. This was in accordance with the definition of 'Final Remuneration' set out in HMRC's Practice Notes IR12 1991. Consequently, Mr S' earnings cap for his second period of service should be £78,600 instead of £76,800.

28.2. There was no written evidence to show that Mr S had received both a UK salary and a Hong Kong salary during his first period of service. No other Scheme member in a comparable situation had been treated in this manner, where work had been solely completed in another country. It was typical for a notional Sterling salary to be set for overseas workers for the purpose of pensions and other benefits.

28.3. The Trustee could only administer the Scheme using the salary information provided by the employer. The definition of 'Salary', set out in Part III of the Scheme Rules, stated that the figure was determined by the employer and notified to the Trustee. So, the Trustee rejected Mr S' claim about this matter and confirmed that it would continue to provide his benefits from the first period of his service using a final pensionable salary of £45,146.30.

28.4. The NRA complaint was also resolved.

29. On 28 August 2019, Mr S responded to the Trustee's letter of 21 August 2019. Mr S was grateful that certain aspects of his complaint had been addressed. However, he was disappointed to see that the Trustee had requested documentary evidence to prove his claim that the Sterling amounts regarding his salary were real and not notional. He had previously provided letters from his employer which he thought were sufficient. He also held copies of payslips and bank statements, which he had attached to this response.

30. On 22 October 2019, the Trustee confirmed to Mr S that, after reviewing the additional information he had provided, it agreed to accept his claim regarding his salary and to increase his pensionable salary to the combined UK and Hong Kong salaries. As a result, Mr S' benefits for his first period of service had been recalculated using a final pensionable salary of £75,000 per year, which was the relevant earnings cap. His deferred pension for this period of service had been amended to £5,033.51 per year at his date of leaving service. This resolved the

'pensionable salary' complaint and the Trustee concluded that, as this resolved Mr S' remaining claim, the IDRP had been completed.

31. On 30 October 2019, Mr S asked the Trustee to consider paying him £1,000 for the distress and inconvenience Capita had caused him, as well as the delay in responding to his complaint. In Mr S' view, Capita made concerted attempts to dismiss his complaint. In addition, the delay in resolving his complaint meant that he had to put important financial decisions on hold. Mr S also pointed out that his complaint about the benefit accrual method used to calculate his deferred benefits had not been resolved yet.

32. On 14 November 2019, the Trustee responded to Mr S and offered him £500 for the non-financial injustice he had suffered. The Trustee added that the formula used in the accrual method was a requirement of the Scheme Rules and was also a condition for approval imposed by HMRC, where a pension scheme had an accrual rate in excess of 1/60th for each year of pensionable service. The Trustee explained that, in 1989, HMRC announced that it no longer required the formula to be applied as a condition for approval in most circumstances. However, there was no requirement for the formula to be removed, which meant that the Scheme Rules might still contain such a limitation. Consequently, the Trustee was required to provide benefits in accordance with these Rules.

33. On 19 November 2019, Mr S accepted the offer of £500 for the non-financial injustice he had suffered. He also confirmed to the Trustee that he would be referring the matter of the benefit accrual method to The Pensions Ombudsman to investigate.

Mr S' position

34. The Trustee's response under the IDRP has mostly resolved his complaint and provided satisfactory redress for non-financial injustice.

35. The only unresolved matter is the method that should be used to calculate the accrual of his benefits. The Scheme has used a uniform formula. The Scheme Rules set out a formula for long service benefits, which has an accelerated accrual of (i) the aggregate of 1/40th of final pensionable salary up to the average upper earnings limit and (ii) 1/30th of final pensionable salary which exceeds this limit, for each year of pensionable service, subject to a maximum of 20 years.

36. For employees with Continued Rights, HMRC legislation requires accruals to be capped at 1/60th for each year of service, up to a maximum of 40 years[1]. However, since Mr S joined the Scheme after 1 June 1989, this cap of 1/60th is not applicable. Instead, his final pensionable salaries were subject to the earnings cap, which was £75,000 in 1993.

[1] The actual applicable HMRC requirements are more complicated than as described in Mr S' submissions as enhanced accrual is permissible in certain circumstances.

37. The Scheme had imposed the earnings cap in calculating his deferred benefits but has not provided the accelerated accrual method as allowed for in contemporary legislation, and in accordance with sections 69 to 74 of the 1993 Act.

38. The Trustee has said that post 1989, there was no requirement for the uniform formula to be removed, so the Scheme Rules may still contain such a limitation. In his view, in the same way that the earnings cap was not set out in the Scheme Rules but was still applied with detrimental impact to his benefits due to superseding legislation, the accelerated accrual basis should also be used instead of uniform accrual to calculate short service benefits due to superseding legislation.

39. The relevant sections of the 1993 Act state that a scheme must provide for short service benefit to be computed on the same basis as long service benefit. As a member without Continued Rights, his accrual rate was not required to be capped at 1/60th per year of service. Additionally, his first period of service is split into two tranches with differing NRAs, a matter which the Scheme Rules do not address.

40. Paragraph 24 of the Memorandum states that the maximum approvable deferred benefit is N/30th, up to a maximum of 20/30ths. In its response to this complaint, the Trustee appeared to confuse maximum and actual accrual, by quoting the Scheme's deferred benefit accrual formula instead of the Rules specific to maximum accrual.

41. The 1988 Rules stated the following regarding maximum accrual:

> "(c) on leaving pensionable service before Normal Retirement Date, a pension of 1/60th of Final Remuneration for each year of completed service (not exceeding 40 years) or of such greater amount as will not prejudice Revenue Approval. The amount computed as aforesaid may be increased by 5% for each complete year between the date of termination of pensionable service and the date on which the pension begins to be payable."

In his view, the 1988 Rules did provide for maximum accrual, as set out in Paragraphs 24 to 26 of the Memorandum.

42. Legislation stated that the imposition of the earnings cap was mutually contingent with the increased maximum accrual rate of 1/30th (Paragraph 26). Since Mr S joined the Scheme after June 1989 (without Continued Rights), the earnings cap and the maximum accrual of 1/30th are each an integral part of the overriding statutory legislation for the approved scheme's calculation of his deferred benefits.

43. Approved schemes may specify particular benefit amounts below that of the maximum allowable. The 1988 Rules refer to a "Formula Pension" which is defined as:

> "… the aggregate of –
>
> (i) 1/40 of such part of his Final Salary as does not exceed the Average Earnings Limit; and

(ii) 1/30 of the amount by which his Final Salary exceeds the Average Earnings Limit,

Multiplied by the period (expressed as a number of years and any fraction of a year) of his Pensionable Service, subject to a maximum of 20 years."

In his view, these combined proportions of remuneration at 1/40th and 1/30th are less than 1/30th of total remuneration and so satisfy the maximum benefit requirements set out above.

The Trustee's and Capita's position

44. Capita has followed the appropriate process in determining the applicable accrual basis, in accordance with the relevant Scheme Rules and overriding legislation.

45. The calculation basis adopted by the Scheme results from the measures that pension schemes were required to implement following the passing of the Finance Act 1989 (**the 1989 Act**). Mr S has complained that an earnings cap has been applied, despite this not being a feature of the 1988 Rules which govern his benefits. However, as explained in the Memorandum, the legislation was overriding and schemes were obliged to adopt the earnings cap where relevant.

46. Where a scheme had an accrual rate in excess of 1/60th for each year of pensionable service prior to the passing of the 1989 Act, exempt approved schemes were required to apply the uniform formula as a condition for continued approval. This formula is reflected in Section C1(C) of the 1988 Rules.

47. Generally, the Scheme Rules in place at the time that a member left pensionable service continue to apply. There are exceptions but there are no Rule amendments which impact upon the application of the uniform formula set out in the 1988 Rules.

48. Paragraph 23 of the Memorandum confirms the calculation basis required prior to the passing of the 1989 Act. Paragraph 24 of the Memorandum sets out an alternative calculation that may be applied by pension schemes. So, it was optional for schemes to move to the alternative method. They could continue to use the earlier formula.

49. As the formula continues to be contained in the Scheme Rules, the Trustee and Capita are required to provide a benefit on that basis, subject to the earnings cap legislative override.

Adjudicator's Opinion

50. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee or Capita. The Adjudicator's findings are summarised in paragraphs 51 to 59 below.

51. The Ombudsman's powers are set out in Part X of the 1993 Act[2] and subsequent regulations. This legislation sets out what the Ombudsman can and cannot do. The Ombudsman has power to determine complaints that actual or potential beneficiaries have sustained injustice as a consequence of maladministration, and also disputes of fact or law (see sections 146(1)(a) and (c) of the 1993 Act). The Ombudsman cannot change or create new legislation. He must consider the law and the relevant scheme rules that apply to the applicant at the relevant time and determine whether they have been applied correctly. The Ombudsman must decide complaints and disputes in accordance with established legal principles rather than by reference to what he may consider fair and reasonable.[3]

52. The Adjudicator noted that most of the issues Mr S raised with the Trustee and Capita in his initial complaint had been resolved to his satisfaction. This included an award for any non-financial injustice he has suffered. The only issue that remained unresolved was that of the benefit accrual method used to calculate Mr S' benefits. So, the Adjudicator only addressed this issue.

53. The Adjudicator reviewed the information provided in order to ascertain whether Capita and the Trustee calculated Mr S' benefits in accordance with the Scheme Rules and relevant legislation.

54. As the Adjudicator understood it, Mr S disagreed with the calculation method used to calculate the accrual of his Scheme benefits. The method used was the uniform accrual formula N/NS x P. Mr S said that, for employees with Continued Rights, this method may calculate short service benefit on the same basis as long service benefit. This was because HMRC legislation capped accrual rates to a maximum of 1/60th. However, legislation introduced prior to his employment removed the accrual cap 'in return' for an earnings cap. As Mr S was an employee with no Continued Rights, he said his salary was subject to the earnings cap but not the accrual cap of 1/60th. Mr S argued that, as a result, the accrual formula N/NS x P used to calculate his short service benefit was no longer on the same basis as that of a long service benefit (which used the Formula Pension method). This was because he was subjected to both an accrual cap and an earnings cap.

55. While it was true that Mr S was subjected to both an 'accrual cap' and an earnings cap, it was the Adjudicator's view that the Trustee was entitled to retain the accrual cap in the Scheme Rules. This was because the revisions to the tax rules relating to limits on accrual did not require otherwise. For example:-

    55.1. Section 591 of the Income and Corporation Taxes Act 1988 (see Appendix 3) did not require the Trustee to give up the accrual cap for an earnings cap. So, the use of both caps could still be in force under the Scheme Rules, as was the case here.

[2] See https://www.legislation.gov.uk/ukpga/1993/48/part/X/enacted

[3] *Henderson v Stephenson Harwood* [2005] Pens LR 209 (s12)

55.2. Part II(b) of the Memorandum confirmed that the earnings cap would be statutory. However, Part 26 of the Memorandum also confirmed that the proposed change from N/60th to N/30th would be discretionary and that there was no obligation on a pension scheme to adopt this change in its rules. So, a pension scheme could apply both an accrual cap and an earnings cap, as was the case here.

56. In the Adjudicator's opinion, the Scheme could legitimately apply both the accrual cap, as well as the earnings cap to Mr S' benefits.

57. Mr S said that the Trustee had failed to comply with the requirements of section 74(1) of the 1993 Act (see Appendix 4), in that a pension scheme must provide for short service benefit to be computed on the same basis as long service benefit.

58. In the Adjudicator's view, section 131 of the 1993 Act (**Section 131**) (see Appendix 5) made it clear that the requirements contained in section 74 of the 1993 Act (**Section 74**) do not override the Scheme provisions. So, in the Adjudicator's opinion, Mr S enjoys no direct legal rights under Section 74.

59. While the Adjudicator sympathised with the position Mr S found himself in, in that his Scheme benefits were subject to both the accrual and the earnings cap, it was the Adjudicator's opinion that his benefits had been calculated in accordance with the Scheme Rules and these calculations were not in breach of any relevant legislation.

60. Mr S did not accept the Adjudicator's Opinion and in response made some additional comments.

Summary of Mr S' post Opinion comments

61. He disagreed with the Adjudicator's view that the requirements contained in section 74 of the 1993 Act did not override the Scheme provisions due to Section 131.

62. The Adjudicator's view appeared to be that Section 74 was disallowed in a very general sense. Mr S questioned why, if this was the case, it would have been enacted.

63. His understanding of Section 131 was that short service benefits may, at the discretion of the Trustee, be more ample than those provided for in Section 74; not more ample, with discretion, than the Scheme's Rules for short service benefit.

64. He was not asking for discretionary benefits additional to those set out in Section 74. He was asking for the minimum benefit due from the overriding legislation of Section 74 which states that the basis of accrual of short and long service benefit must be equal even if the Scheme Rules deny it.

65. The term "preservation requirements" used in Section 131 is defined in section 69 of the 1993 Act as: "the requirements specified in or under sections 71 to 82." Section 131 meant that nothing in Chapter I of Part IV precluded a scheme from providing more ample short service benefits than set out in sections 71 to 82 of the 1993 Act

(**Sections 71 to 82**). It did not say that Sections 71 to 82 were not applicable, but that they were the minimum statutory requirement. This included Section 74 which stated the accrual basis for short service benefit must be the same as for long service benefit. He was not requesting more ample benefits than those set out in Sections 71 to 82, so Section 131 was not relevant in this instance.

66. The Trustee and Capita said that he had complained that an earnings cap had been applied when calculating his benefits. This was not the case. It was the value of the earnings cap that had originally been used by Capita that he had complained about. This matter had been subsequently resolved.

67. As Mr S did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. I issued a preliminary decision (**the Preliminary Decision**) which did not uphold the complaint.

68. Mr S made further submissions in respect of the Preliminary Decision, which are summarised in paragraphs 69 to 72 below. I have considered these additional submissions and the extent (if any) that they affect my earlier conclusions, in the section entitled the "Ombudsman's Decision" below.

Summary of Mr S' response to the Preliminary Decision

69. He referred to the view in my Preliminary Decision (expanded on in paragraph 112 to 116 below) that the short service and long service benefits are calculated on the same basis since they may be treated as "Actual Pensionable Service/Prospective Pensionable Service to NRA x Formula Pension". He said that this meant that generally short service benefit can only ever be calculated on an N/NS accrual basis thus rendering section 74(1) - (5) of the 1993 Act redundant. If so, it should just be replaced with "each and every short service benefit should be calculated on a N/NS basis", as per section 74(6) of that act.

70. He does not agree that the law was written to be interpreted in this way. He said that the short and long term bases of accrual are different for the Scheme. He conceded that the final amount at NRA would be the same, but was of the view that is the nature of a different basis, and the law says it is the basis which should be the same not the amount calculated at NRA. The "basis" of long service benefit in the Scheme is stated as 1/40 (1/30) of final salary multiplied by period of service subject to a maximum of 20 years (Appendix 1). Section 74(1) of the 1993 Act clearly states short service benefit must be computed "on the same basis". It does not say "should be computed on the basis of uniform accrual to formula pension at NRA".

71. He also asked that, given the effect of the Barber Window, consideration be given to the effect of different NRA tranches within his benefit, and felt my decision would be clearer if it addressed this additional point.

72. Mr S referred to my statement (repeated in paragraph 117 below), that his argument ensures short service members would receive a proportionately better benefit than long service members. Mr S said that, firstly, this was only true for prospective

service greater than 20 years; secondly, he saw nothing in the legislation which stated benefits cannot accrue faster for some short service members compared to some long service members. There would be a range of accruals amongst members for either method of calculation.

Ombudsman's decision

73. Mr S is unhappy that, when calculating his benefits from the Scheme, Capita did not allow for accelerated accrual and his deferred benefit was calculated on a uniform accrual basis.

74. Mr S' entitlement to the benefits for the period of accrual after he rejoined the Scheme in 1994 is governed by the Trust Deed and Rules dated 17 November 1988.

75. If Mr S had remained in pensionable service until NRA he would have been entitled to a pension at NRA equal to his 'Formula Pension' under Rule D1, which deals with retirement at NRA and is set out in more detail in Appendix 1.

76. The "Formula Pension", means, in relation to a Member, a pension equal to the aggregate of:

    76.1. 1/40th of such part of his Final Salary as does not exceed the Average Upper Earnings; and

    76.2. 1/30th of the amount by which his Final Salary exceeds the Average Upper Earnings Limit,

    multiplied by the period (expressed as a number of years and any fraction of a year) of his Pensionable Service, but subject to a maximum of 20 years.

77. Mr S however did not take his benefits at NRA. Instead, he became a deferred pensioner when he ceased to be in Pensionable Service. Accordingly, his pension is calculated in accordance with Rule C1(C) (Deferred pension) which provides that:

    > "he shall be entitled to an annual pension starting on the first day of the month following his [NRA] of an amount equal to the Relevant Proportion of the Formula Pension to which he would have been entitled if he had continued in Pensionable Service until his [NRA]".

78. Under rule C1(C)(iii), for this purpose, the "Relevant Proportion" in relation to a Member is the proportion which his Pensionable Service would have been had he remained in Pensionable Service until his NRA.

79. In other words, the deferred pensioner rule requires Mr S' benefits to be calculated on the basis that the Formula Pension accrues "uniformly" over the period of his Pensionable Service until NRA.

80. In relation to members with Pre 87 and Pre 89 Continued Rights for HMRC purposes, Mr S is correct that, as noted in his 5 July 2021 letter, there was an HMRC

requirement for discretionary approval of the Scheme that the total benefits payable before normal retirement date required a limitation on accrual of the greater of an accrual rate of 1/60th final remuneration for each year of service or an N/NS x P accrual formula.

81. Mr S is also correct, as noted in his 5 July 2021 letter, that members without Pre 87 and Pre 89 Continued Rights (i.e. those who joined on or after 1 June 1989) were not subject to this requirement, but were subject broadly both to the earnings cap[4] and also a requirement that benefits should not accrue at a rate of more than:

    81.1. 1/30th of final remuneration[5] (subject to a maximum of 20 years); and

    81.2. 2/3rds of final remuneration less any retained benefits.

82. The change was announced in Joint Office Memorandum 99, extracts of which are set out in Appendix 2 and have been referred to by the parties. The difference in HMRC requirements is also recorded in subsequent versions of HMRC Practice Notes IR12(1997) and IR12(2001). The 1/30th accrual formula represents a maximum level of benefit, not an overriding minimum required level of benefit to ensure that a scheme maintained its approved status.

83. However, the fact that the Rules provide for Mr S' deferred benefits to be calculated in accordance with a uniform accrual formula is an integral part of the Scheme benefit design. The fact that the requirements for calculating the maximum benefit accrual under HMRC rules for discretionary approval changed from 1 June 1989, to remove the requirement for the imposition of an N/NS formula (for non Continued Rights members) and were replaced with different requirements (and that some HMRC requirements were subsequently abolished from 6 April 1997 subject to certain transitional provisions), does <u>not</u> give Mr S a right to have the benefit design changed so that his benefits increase, by removing a similar uniform accrual formula (N/NS x P) that was hard coded into the Rules and that formed part of the Scheme's own benefit design. The Scheme is not required by HMRC requirements, which were in force at the time Mr S ceased to be in pensionable service, to provide fixed accrual of benefits, albeit that HMRC requirements would have permitted such fixed benefit accrual to have been provided, thereby giving Mr S a higher pension than he is in fact entitled to. HMRC limits set a maximum (not a minimum) level on the benefits to be provided.

84. Mr S has however also argued that calculating his deferred benefits using a uniform accrual method is not consistent with the Preservation Requirements[6] as the short service benefit is not calculated in the same way as the long service benefit. Preservation was introduced to prevent schemes discriminating against members who do not remain in pensionable service until normal pension age. Before the

[4] Section 590C of ICTA 88 – the earnings cap was overriding for post 1 June 89 members. This is accepted by Mr S in his submissions.
[5] Final remuneration could not exceed the earnings cap except for those members with Continued Rights
[6] Mr S referred in his submissions to the Preservation Requirements as set out in Schedule 16 of the Social Security Act 1973. These are now contained in the 1993 Act.

introduction of the Preservation Requirements, occupational pension schemes often provided no benefits or inferior benefits to early leavers compared with those who remained in pensionable service until normal pension age.

85. Mr S has argued, broadly, that Section 132 of the 1993 Act simply deals with the situation in which a scheme trustee wishes to award benefits which are less generous than those which are required by Section 74, and that Section 131 of the 1993 Act does not prevent Trustees providing more generous benefits. Mr S contends that he should be entitled to accrue his benefits at the rate specified in the Formula Pension and not, as set out in the Scheme's Rules, a proportion of that pension pro-rated by reference to an N/NS x P formula to NRA (as he was not subject to the N/NS requirements applicable to members with Pre 87 and Pre 89 Continued Rights). Moreover, he says that the Trustee is required to provide him with benefits using what he describes as a fixed accrual basis.

86. As noted by my Adjudicator, the Preservation Requirements do not override the Scheme Rules. This point was confirmed in the case of *Konica Minolta Business Solutions (UK) Ltd v Applegate and others*[7] (***Konica***) where, at paragraph 39, Asplin J (as she then was) commented:

> "However, as a result of section 131 of the Pension Schemes Act 1993, although scheme rules must comply with the preservation requirements, they are not overriding where the rules of a scheme are inconsistent with them."

87. Asplin J, however, goes on to note that Section 132 (as amended), makes it clear that it is for the trustees and managers of a scheme "to take such steps as are open to them for bringing the rules of the scheme into conformity with those requirements."

88. I therefore do not consider that Mr S' dispute can be determined solely on the basis that his benefits have been paid in accordance with the Rules, and that the Rules provide for uniform accrual as part of the benefit design. Rather, I need to go on to consider whether the deferred benefit rule is compliant with the Preservation Requirements as, if it is not, the Trustee would be required to bring the Scheme Rules into conformity with those requirements and provide Mr S with the higher benefit he claims he is entitled to. This is not an easy question. However, many similar issues to Mr S' case have already been considered in depth by Asplin J in *Konica,* which also contains helpful guidance about how a court (or for that matter the Ombudsman) should go about determining compliance with the Preservation Requirements. Accordingly, I will look at the analysis in this case in so far as it is relevant to Mr S. I need of course to recognise that the rules of the Konica scheme are different in a number of respects to those governing Mr S' entitlement under the Scheme. So, the analysis will not necessarily be the same.

89. The key Preservation Requirements which are relevant to Mr S' dispute can be found in sections 71, 72 and 74 of the 1993 Act (these are set out in full in Appendix 4).

[7] *Konica Minolta Business Solutions (UK) Ltd v Applegate and others* [2012] EWHC 3741 (Ch)

90. Under section 71, in very general terms, a member who has at least two years qualifying service is entitled to a “short service benefit”, comprising a benefit of any description which would have been payable under the scheme as long service benefit.

91. “Long service benefit” is, broadly, the benefit payable under the scheme to members on the assumption that they remain in pensionable service until they attain “normal pension age” and continue to qualify for benefit for the full period of pensionable service.[8]

92. Under section 72, a scheme must not contain any rule which results, or can result, in a member being treated less favourably for any purpose relating to a short service benefit than he is, or is entitled to be, treated for the corresponding purpose relating to long service benefit.

93. Under section 74(1), subject to the remainder of section 74, a scheme must provide for short service benefit to be computed on the same basis as long service benefit. However, there are some exceptions to this. As a result of section 74(3), section 74(1) does not apply to “so much of any benefit as accrues at a higher rate, or otherwise more favourably, in the case (a) of members with a period of pensionable service of some specified minimum length, or (b) of members remaining in pensionable service up to some specified minimum age”. There is also an exception in section 74(4), so that section 74(1) also does not apply to “so much of any benefit as is of an amount or rate unrelated to length of pensionable service”.

94. In so far as short service benefit is not required to be computed in accordance with section 74(1), as a result of the exception in either 74(3) or (4), section 74(6) then requires the short service benefit to be computed on the basis of uniform accrual - “so that at the time the pensionable service is terminated, [the short service benefit] bears the same proportion to long service benefit as the period of that service bears to the period from the beginning of that service to the time when the member would attain normal pension age…”. In other words, a uniform accrual formula should be applied if the rule falls within the exceptions to section 74(1), under sections 74(3) or 74(4).

95. The combined effect of all these provisions is that the Preservation Requirements require a scheme to provide a member a “short service benefit” which is a pension calculated on the same basis as his ordinary retirement pension or, where applicable, in accordance with uniform accrual. The short service benefit is, broadly speaking, a pension based on the period of service to, and the pension remuneration payable at, the date of leaving service. The pension is not payable immediately. Instead, it is a deferred pension which only becomes payable at the member’s “normal pension

[8] “Normal pension age” is defined under section 180 of the 1993 Act as the earliest age at which the member is entitled to receive benefits (other than a guaranteed minimum pension) on his retirement from employment with the employer. However, any scheme rule making any special provision as to early retirement on grounds of ill-health or otherwise is to be disregarded. Normal pension age is often (but not always) the same as a scheme normal retirement date.

age", which is usually the age which the ordinary retirement pension becomes payable.

96. Examples of how uniform accrual applies to some particular benefit structures can be found in the historical Joint Office Memorandum 78 published by what was the Occupational Pensions Board, before it was abolished. The Occupational Pensions Board's role, among other things, was to determine whether scheme rules were compliant with the Preservation Requirements[9]. The example set out below illustrates how the uniform accrual formula prevents members entitled to a short service benefit being discriminated against, compared with a member entitled to a long service benefit where the accrual rate increases during the period the member is in pensionable service.

Example

A scheme with an NPA of 60 provides:

a. for each of the first 20 years of membership 1/80th of final pensionable earnings and

b. for each subsequent year of pensionable service 1/60th of final pensionable earnings.

A member joins at 35 having 25 years prospective pensionable service. If he/she left pensionable service after 15 years and final pensionable earnings were £10,000 he/she would be entitled to a preserved pension of:

15/25 X (20/80ths + 5/60ths) X £10,000 = £2,000

97. In *Konica* it was confirmed by Asplin J[10] that the first task of a court when determining compliance with the Preservation Requirements is to apply the ordinary rules of construction in order to determine what the rights of members are to long service benefit and the way it is computed. This is obviously necessary in order to be in a position to determine whether the rules are compliant with the Preservation Requirements by means of the general rule contained in section 74(1), or whether the exceptions contained in section 74(3) and/or 74(4) apply. Importantly, it was also confirmed at paragraphs 94 and 96 of her judgment that, when determining whether the Preservation Requirements were satisfied, one should consider the rules as a whole and not consider compliance on an individual 'member by member' basis. In Asplin J's judgment therefore, it is necessary to construe the rules as they might apply in any circumstance, and in particular to any member who might join at any age, rather than merely in relation to a specific member, or solely with an eye to those who joined over or under a particular age. These principles are potentially relevant to Mr S' case and are considered further below.

[9] And, although I have not been provided with a copy of the letter issued by the OPB confirming compliance with preservation requirements in relation to the 1988 Rules, I would assume that the OPB issued one in relation to the Scheme.

[10] at paragraph 93

98. By way of background, in *Konica* "Pre 87 Members" had the following benefit entitlement on retirement at Normal Retirement Date:

> "(1) A Member who retires from Service at [NRD] shall be entitled to a pension of such an amount as is necessary to provide an Aggregate Pension of two-thirds of his Final Scheme Salary provided that he has completed at least ten years' Service. A Member who has completed less than ten years' Service when he retires from Service at [NRD] shall be entitled to a pension of such an amount as is necessary to provide an Aggregate Pension in accordance with the following table.
>
> | Years of Service to Normal Retirement Date | Aggregate Pension expressed as a fraction of Final Scheme Salary |
> |---|---|
> | 1-5 | 1/60 for each year |
> | 6 | 8/60 |
> | 7 | 16/60 |
> | 8 | 24/60 |
> | 9 | 32/60 |
>
> (2) […]
>
> (3) Provided that the Aggregate Pension shall not exceed two-thirds of Final Remuneration or such lesser amount as may be necessary in order not to prejudice Approval of the Scheme."

99. The benefit structure for a second category of Pre 89 members was more complicated. The benefit also had to comply with a requirement (mirroring post 1 June 1989 HMRC limits for non-continued rights members) that the benefit could not accrue at more than 1/30th Pensionable Service with a 20 year cap (which was a requirement at the time under the Income and Corporation Taxes Act 1988 for this category of member). However, Asplin J concluded, after considering contrary submissions, that the underlying benefit for this category of member was still calculated using the above "accelerated" accrual formula and with the 1/30th accrual rate being imposed as a further limitation on benefit accrual. Effectively the lower of the two benefits were payable, and the 1/30th accrual formula had not replaced the accelerated accrual formula applicable to Pre 87 Members.

100. Asplin J accepted in *Konica* that, under the benefit structures applicable to both Pre 87 and Pre 89 members in the Konica scheme, the accrual of benefits was uneven (even though Pre 87 members with more than 10 years pensionable service would always have a 2/3rds pension promise and all the Pre 89 members would have a 2/3rds pension promise after 20 years). There was a higher accrual rate (uneven accrual) for those members with a period of pensionable service of a specified minimum length. Asplin J considered that it was necessary to look at how the rule affected <u>all</u> members, and it was not appropriate to consider compliance with the Preservation Requirements on an individual member by member basis or members

below or above a particular age. So, the fact that some members had more than 10 years pensionable service to normal pension age did not affect her conclusion. Accordingly, the benefit structure fell within the exception under section 74(3) and uniform accrual applied under section 74(6). Asplin J considered that applying an actual/potential service accrual methodology was consistent with the purposes of the legislation which was to protect deferred members being discriminated against and being treated less favourably than those who remained in pensionable service to normal pension age.

101. Asplin J also considered in *Konica* an argument that the section 74(4) exception applied on the basis that all the affected Pre 87 members potentially had more than 10 years pensionable service to normal pension age, and accordingly the pension payable was unrelated to pensionable service. The formula pension would always be fixed at a 2/3rds pension at date of joining the scheme, Asplin J concluded on the facts of the case that 74(4) did not apply as it was not appropriate to consider compliance on an individual member by member basis and, in relation to those members with fewer than 10 years prospective service, the pension was calculated by reference to their pensionable service. It was difficult to see how the benefit payable under the rule was unrelated to the period of pensionable service. Asplin J accepted that "unrelated" was a very wide term and should be construed accordingly.

102. In Mr S' case under the Scheme Rules, the Formula Pension is expressed as providing for 1/40th of Final Salary up to Average Upper Earnings and 1/30th of Final Salary above the Average Upper Earnings for each year of Pensionable Service, up to 20 years.

103. I have found it difficult to apply the position in *Konica* to the facts of the Scheme, in order to reach a view whether the exception in section 74(3) applies. The benefit for Pre 87 members in *Konica* accrued at an uneven and accelerating rate before being capped at 10 years of pensionable service – although in most circumstances it would not be payable until later, at the member's normal retirement date. For the Scheme that is not the case – as for the Formula Pension, the accrual is 'even' until the 20 year 'cap' is reached, and after that a member remains entitled to the full fraction at NRA.

104. So, on one hand, unlike the position in *Konica*, it is possible to argue that the section 74(3)(a) exception does not apply to Mr S, as the benefits do not accrue at a higher rate after the member's pensionable service reaches a specified minimum length. In *Konica* there was an accelerated accrual formula for the Pre 87 Members in the first 10 years of accrual, so members did accrue benefit on a more favourable basis on reaching a specified minimum length.

105. In contrast, it is also possible to argue that the exception in 74(3)(a) does apply. This exception requires that the general rule in section 74(1) does not apply to "so much of any benefit as accrues at a higher rate, or otherwise more favourably, in the case – (a) of members with a period of pensionable service of some specified minimum length, …". Here, a member of the Scheme is not entitled to his pension until NRA.

However, by accruing 20 years pensionable service (the 'specified minimum length'), the member becomes entitled to his 'full pension' at NRA (the 'higher rate or otherwise more favourably'), even if there is still some time to go until NRA (and provided he remains in pensionable service to NRA). On that basis, the exception would arguably apply and uniform accrual would then be required under 74(6).

106. This, to me, has some support from *Shucksmith v Occupational Pensions Board re Anns Homes Limited Pension Scheme* [1989] PLR 63 (***Shucksmith***), a case referred to in *Konica*. *Shucksmith* dealt with predecessor legislation to the 1993 Act, but the Vice Chancellor was required to form a view on whether one element of a pension formula was caught by the equivalent exception in the predecessor legislation[11].

107. The defined benefit element of the pension formula, referred to as the Rule 11(1)(b) pension in *Shucksmith*, was "a pension calculated in accordance with a table, interpolating where appropriate. There then follows a table setting out the amount of pension payable, dependent on the length of service. Down to ten years the amount of pension expressed as a fraction of salary is less than 40/60ths, after ten years or more service the pension amounts to 40/60ths of the final pensionable salary. Accordingly, that rule provides for a pension ascertainable as being the lesser of two sums: … (2) a pension of a defined amount equal after ten years to 40/60ths of pensionable salary."[12]. On the face of it, that is similar to the position found in the Scheme.

108. The Vice Chancellor then tested that against the predecessor Preservation Requirements: "the next matter the Board had to turn to was to consider the impact of the 16th Schedule in determining whether the short service benefits procured by the scheme did or did not comply with the provisions of that schedule. Under paragraph 10 [of the Social Security Act 1973] the approach is that the scheme must provide for short service benefit, computed on the same basis as long service benefit. However, paragraph 10(3) provides that "*this paragraph does not apply to so much of any benefit as (a) accrues at a higher rate, or otherwise more favourably, in the case of members with a period of pensionable service of some specified minimum length*"".[13]

109. The Vice Chancellor highlighted that the OPB had concluded that "… the pension as computed under rule 11(1)(b), being a pension providing for unequal pension rights dependent on the period during which the member had been employed, was

[11] Paragraph 10(3) of Paragraph 16 of the Social Security Act 1973 provided that *"(3) This paragraph does not apply to so much of any benefit as — (a) accrues at a higher rate, or otherwise more favourably, in the case of members with a period of pensionable service of some specified minimum length, or of those remaining in pensionable service up to some specified minimum age; or*…"
[12] Paragraph 2 of *Shucksmith.*
[13] Paragraph 6 of *Shucksmith.*

excluded from the formula set out in paragraph 10[14] and fell to be computed under paragraph 11[15]".[16]

110. Looking at this decision he concluded that the OPB was correct to conclude that the rule 11(1)(b) pension fell within the paragraph 10(3) exception, so that uniform accrual was then required[17]. As a result, there seems a good argument that the equivalent exception now contained in section 74(3)(a) acts in relation to the Scheme so as to require uniform accrual to apply.

111. I now turn to the other exception found in section 74(4). There is a reasonable argument in Mr S' case that the amount or rate of pension is unrelated to length of pensionable service, and so the section 74(4) exception applies. Mr S had more than 20 years' pensionable service to normal pension age. His Formula Pension is fixed at 20/40th of Final Salary up to Average Upper Earnings and 20/30th of Final Salary above the Average Upper Earnings, on joining the Scheme. However, in *Konica* a similar argument (advanced by Konica) was rejected by Asplin J on the basis that it is necessary, when considering whether a particular rule is compliant with the Preservation Requirements, to consider its impact on all the potentially affected members and not on an individual member by member basis. Given that under the benefit structure for those members in *Konica* with less than 10 years' pensionable service benefits were calculated by reference to pensionable service under the enhanced accrual formula, the Formula Pension could in my view relate to pensionable service in the case of some members and section 74(4) may not apply. Similarly, those Scheme members with potential pensionable service of less than 20 years pensionable service will have a pension calculated related to their period of pensionable service. I consider that the better view is, on the basis it is settled law, that it is not appropriate to look at compliance with the Preservation Requirements on an individual member or group of member basis, the section 74(4) exemption likely does not apply to Mr S.

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[14] i.e. the general rule in paragraph 10(1) that "*A scheme must provide for short service benefit to be computed on the same basis as long service benefit*", equivalent to section 74(1) of the 1993 Act.
[15] i.e. the uniform accrual requirements: "*So far as any short service benefit is not required to be computed in accordance with paragraph 10 above, it must be computed on the basis of uniform accrual, bearing the same proportion to long service benefit at the time when pensionable service is terminated as the period of that service bears to the period from the beginning of that service to the time when the member would attain normal pension age or such lower age as may be prescribed*", equivalent to section 74(6) of the 1993 Act.
[16] Paragraph 6 of *Shucksmith.*
[17] At paragraph 19 of *Shucksmith* the Vice Chancellor concluded that "*It seems to me, though the wording is not entirely happy, that what is sought to be done by paragraph 10(3) is to look at the sum of the pension benefits and see if the whole or any part of those benefits are to be taken as accruing by reference to an unequal formula which does not attribute a share in the pension on the basis of year by year accrual. So much of the benefit as has to be computed according to the scheme on the basis of unequal accrual is taken out of paragraph 10 and has to be dealt with on the base of uniform accrual under paragraph 11. So in this case it seems to me that the Board were right that at a time when it is impossible to know which of two alternative pensions will in the event be payable the Board has to apply paragraphs 10 to 12 to the two bases separately and satisfy itself that, having applied paragraph 10 to the pension provided for by rule 11(1)(a) and applied paragraph 11 to the pension provided for by rule 11(1)(b), the two of them together satisfy the requirements of the Schedule to the Act".*

112. If section 74(3) or (4) do not apply (although for the reasons given above, in my view there is a good argument that the exception in 74(3) does apply), it is necessary to consider next whether the short service and long service benefit are being computed *on the same basis* and accordingly are compliant with section 74(1). In making such an assessment it is necessary, as noted by Asplin J, to construe the effect of the rules as a whole and have regard to the purposes of the legislation to ensure that short service benefit members are not being discriminated against compared with those entitled to a long service benefit.

113. To my mind, in relation to a member with potentially less than 20 years to NRA there is no doubt that the short service benefit and the long service benefit are being computed on the same basis. They are accruing uniformly over their period of pensionable service to NRA.

114. In relation to members, like Mr S, with potentially more than 20 years pensionable service, the position is different. In my view, if the rules are construed as a whole, Mr S (and other members in a similar position) are accruing the maximum benefit of 20/40th of Final Salary up to Average Upper Earnings (and 20/30th of Final Salary above the Average Upper Earnings) uniformly over the period from date of being admitted to pensionable service until their NRA in accordance with an N/NS formula. The effect of the rule is that a member with potentially more than 20 years pensionable service until NRA is not entitled to the Formula Pension after 20 years but only, in my view, when they reach NRA. It is only at NRA that they are entitled to the long service benefit.

115. Another way of looking at the issue is that the combined effect of the relevant deferred member and retirement at NRA rule, together with the Formula Pension definition, is that the member is entitled to a pension in accordance with the following formula.[18]

> Actual Pensionable Service/Prospective Pensionable Service to NRA x Formula Pension

116. On that basis, even if the exception in 74(3)(a) did not apply, my conclusion is that under the Scheme Rules the Formula Pension accrues uniformly over their period of pensionable service until NRA, and accordingly is being computed on the same basis as the short service benefit and the Rules are compliant with section 74(1) of the 1993 Act.

[18] I appreciate that it was recognised in the old Occupational Pensions Board's Joint Office Memorandum 78 paragraph 132 that where a scheme has a higher accrual rate than 1/60th for example 1/45th so the two thirds benefit cap would be reached after 30 years, preservation may mean that the rules of a scheme must provide an early leaver with a greater benefit than that arrived at using PSO formula of N/NS x P (Practice note 10.10 refers). So a higher benefit could be provided without breaching old HMRC limits if the N/NS formula is not hard coded into the rules. However, in this example there is no indication that an actual/potential service formula was hard coded into the rules of the Scheme and accordingly, as is currently the case, forms part of the benefit design.

117. The intention of the Preservation Requirements was to prevent members who leave before normal pension age being discriminated against. They do not, in my view, require the provision of a proportionately better benefit for a deferred member than a member who remains in pensionable service until normal retirement age. I agree that Section 131 of the 1993 Act confirms that the Preservation Requirements do not preclude a scheme from providing "ampler benefits". However, nor does it in this case require Mr S to be provided with better benefits than those which are hard coded into the rules and form an integral part of the benefit design.

118. Mr S did not agree with my above conclusions which follow the analysis set out in my Preliminary Decision. In particular, he contended that, if it is correct that the short and long service benefits are calculated on the same basis because, in effect, the pension is calculated by reference to a formula of "actual service/prospective service x formula pension", it would mean that generally short service benefit can only ever be calculated on an N/NS accrual basis. This would render section 74(1) - (5) of the 1993 Act redundant. If this was intended, then section 74 should be replaced with a requirement that "each and every short service benefit should be calculated on an N/NS basis" which is not what the legislation provides for. Mr S notes that the short and long service basis of accrual are different for the Scheme - although Mr S does agree that the final amount at NRA would be the same, but that is as a result of a different basis. However, the legislation provides that it should be calculated on the same basis and not the amount calculated at NRA. Mr S considers that the "basis" of the long service benefit in the Scheme is clearly stated as 1/40th (1/30th) of final salary multiplied by the period of service subject to a maximum of 20 years (Appendix 1 refers). The 1993 Act, section 74(1) provides that short service benefit MUST be computed on the same basis. It certainly does not say "should be computed on the basis of uniform accrual to formula pension at NRA."

119. I do not agree with Mr S' supplementary submissions. Broadly, what section 71(1) of the 1993 Act provides is that, unless one of the exceptions in 74(3) or (4) apply, the short service benefit must be calculated on the same basis as the long service benefit. If the exceptions in section 74(3) or (4) apply, the default position is that the short service benefit must be calculated on the basis of uniform accrual. It does not follow, however, that if a particular benefit structure does not fall within one of the exceptions under section 74(3) or (4), the short service benefit is not being calculated on the same basis for the purposes of section 71(1) if the rules (when construed together) provide for uniform accrual of benefits to normal pension age. The exceptions under sections 74(3) and (4) were included to cater for the unusual situation where it is not so calculated where for example there is a lower level of accrual to begin with or a fixed benefit is provided. There are a very wide range of benefit structures under occupational pension schemes. It is still possible that a calculation methodology with a uniform accrual basis can fall within section 74(1) and be consistent with preservation, as could other calculation bases which do not provide for uniform accrual.

120. Mr S' analysis is looking at the rule which provides that there is 1/40th (or 1/30th) accrual multiplied by 20 years subject to a maximum of 20 years in isolation from the N/NS requirement which is also written into the rules. The two rules have to be read together to understand the basis on which the benefit is calculated. The combined effect of the rules is that they provide for uniform accrual of benefits to NRA. In my view therefore the benefit structure is compliant with section 74(1) as the benefits for a short service and long service member are being calculated on the same basis. It is possible for the benefit to be calculated on the same basis, even if a uniform accrual method of calculation is being applied. Even if this were not the case, I would prefer the argument, following *Shucksmith*, that the exception in 74(3) would nonetheless require uniform accrual to be applied.

121. In relation to my analysis set out in the Preliminary Decision at paragraph 99 (repeated at paragraph 117 of the Determination) Mr S contends that I state that his analysis ensures short service would receive a proportionately better benefit than for long service and this should not be allowed. Mr S considers, firstly, this is only true for prospective service greater than 20 years; secondly, he can see nothing in the legislation which states benefit cannot accrue faster for some short service members compared to some long service members. There will be a range of accruals among members for either method of calculation.

122. These observations do not reflect what I have concluded in what is now paragraph 117 of the Determination. I agreed with Mr S' previous arguments that section 131 of the 1993 Act confirms that the Preservation Requirements do not preclude a scheme from providing "ampler benefits". However, it does not in this case, require Mr S to be provided with better benefits than those which are hard coded into the rules and form part of the benefit design.

123. Mr S has also raised a supplementary issue in response to my Preliminary Decision, saying that he "would be grateful if I could consider different NRA tranches within my benefit". By itself this is a complicated issue that goes to whether it is possible to have more than one normal pension age for preservation purposes. That is an unresolved area of the law and, as it is a new issue being raised at this stage, is one that the respondent has not had an opportunity to consider either during their own internal dispute resolution process or as a part of submissions made to me. The nature of proceedings before the Ombudsman is by its very nature less formal than the Courts and, while I am generally limited to the investigation of the complaint actually made to TPO, the courts recognise that I can invite the applicant to add to his complaint. However, I am not bound to do so.[19] In this case, taking into account the fact that the respondent has not had an opportunity to comment on these issues, together with the stage that the complaint has reached (after an already lengthy journey), I do not agree to extending the scope of the complaint any further by investigating Mr S' supplementary issue.

[19] *Hamar v French* [1998] PLR 321 (CA) at paragraph [73]

124. Accordingly, I do not uphold Mr S' complaint.

Dominic Harris

Pensions Ombudsman
17 October 2024

Appendix 1

Extracts from the Definitive Trust Deed and Rules of the Svenska UK Retirement and Death Benefits Scheme dated 17 November 1988

The Scheme Rules define the term Formula Pension, used in Section D and C1(C), as follows:

> ""Formula Pension" means, in relation to a Member, a pension equal to the aggregate of
>
> (i) 1/40 of such part of his Final Salary as does not exceed the Average Upper Earnings Limit; and
>
> (ii) 1/30 of the amount by which his Final Salary exceeds the Average Upper Earnings Limit,
>
> multiplied by the period (expressed as a number of years and any fraction of a year) of his Pensionable Service, subject to a maximum of 20 years; and for the purposes of this definition a fraction of a year shall be calculated by reference to whole months of Pensionable Service completed by the Member."

A further extract from the Scheme Rules is provided below:

> "Section C – Leaving Employment Benefits
>
> C1. Leaving Pensionable Service
>
> […]
>
> C1(C) Deferred Pension
>
> (i) If the Member has completed 5 years', or (where his Pensionable Service ends on or after 6th April, 1988) 2 years', Qualifying Service, or (where his Pensionable Service ends on or after 27th July, 1987) a transfer payment in respect of his rights under a Personal Pension Scheme has been made to the Scheme, he shall be entitled to an annual pension starting on the first day of the month following his Normal Retirement Date of an amount equal to the Relevant Proportion of the Formula Pension to which he would have been entitled if he had continued in Pensionable Service until his Normal Retirement Date.
>
> (ii) Notwithstanding anything to the contrary in the Rules, the benefits payable under this Rule C1(C) are payable in lieu of all other benefits under the Scheme other than any arising under –
>
> (a) Rule B2(B) (Member's voluntary contributions), and
>
> (b) Rule B3 (Transfers-in).

(iii) For the purpose of Rule C1(C)(i), the “Relevant Proportion” in relation to a Member is the proportion which his Pensionable Service bears to what his Pensionable Service would have been had he remained in Pensionable Service until his Normal Retirement Date.

[…]

Section D – Retirement Provisions

D1. Member’s Normal Retirement

D1 Retirement at Normal Retirement Date

Subject to Rule D3 (Late Retirement), a Member who is in Pensionable Service on the day before his Normal Retirement Date

(i) shall cease to be a Member on his Normal Retirement Date, and

(ii) shall be entitled to a pension starting on the first day of the month following his Normal Retirement Date equal to his Formula Pension.

[…]

Part IV – Inland Revenue Restrictions

1. Application and Interpretation

Notwithstanding anything to the contrary in the Scheme provisions, the benefits payable to a Member or his widow, Dependants or other Beneficiaries in respect of him shall not when aggregated with all benefits of a like nature provided under all other schemes providing Relevant Benefits in respect of employment with an Employer, exceed the limits set out below.

[…]

2. Aggregate Retirement Benefit

The Member’s Aggregate Retirement Benefit shall not exceed:

(a) on retirement at or before Normal Retirement Date, a pension of 1/60th of Final Remuneration for each year of employment with the Employers (not exceeding 40 years) or such a greater amount as will not prejudice Revenue Approval;

(b) on retirement after Normal Retirement Date, a pension of the greatest of:

(i) the amount calculated in accordance with paragraph 2(a) above on the basis that the actual date of retirement was the Member’s Normal Retirement Date;

(ii) the amount which could have been provided at Normal Retirement Date in accordance with paragraph 2(a) above increased either actuarially in respect of the period of deferment or in proportion to any increase in the Index during that period, and

(iii) where the Member's total employment with the Employers has exceeded 40 years, the aggregate of 1/60th of Final Remuneration for each year of employment before Normal Retirement Date or, in the case of a 20% director, his 70th birthday (not exceeding 40 such years) and of a further 1/60th of Final Remuneration for each year of employment after Normal Retirement Date, with an overall maximum of 45 reckonable years.

Final Remuneration being computed in respect of (i) and (iii) above as at the actual date of retirement, but subject always to paragraph 7 below.

(c) on leaving Pensionable Service before Normal Retirement Date, a pension of 1/60th of Final Remuneration for each year of completed service (not exceeding 40 years) or of such greater amount as will not prejudice Revenue Approval. The amount computed as aforesaid may be increased by 5% for each complete year between the date of termination of Pensionable Service and the date on which the pension begins to be payable."

Appendix 2

Extract from the Joint Office of Inland Revenue Superannuation Funds Office and Occupational Pension Board Memorandum 99 issued in March 1989

"Part II – The Proposals Affecting Occupational Schemes And AVC Schemes

[…]

b. There will be a statutory maximum (initially £60,000 per annum but it will be indexed) on earnings pensionable through an approved scheme. This will replace the existing permitted maximum of £100,000 on earnings for calculating lump sum retirement benefits.

[…]

Restriction on Pensionable Earnings

9. It is proposed that in calculating the maximum approvable benefits which can be provided by an approved scheme on retirement, leaving service or death, earnings in excess of £60,000 (indexed for inflation) will be ignored. This will apply to the aggregate of benefits from all approved schemes in respect of all service with the employer or any associated employer. Concurrent service will not be double counted. Thus it will not be possible to obtain benefits based on earnings of, for example £60,000 from each of a series of associated employers. The association of employers for this purpose is expected to be on the lines of control (direct or indirect) of one by another, or of both by a third person. Scheme benefits arising from transfer payments received from outside the association will not count against this maximum, but will continue to be treated as retained benefits if accelerated accrual is given (PN 14.12). When an employee has separate employments with employers who are not associated the £60,000 limit will apply separately to the earnings from each.

[…]

11. Sections 590(3)(a) and (d), 592(8) and 594(2) [Income and Corporation Taxes Act 1988] will be amended accordingly. The contribution restriction will apply for 1989/90 et seq. For benefits the intention is that these restrictions will apply to the approval of all schemes set up on or after 14 March 1989. For schemes set up before that date they will apply only to members joining on or after 1 June 1989.

[…]

Early Retirement or Leaving Service Benefits

23. Subject to preservation requirements the maximum approvable immediate or deferred benefits on early retirement or leaving service are based on the

proportion of service to normal retirement age actually completed (ie N/NS x P as described in PN 10.3) if this is better than 1/60th of remuneration for each year of actual service (N/60th).

24. It is now proposed that the alternative to N/60th will be 1/30th of remuneration for each year of service with an employer (N/30th) up to a maximum of 20/30ths, subject to not exceeding 2/3rds of remuneration when aggregated with retained benefits (PN 6.26). This limit applies to immediate or deferred pensions on retirement at any age between 50 and 70, and to deferred benefits on leaving service at any time. It is not available for calculating the “leaving service” benefits of members leaving an employer’s scheme before retirement but remaining in service, for whom N/60 or N/NS x P will continue to apply. It will still be necessary to link funding to a normal retirement age in the range 60 (55 for women) to 70 prescribed by Section 590(3)(a) [Income and Corporation Taxes Act 1988], and any enhancement of early benefits will be by augmentation.

25. As a corollary to the new freedom to provide early retirement benefits of 1/30th for each year of service it will no longer be appropriate to allow more than N/30 (maximum 20/30) for total service including service after the scheme [normal retirement date]. Therefore, except to the extent necessary to comply with DSS legislation, the present “late retirement” rules will be discontinued. Increases for “late retirement” will be limited to 1/30ths (in order to bring benefits up to two-thirds of final salary) or by references to final salary at actual retirement where that is higher than at [normal retirement date].

26. This new alternative, including the change to late retirement, will be available as part of the discretionary practice under Section 591 [Income and Corporation Taxes Act 1988]. There is no compulsion to adopt it instead of the existing limits. But it may be included in the rules of schemes set up on or after 14 March 1989 in place of the existing limits. Other schemes wishing to change their rules to incorporate this relaxation may do so provided that at the same time the rules are made to apply the £60,000 earnings limit and the new maximum for accelerated accrual of lump sum benefits to the members concerned if these restrictions are not already applied by the statutory scheme overrides.”

Appendix 3

Extract from Section 591 of the Income and Corporation Taxes Act 1988

"**591 Discretionary approval.**

(1) The Board may, if they think fit having regard to the facts of a particular case, and subject to such conditions, if any, as they think proper to attach to the approval, approve a retirement benefits scheme for the purposes of this Chapter notwithstanding that it does not satisfy one or more of the prescribed conditions; but this subsection has effect subject to subsection (5) below.

(2) The Board may in particular approve by virtue of this section a scheme—

(a) which exceeds the limits imposed by the prescribed conditions as respects benefits for less than 40 years; or

(b) which provides pensions for the widows and widowers and surviving civil partners of employees on death in service, or for the children or dependants of employees; or

(ba) which provides pensions for the widows and widowers and surviving civil partners of ex-spouses or former civil partners dying before the age at which their pensions become payable and for the children or dependants of ex-spouses or former civil partners; or

(c) which provides on death in service a lump sum of up to four times the employee's final remuneration (exclusive of any refunds of contributions); or

(d) which allows benefits to be payable on retirement within ten years of the specified age, or on earlier incapacity; or

(e) which provides for the return in certain contingencies of employees' contributions; or

(f) which relates to a trade or undertaking carried on only partly in the United Kingdom and by a person not resident in the United Kingdom; or

(g) which provides in certain contingencies for securing relevant benefits falling within subsection (2A) below (but no other benefits) by means of an annuity contract made with an insurance company of the employee's choice; or

(h) to which the employer is not a contributor and which provides benefits additional to those provided by a scheme to which he is a contributor.

(2A) Relevant benefits fall within this subsection if they correspond with benefits that could be provided by an approved scheme, and for this purpose—

(a) a hypothetical scheme (rather than any particular scheme) is to be taken, and

(b) benefits provided by a scheme directly (rather than by means of an annuity contract) are to be taken.

(3) In subsection (2)(g) above "insurance company" has the meaning given by section 659B.

(4) In applying this section to a scheme which was in existence on 6th April 1980, the Board shall exercise their discretion, in such cases as appear to them to be appropriate, so as to preserve—

(a) benefits earned or rights arising out of service before 6th April 1980; and

(b) any rights to death-in-service benefits conferred by rules of the scheme in force on 26th February 1970.

(5) The Board shall not approve a scheme by virtue of this section if to do so would be inconsistent with regulations made by the Board for the purposes of this section.

(6) Regulations made by the Board for the purposes of this section may restrict the Board's discretion to approve a scheme by reference to the benefits provided by the scheme, the investments held for the purposes of the scheme, the manner in which the scheme is administered or any other circumstances whatever."

Appendix 4

Extract from the preservation requirements of the Pension Schemes Act 1993

"71 **Basic principle as to short service benefit.**

(1) A scheme must make such provision that where a member's pensionable service is terminated before normal pension age and—

(a) he has at least 2 years' qualifying service, or

(b) a transfer payment in respect of his rights under a personal pension scheme has been made to the scheme,

he is entitled to benefit consisting of or comprising benefit of any description which would have been payable under the scheme as long service benefit, whether for himself or others, and calculated in accordance with this Chapter.

(2) The benefit to which a member is entitled under subsection (1) is referred to in this Act as "short service benefit".

(3) Subject to subsection (4), short service benefit must be made payable as from normal pension age or, if in the member's case that age is earlier than 60, then from the age of 60 […]

72 **No discrimination between short service and long service beneficiaries.**

(1) A scheme must not contain any rule which results, or can result, in a member being treated less favourably for any purpose relating to short service benefit than he is, or is entitled to be, treated for the corresponding purpose relating to long service benefit. […]

74 **Computation of short service benefit.**

(1) Subject to the provisions of this section, a scheme must provide for short service benefit to be computed on the same basis as long service benefit.

(2) For that purpose, no account is to be taken of any rule making it (directly or indirectly) a condition of entitlement to benefit that pensionable service shall have been of any minimum duration.

(3) Subsection (1) does not apply to so much of any benefit as accrues at a higher rate, or otherwise more favourably, in the case—

(a) of members with a period of pensionable service of some specified minimum length, or

(b) of members remaining in pensionable service up to some specified minimum age.

(4) Subsection (1) does not apply to so much of any benefit as is of an amount or at a rate unrelated to length of pensionable service or to the number or amount of contributions paid by or for the member.

(5) Regulations may provide that subsection (1) shall not apply to any category of schemes or members, or description of benefit.

(6) So far as any short service benefit is not required to be computed in accordance with subsection (1), it must be computed on the basis of uniform accrual, so that at the time when pensionable service is terminated, it bears the same proportion to long service benefit as the period of that service bears to the period from the beginning of that service to the time when the member would attain normal pension age or such lower age as may be prescribed.

(7) Where long service benefit is related to a member's earnings at, or in a specified period before, the time when he attains normal pension age, short service benefit must be related, in a corresponding manner, to his earnings at, or in the same period before, the time when his pensionable service is terminated.

(8) A scheme must comply with any regulations relating to the basis of computation of short service benefit, including regulations providing for the avoidance of fractional amounts and otherwise to facilitate computation."

Appendix 5

Extract from Section 131 of the Pension Schemes Act 1993

"**131 Relationship of preservation requirements and scheme rules.**

It is hereby declared that nothing in Chapter I of Part IV—

(a) applies with direct effect to any scheme, or to the rights or liabilities of any person in, under or by virtue of a scheme; or

(b) precludes a scheme from being so framed as to provide benefits on any ampler scale, or (subject to any express provision made in that Chapter) payable at any earlier time or otherwise more favourable to beneficiaries, than is called for by the preservation requirements."

Extract from section 132 of the Pension Schemes Act 1993

"**132 Duty to bring schemes into conformity with indirectly-applying requirements.**

Where the rules of an occupational pension scheme to which the preservation requirements apply do not comply with those requirements it shall be the responsibility of—

(a) the trustees and managers of the scheme; or

(b) in the case of a public service pension scheme, the Minister, government department or other person or body concerned with its administration,

to take such steps as are open to them for bringing the rules of the scheme into conformity with those requirements."