CAS-50353-Y4X5

Ombudsman's Determination

Applicant	Mr H
Scheme	Olivetti UK Limited Pension and Life Assurance Scheme (**the New Scheme**)
Respondents	Capital Cranfield Trustees (**the Trustee**)
	Olivetti UK Limited (**the Employer**)

Complaint Summary

Mr H complains that increases to his Pre-6 April 1997 pension under the New Scheme are not what he was told he would receive following the transfer of his benefits from an occupational pension scheme then known as the Olsy Pension Scheme (**the Previous Scheme**) with effect from 1 January 1998.

Summary of the Ombudsman's Determination and reasons

The complaint/dispute is upheld against The Trustee and the Employer.

There has been maladministration and breach of law by the Employer in:

a) failing to procure that Mr H was entitled to mirror benefits in the New Scheme to those he was entitled to in the Previous Scheme, with effect on and from the date he joined the New Scheme, in accordance with the contractual commitment given to Mr H at the time he agreed to transfer his Previous Scheme benefits to the New Scheme; and

b) failing to document the contractual commitments given to Mr H for a period of almost 18 years and, on discovering the failure, seeking to avoid those commitments in breach of contract.

There has also been breach of trust (but no maladministration as the Trustee took and followed legal advice) by the Trustee in:

a) failing to grant the benefits promised in return for the transfer payment made in respect of Mr H under the transfer-in rule in relation to the period on or after 22 May 2017; and

b) failing to administer the New Scheme in accordance with the New Scheme rules in relation to the period after 22 May 2017 in respect of the transferred in benefits.

Detailed Determination

Material facts

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

2. Mr H joined the Previous Scheme on 1 September 1981 when he was employed by a company which was then known as British Olivetti Limited (**the Previous Employer**). The Previous Employer employed Mr H until 31 December 1995.

3. The Previous Employer established the Previous Scheme, originally known as the British Olivetti Limited Retirement Benefit Plans (1978), on 6 April 1978 by an Interim Trust Deed dated 21 March 1978. The Previous Employer was the principal employer of the Previous Scheme.

4. On 1 May 1989, Mr H became entitled to 'special terms' benefits (**Special Terms**), provided to executive members of the Previous Scheme. Executive member benefits were more generous than the standard benefits offered to Previous Scheme members. In particular, Mr H was promised a pension of 2/3rds of his final pensionable salary at the age of 60 if he completed 25 years' pensionable service. The members entitled to Special Terms were referred to as Special Members (**Special Members**) in the explanatory literature issued to them.

5. There were two other categories of member of the Previous Scheme: one entitled to accrue benefits at the rate of 1/80th of final pensionable salary; and one entitled to accrue benefits at 1/60th of final pensionable salary, who are referred to in later announcements as Category A and B members respectively.

6. The Previous Scheme has been known by various names over its history, but for most of the time the events which are the subject matter of this complaint occurred, it was known as the Olsy Pension Scheme.

7. The Previous Scheme was governed, at the time of those events, by a set of rules (**the 1992 Rules**) annexed to a Trust Deed dated 16 December 1992.

8. The pension increase provisions are to be found at Rule 8.2 of the 1992 Rules, and read:

> "On each 1 April that part of the Member's pension under rule 3 which exceeds the Member's Guaranteed Minimum Pension shall increase at such percentage rate per annum compound as may be fixed from time to time by the Trustees at the direction of the Principal Employer and advised in writing to Members. The whole of any pension payable to the Member before State Pensionable Age shall increase at such percentage rate per annum compound as may be fixed from time to time by

> the Trustees at the direction of the Principal Employer and advised in writing to Members up to 1 April falling immediately before the day on which the Member reaches State Pensionable Age. …"

9. The meaning of Rule 8.2 is in dispute between the parties, and its interpretation is discussed later in this Determination. However, for the purposes of this early discussion, it is sufficient to note that the whole pension (and the excess over GMP in payment after State pension age) is increased at a rate fixed "at the direction" of the Principal Employer from time to time, rather than by reference to a specific percentage rate entrenched in the rules.

10. The Special Terms applicable to Special Members, such as Mr H, can be found in Rule 34, which overrode any other inconsistent rules of the Previous Scheme. However, the Special Terms did not contain anything specifically referring to the increases to be granted to pensions in payment.

11. There is evidence that Mr H received a copy of the Previous Scheme booklet enclosed with an 'Internal Memo' to the 'Pension Scheme Member' from Julie Davies, Pension Manager Putney, dated 6 March 1990 (**the 1990 Booklet**).

12. Mr H also appears to have received an updated copy of the 1990 Booklet on 3 October 1994 with a memo from JP Edward, Director of Human Resources, which said:

> "Re Olivetti Pension Scheme Special Members' Benefits
>
> The enclosed new booklet on the Pension Scheme is being circulated to all members by Julie Davies. Non-members will also receive a pack, with an invitation to join the Scheme.
>
> Your benefits as a member of the Executive scheme are described in the Special Members' Supplement which has a limited "members only" circulation and your personal copy is also enclosed."

13. The 1990 Booklet included a section at page 12 on increases to pensions in payment which stated, among other things, that the part of the pension in excess of GMP is "Increased by the Scheme at the rate of 5% per annum compound or in line with Retail Prices Index (RPI) if less".

14. The 1990 Booklet also stated that the Trustee may, with the Employer's consent, make additional periodic discretionary increases.

15. The increases provided by the Previous Scheme, on all pensions, were to take effect on each 1 April. A proportionate increase would be paid for the part of the year which followed the commencement of a member's pension.

16. However, as is commonly the case, the 1990 Booklet stated in the introduction that:

> "The booklet describes the benefits you will receive …[and] does not override the legal documents – the Trust Deed and Rules – which govern the Scheme…"

17. The summary of Special Terms applicable to Special Members, which were contained in a Special Member Supplement (**the Supplement**), included among other things the following information:

> "PENSION AGE
>
> This is your 60th birthday
>
> PERSONAL PENSION
>
> At Pension Age with twenty-five or more years' service completed, a pension equal to 2/3rds of Final Remuneration will be payable.
>
> Final Remuneration will be the greater of:
>
> Basic salary received in the last 12 months plus the yearly average of remuneration from the Company in excess of basic salary received over the last 36 months,
>
> Yearly average of gross remuneration received from the Company over any 36-month period out of the last 10 years.
>
> …
>
> Special terms apply where less than twenty-five years' service can be completed and will be notified to you if applicable.
>
> CASH AT RETIREMENT
>
> Within certain limits, part of the personal pension can be exchanged for a cash sum at retirement.
>
> ESCALATION
>
> After retirement, the pension in payment will be increased at the rate of 5% per annum compound or the change in Retail Prices Index, if lower. After State Pension Age (65, for men, 60 for women) escalation will only apply to that part of the pension in excess of the Guaranteed Minimum Pension (GMP) The State Pension Scheme will provide for increases to the GMP by reference to any rise in prices.
>
> …
>
> Further details of the benefits above will be found in the main Pension Scheme booklet which you should refer to as necessary."

18. A statement at the end of the Supplement indicated that the Supplement was intended to be read together with the 1990 Booklet which contained details of the increases to be provided, but also said the 1990 Booklet had to be read subject to the rules.

19. The summary of the Special Terms applicable to Special Members is mostly consistent with the Special Member rule under Rule 34 of the 1992 Rules. Rule 34 overrode any provision elsewhere in the 1992 Rules which was inconsistent with it and applied only to Special Members.

20. Under Rule 34, Special Members:

    a) had a Normal Retirement Date (**NRD**) at age 60;

    b) paid an employee contribution rate of 6%;

    c) were promised a 2/3rds pension at age 60 after 25 years' service;

    d) were entitled to a pension calculated by reference to Final Remuneration and not Final Pensionable Salary as for other members; and

    e) had especially generous actuarial reduction factors at the rate of 2% per annum for each complete year before NRD (or such other rate as may be decided by the Principal Employer from time to time on the advice of the Actuary) to take account of early payment.

21. However, Rule 34 did not, unlike the Supplement, provide that pensions in payment in excess of GMP would receive a guaranteed increase at the rate of 5%, or RPI if less – and so Rule 34 did not override the main increase provision under the rules in respect of this issue.

22. On 1 January 1996, Mr H's employment was transferred to the Employer (which was then known as Olivetti Lexikon UK Limited) as part of an internal re-organisation of Olivetti to incorporate the commercial activities of Triumph Adler UK Limited and the supplies and office products of Olivetti UK.

23. As a temporary arrangement the Employer was admitted to participation in the Previous Scheme to enable Mr H (and other members of the Previous Scheme) to continue to participate in the Previous Scheme while replacement pension arrangements were finalised.

24. The Employer was the sponsoring employer of the New Scheme, which was then known as the Olivetti Lexikon Pension and Life Assurance Scheme but later changed its name to the Olivetti UK Limited Pension and Life Assurance Scheme.

25. Mr H was told by letter from the Previous Employer, on 24 June 1996, that a decision had been made to transfer his benefits from the Previous Scheme to the New Scheme operated by the Employer. To enable time for the necessary arrangements, calculating the transfer value and obtaining his signed authority, his period of membership of the Previous Scheme had been extended.

26. In March 1997, there was a meeting of the Employer with its benefit consultants, SBJ Benefit Consultants (**SBJ**). SBJ was instructed, on behalf of the Employer, to formulate proposals for the amalgamation and future management of the company benefit plans. SBJ also appears to have been the actuarial and benefit consultants to

the then trustees of the New Scheme. Dual appointments of this type were common at the time and, after 1 January 1998, there is evidence that SBJ also acted as administrators of the New Scheme on behalf of the then trustees of the New Scheme

27. The scope of SBJ's engagement demonstrates that it was engaged to carry out various tasks for the Employer as well as tasks which related to the administration of the New Scheme, carried out on behalf of the then trustees of the New Scheme.

28. SBJ prepared a report (**the Report**), dated May 1997, for the Employer which compared the benefits provided under the Previous Scheme and the New Scheme. The report made recommendations for changes to be made to the New Scheme with effect from 1 January 1998, being the date that it was proposed that the active members would be transferred to the New Scheme. These changes affected both the transferring scheme members from the Previous Scheme, as well as the existing members of the New Scheme.

29. The Report noted, among other things, that it was estimated that the transfer value on the 'Godwins' Basis' (Godwins being a firm of actuaries, presumably acting on behalf of the Previous Scheme trustees) was around £1.2 million. The Report stated that the transfer value:

> "…will not cause an initial strain on the funding of the benefits but does not fully provide for salary increases or a share of surplus indicated by the reduction in the contribution rate".

30. SBJ's recommended actions in the Report included an update to the definitive deed and rules, seemingly recognising that the proposed rule changes would need to be documented in due course.

31. In the comparison of benefits prepared by SBJ, it noted the following difference in increases to pensions in payment, evidencing the fact that at the point of transfer Limited Price Indexation (**LPI**) increases were being provided under the Previous Scheme. The SBJ report was drafted on the assumption that the New Scheme (then known as the Triumph Adler scheme) had guaranteed 3% increases up to April 1997. As discussed below, it was later established that the guaranteed 3% increases in the New Scheme had been announced to members but had never been documented by way of formal rule amendment.

	Triumph Adler [*New Scheme*]	Olivetti [*Previous Scheme*]
Pension Increase	3% (LPI post April 1997)	LPI (RPI with a ceiling of 5%)

32. SBJ later produced a series of announcements to be sent to:

a) Previous Scheme standard members on 1/80th accrual – Category A members;

b) Previous Scheme standard members on 1/60th accrual – Category B members;

c) Previous Scheme Special Member (Mr H was the only Special Member);

d) New Scheme existing members – Category A; and

e) New Scheme existing members – Category B.

33. The first three announcements (**the November 1997 Announcements**) set out the new benefit structure which would apply to Previous Scheme members from 1 January 1998 if they joined the New Scheme, and also the benefits which would be provided if they agreed to transfer to the New Scheme from the Previous Scheme. The fourth and fifth announcements (**the October 1997 Announcements**) set out the revised benefits which would apply to existing New Scheme members from 1 January 1998 if they consented to the new benefit structure. In other words, existing members of the New Scheme were told that a common benefit structure and employee contribution rate, which was different in certain respects from the old benefit structures in the New Scheme, would apply to all active members in respect of future benefit accrual from 1 January 1998 if they agreed to the changes in the benefit structure.

34. On the balance of probabilities I am satisfied, and also find as a question of fact, that the then trustees had knowledge of, and sight of, all the benefit literature given that SBJ was jointly engaged by the Trustee and the Employer, and that the announcements were prepared as a pack. It is inconceivable, in my experience, that a properly advised trustee would have agreed to a transfer without clarifying the benefits to be provided in respect of a transfer payment. Failure to do so would not be consistent with the fiduciary duties owed by the trustees from time to time of the Scheme to the transferring members or their obligations under the transfer-in rule.

35. The November 97 Announcements to Category A and B members of the Previous Scheme were sent by Mr Glynn Bissell (head of HR at the Employer) and said among other things:

> "With effect from 1 December 1997 the Company is pleased to offer you membership of the Olivetti Lexikon Pension and Life Assurance Scheme in place of your current membership of the Olivetti Pension Scheme
>
> You will note from the attached Announcement that the Olivetti Lexikon Scheme will offer similar benefits to those enjoyed under the Olivetti Pension Scheme. To join the Scheme please complete and return the attached Application Form by 21 November 1997
>
> …
>
> What increases are applied to pensions in payment?

Your pension earned from 1 December will be increased in line with inflation subject to a maximum of 5% pa. The pension earned up to 30 November 1997 will receive increases in the same way as the existing pension scheme.

…

All benefits are payable in accordance with the Rules and are subject to Inland Revenue limits.

The Company expects to maintain the Scheme indefinitely but reserves the right to amend or terminate the Scheme at any time."

36. Mr H, as the sole Special Member, received an individual memorandum, dated 28 November 1997 (**the November 97 Memorandum**), from Mr Bissell which stated, among other things:

"1. With effect from 1 January 1998, the Company is pleased to offer you membership of [the New Scheme] in the place of your current membership of [the Previous Scheme].

2. You will note from the attached announcement that [the New Scheme] will offer similar benefits to those enjoyed under [the Previous Scheme]. The Announcement should be read in conjunction with [the Previous Scheme] Special Membership Supplement. In other words your membership terms will mirror those under [the Previous Scheme].

3. However, in accordance with legislation, on retirement prior to age 60 the part of your benefits accrued after 1 January 1998 that is deemed to be Protected Rights cannot be paid until age 60.

4. To join [the New Scheme] please complete and return the attached Application Form by 21 December 1997.

5. The basis of contracting out of SERPS under [the New Scheme] differs to that under [the Previous Scheme]. If you decide to join the attached Notices are relevant."

37. Mr H does appear (and I find as a question of fact) to have been sent a copy of an updated version of one of the November 1997 Announcements (most likely the one relating to Category A Members) relating to the New Scheme which was sent to other transferring members as well as the documentation relating to his own benefits. The updated November 1997 Announcement sent to Mr H was drafted on the assumption that the transfer was now occurring on 31 December 1997 and provided as follows:

"**What increases are applied to pensions in payment?**

Your pension earned from 1 January 1998 will be increased in line with inflation subject to a maximum of 5% per annum. The pension earned up to 31 December 1997 will receive annual increases in the same way as under the existing pension scheme.

Your spouse's post-retirement pension will increase similarly."

38. The October 1997 Announcements issued to the existing members of the New Scheme also included a detailed table comparing the old and the new benefit structure in the New Scheme showing the changes which would affect the existing members of the New Scheme which included the following statement:-

    a) Pension Increases up to 31 December 1997 - 3% pa on total pension earned up to 5 April 1997 and inflationary increases up to a maximum of 5% pa on pension earned thereafter.

    b) Pension Increases from 1 January 1998 - Inflationary increases up to a maximum of 5% pa on pension earned after 1 January 1998.

39. In other words, the draftsperson of the October 1997 Announcements assumed that existing members of the New Scheme were guaranteed increases of 3% pa in respect of the total pension earned up to 5 April 1997, and only LPI (i.e. variable statutory increases) in respect of pension accrual after that date. The November 1997 Announcements however confirmed that for former Previous Scheme members their pensions accrued up to 31 December 97 would continue to increase in the same way as under the Previous Scheme.

40. The October 1997 and November 1997 Announcements included application forms, by which members of the respective schemes could apply (i) (in the case of the existing New Scheme members) for continued membership of the New Scheme and (ii) the current Previous Scheme members who were employed by the Employer could elect to join the New Scheme and they authorised the deduction of contributions from pensionable salaries. Completed examples of each form have been located.

41. Mr H was told specifically in the covering November 1997 Memorandum that the applicable November 1997 Announcement, issued to Previous Scheme members about the benefit to be provided to them in the New Scheme, had to be read in conjunction with his existing Special Membership Supplement and that he would receive "mirror" benefits to those which he was entitled to under the Previous Scheme as a Special Member.

42. Mr H signed the Application Form electing for membership of the New Scheme (**the Application**) and the deduction of contributions from his Pensionable Salary. He also elected to transfer his past service benefits in the Previous Scheme to the New Scheme.

43. Before signing the Application and transferring his benefits to the New Scheme, Mr H met with SBJ. A letter to Mr H, dated 22 December 1997, from SBJ said:

    "Further to our meeting on 17 December 1997, I have now reviewed our records and would confirm that on transferring your membership to [the New Scheme] your

accrued and future Pensionable Service benefits would mirror those that would have been available under [the Previous Scheme]."

44. There is therefore near contemporaneous evidence that it was agreed that the Employer had promised Mr H mirror benefits in the New Scheme to the benefits which he was entitled to in the Previous Scheme and also agreed to transfer his past service benefits on the basis that the transferred in benefits would mirror the benefits Mr H was entitled to under the Previous Scheme.

45. The New Scheme was established by a Declaration of Trust dated 1 September 1983 (**the 1983 Deed**). The New Scheme was at the time of the transfer from the Previous Scheme, and is still, governed by the 1983 Deed and by rules adopted by a resolution dated 17 March 1986 (**the 1986 Rules**) as amended.

46. Under the 1986 Rules a pension is payable of 1/60th of Final Pensionable Salary for each year of Pensionable Service payable from NRD, which was 65 for men and 60 for women. Final Pensionable Salary was the highest Pensionable Salary in any Scheme Year out of the three Scheme Years completed on or immediately before the relevant date. for calculation of the benefits

47. Under the amendment power in the 1986 Rules the Employer had the power to unilaterally amend the rules by resolution without the consent of the Trustee, subject only to section 67 of the Pensions Act 1995 (**the 1995 Act**). The amendment power provided:

> "The Principal Employer may (subject to the terms of the [1983] Deed[1] and subject to the consent of the Occupational Pensions Board where required by the Pensions Act at any time by resolution amend any of the provisions of the Rules."

48. There is a general augmentation power in the 1986 Rules at Rule 12(1)(ii) which provides that:

> "Subject to the provisions of Rule 13 hereto and provided that the approval of the Scheme under the Act is not otherwise prejudiced the Employer may at its discretion upon payment of any additional contributions which may be required under Rule 4
>
> (1) Augment any benefits to which a Member is entitled or prospectively entitled as the case may be under Rules 5, 6, 7, 15 or (subject to Rule 10) 9 provided that if a Member has taken a lump sum at Normal Retiring Date under Rule 7 then any subsequent augmentation shall be limited to pension benefits only; and
>
> (2) Augment a pension payable under the Scheme which is already in course of payment."

[1] There is no provision in the 1983 Deed which imposes any other requirements for amendments to the governing provisions of the Scheme - cl 2(d) of the 1983 Deed provides that the Employer may at any time amend any provisions of the Deed and clause 1 contains the usual undertaking by the Employer to adopt rules governing the Scheme within the prescribed time limit.

49. The 1986 Rules did not provide for the revaluation of pensions in deferment or increases to pensions in payment.

50. By an announcement dated May 1988 (**the May 1988 Announcement**) the existing members of the New Scheme were, however, notified of changes made to their benefits by reason of the Social Security Act 1986 with effect from 6 April 1988, the relevant terms of which were as follows:

> "When a pension starts to be paid under the scheme, the current position is that the state provides annual increases in order to maintain the value of the Guaranteed Minimum Pension in relation to the level of prices. These increases are calculated annually and paid with the state pension.
>
> With effect from the 6th April 1988 the state will no longer be responsible for the first 3% per annum of any such increases in respect of the amounts of Guaranteed Minimum Pensions accrued under the scheme after 6th April 1988. These increases must now be provided by the scheme and the state will only be responsible for paying the balance (if any) of any increases above 3% per annum.
>
> With effect from the 6th April 1988 our scheme will provide for pensions to increase in excess of the minimum requirements and will provide for the whole of a Member's personal pension and any pension payable to a Dependant to increase at the end of the year of payment by 3% compound."

51. Later, by an announcement dated February 1997 (**the February 1997 Announcement**) issued by the Trustee, existing members of the New Scheme were also notified of the relevant changes to the New Scheme from 6 April 1997 effected by the 1995 Act, including the following:

> "INCREASING PENSIONS
>
> To comply with the requirements of the Act the method used to calculate increases to pensions in payment is to be changed.
>
> Pensions will continue to increase at the end of each year of payment at the rate of 3% compound. However, in respect of that part of your pension and any pension payable to your Dependant which you earn after 5th April 1997 each increase will be subject to a minimum amount calculated in accordance with orders issued by the Government relating to the increase in prices and a maximum amount of 5%."

52. These changes to the rate at which pension in payment would increase (in particular the guaranteed 3% increases for pre 6 April 1997 benefit accrual for existing members of the New Scheme) were however never documented by way of a rule amendment – although the requirement under section 51 of the 1995 Act to provide LPI increases in respect of the period on or after 6 April 1997 and any required increases to pre 88 GMPs would have overridden the rules. Therefore, the New Scheme Rules did not provide for increases to pensions in payment or deferment for

Scheme members (over and above those required by statute) and still do not provide for such increases (other than those required by statute), although there is a general power given to the Employer as sponsoring employer to unilaterally amend the rules without Trustee agreement and the power to augment benefits subject to the payment of such additional contributions as may be required under Rule 4.

53. In respect of members of the Previous Scheme, who transferred into the New Scheme, it is also necessary to have regard to the New Scheme's Transfer-in power. The Transfer-in power in the 1986 Rules provided as follows:

> "**16 Transfers to and from other Schemes**
>
> (1) If a Member joins another retirement benefits scheme approved by the Board of Inland Revenue under the Act or under Section 222(1) Income and Corporation Taxes Act 1970 or any fund wholly approved under section 208 of the latter act or any other fund, scheme or arrangement approved for the purposes of this Rule by the Board of Inland Revenue (hereinafter called "the Transferee Scheme") the Administrator with the consent of the said Member may transfer to the trustees or administrator of the Transferee Scheme out of the Scheme such sum as shall represent the amount of the Member's interest in the Scheme such sum as shall represent the amount of the Member's interest in the Scheme at the date of his transfer…" .
>
> (2) If an Eligible Employee becomes a Member and has ceased to continue to benefit under any fund, scheme or arrangement (hereinafter called "the Transferor Scheme") from which a transferred sum (as hereinafter defined) relating to his membership thereof has been received he shall [subject to the provisions of the Appendix hereto and in respect of a Contracted out Member subject to the proviso to sub-Rule 29(1) (iii)] be entitled to receive out of the Scheme such further benefit as the Administrator shall consider to be justified by the said transferred sum.
>
> Alternatively, the Member may be granted additional years of Pensionable Service under the Scheme…"

54. The benefit changes made with effect from 1 January 1998 and announced to existing members of the New Scheme and transferring members of the Previous Scheme, also do not appear to have been documented at the time of the transfer or in subsequent years, as had been contemplated in SBJ's report to the Employer. This was despite the fact that the comparison of the changes to apply from 1 January 1998 issued to existing members of the New Scheme referred to the fact that:

a) the rate of increase in the New Scheme would change from 1 January 1998 to "Inflationary Increases up to a maximum of 5% pa on pension earned after 1998";

b) various other changes would be made to the benefit structure of the New Scheme and the employee contribution rate increased from 5% to 6% with effect from 1 January 1998; and

c) other changes would be made to the benefit structure including changing the Pensionable Salary definition.

55. A sample application form for continued membership of the New Scheme issued to one of the existing New Scheme members, which has been provided to me, required the member to elect for continued membership of the New Scheme, authorise the deduction of employee contributions (increased from 5% to 6%) from the member's 'pensionable salary' and for the member to state that they understood that after 1 January 1998 benefits would be earned in the revised scheme. The consent form for the sample member then needed to be countersigned by the Employer confirming the 'pensionable salary'. There were a number of changes to the existing benefit structure in the New Scheme for existing members as detailed in a comparison of the old and new benefit structures.

56. Mr H resigned from employment with the Employer, with effect from 10 June 1998, in a letter dated 13 May 1998. Mr H was issued with a leaving service statement (**the leaving service statement**) by SBJ setting out his preserved benefits. The benefits, set out in the leaving service statement below, were consistent with Mr H having been admitted to membership of the New Scheme on terms mirroring his membership of the Previous Scheme. The leaving service statement, among other things, said:

> "Pension on retirement…
>
> Your deferred pension consists of the following elements
>
> GMP = £2079.48
>
> Excess pension = £21399.13
>
> The GMP will increase at 6.25% compound for each complete tax year from your date of withdrawal at Normal Retirement Date (NRD). The Excess Pension will increase in line with the Retail Prices Index to a maximum of 5% pa compound for each complete years from date of withdrawal to NRD.
>
> The Scheme incorporates a guarantee that the benefits payable in respect of Pensionable Service earned after 1 January 1998 (when you transferred across from the Olsy Pension Scheme) will not be less than the pension that is equivalent in value to your Benefit Underpin. This is currently valued at £332.01."

57. In other words, the leaving service statement reflected the fact that the Excess Pension would increase in line with RPI (capped at 5%). It is my understanding that these figures were calculated on the basis that Mr H had the same two thirds pension promise, other special terms he had under the Previous Scheme and were consistent with the commitments he had been given at the time of the transfer.

58. Various reports and accounts for the New Scheme from 1998 to 2017 also stated that:

> "Benefits in respect of former members of Olsy Pension Scheme were increased in line with Limited Price Indexation requirements"

59. Mr H opted to take his benefits in 2014. The retirement quotation given to him on 14 August 2014 stated:

> "Your pension up to age 65 will increase in line with the changes in Retail Prices Index (RPI) to a maximum of 5% pa. From age 65 the following increases will apply
>
> > From age 65, £3348.25 of your pension will relate to Pre 6/4/88 Guaranteed Minimum Pension and this portion of your pension will not increase in payment
> >
> > From age 65, £3231.32 of your pension will relate to Post 6/4/88 Guaranteed Minimum Pension and this portion of your pension will increase in payment in line with the cost of living subject to a maximum increase of 3% pa compound
>
> The remainder of your pension will continue to increase in line with changes in the Retail Prices Index (RPI) to a maximum of 5% pa."

60. It follows that Mr H should, if the New Scheme had continued to have been administered in accordance with those communications, have received increases to his pension in payment following his retirement on 6 April each year. In fact, what happened was that the then New Scheme administrators incorrectly calculated his post commutation pension at the point of retirement in October 2014 at £27,364.92. This figure was not correct (it was an underestimate), as the administrators had only taken into account 15 years instead of 16 years' revaluation. Mr H was then granted a first increase in April 2015 on the incorrect assumption that he had always been a New Scheme member (not a Previous Scheme member) and so it was thought that he was not entitled to RPI increases (capped at 5%) on his excess over GMP, but rather 3% fixed increases in accordance with the administrative practice applicable to other (non-transferred) New Scheme members.

61. As a result, the first increase granted in April 2015 was pro-rated for five months and Mr H received: (i) 3% fixed increases on pre 6 April 97 excess over GMP; (ii) CPI increases (minimum 3% and maximum 5%) on his later accrued benefits (from 6 April 1997 to 5 April 1998) in excess of GMP; and (iii) fixed 3% increases on the pre and post 88 GMP (although Mr H was under GMP age). The New Scheme records also showed Mr H as being a special category member which entitled him to higher benefits than other New Scheme members.

62. The approach taken in relation to Mr H can be contrasted with the approach taken for other transferred members from the Previous Scheme, who were given increases in accordance with the documentation issued at the point of transfer of their benefits from the Previous Scheme and were, until rectification of their benefits on advice of Counsel (see Appendix 2), granted increases at each April of: (i) RPI capped at 5%

on the pre 1 January 1998 excess over GMP; (ii) CPI maximum 5% on post 31 December 1997 to 5 April 2005 excess over GMP; and (iii) CPI maximum 5% on post 5 April 2005 excess over GMP and (iv) statutory increases on pre and post 88 GMP. There does not seem to be any particular reason why Mr H was treated differently from other transferred members. Rather, he just seems to have been misclassified as having always been a New Scheme member.

63. In or around 2015, the Trustee of the New Scheme took advice from Counsel on how it should be administering the scheme.

64. The instructions to Counsel noted, among other things:

a) that the New Scheme was governed by the 1983 Deed and 1986 Rules;

b) that the 1986 Rules did not provide for revaluation of pensions in deferment or for increases to pensions in payment;

c) the existence of the May 1988 Announcements and February 1997 Announcements;

d) the fact that, during 1996, the group of companies which included the Employer was restructured so that the members of the Previous Scheme were invited to take up active membership of the New Scheme with effect from 31 December 1997;

e) that with effect from 1 January 1998, it was intended that the benefit structure of the New Scheme be changed so as to create a single structure to cover transferring Previous Scheme members as well as existing New Scheme members; and

f) that the above changes were notified to members of the Previous Scheme and members of the New Scheme by the November 1997 Announcements and the October 97 Announcements).

65. In his opinion, dated 10 July 2015, Counsel opined on a number of issues including whether:

a) the benefits of male and female members of the New Scheme had been properly equalised to comply with European sex discrimination law (most men still had a normal retirement date of 65 and women 60);

b) the correct revaluation had been granted to pensions in deferment; and

c) the correct increases had been granted to pensions in payment, both in respect of the original New Scheme members and also those members who transferred from the Previous Scheme to the New Scheme with effect from 1 January 1998.

66. Counsel's view was that:

    a) the normal retirement date of male and female members had not been properly equalised;

    b) members of the New Scheme were not entitled to increases to pensions in payment which were announced to them by the May 1988 Announcement and February 1997 Announcement as these increases had never been documented in the New Scheme rules; and

    c) those members of the Previous Scheme who had transferred their benefits to the New Scheme with effect from 1 January 1998 did not have a right to increases under the rules of the New Scheme other than those required by statute.

67. The instructions to Counsel were given by the Trustee but were prepared collaboratively with the Employer's lawyers. The instructions did not specifically ask if the members had a contractual right to increases at the level announced and/or the Employer was prevented, on grounds of estoppel by convention, from denying members these increases. Counsel was so far as I am aware, not asked to specifically consider the position of Mr H, who occupied a seemingly unique position, nor address the transfer in provisions of the New Scheme.

68. Counsel advised on whether (i) there had been a valid amendment to the rules of the Scheme, (ii) there was a valid contract which overrode the rules, and (iii) looked at estoppel by convention. I set out, in more detail than I normally would, key points emerging from the Opinion, as it is of relevance in distinguishing how I reach my views later in this Decision.

Counsel's opinion – validity of amendment

69. In relation to the issue of whether there had been a valid amendment, Counsel first noted that no formal documents had been located to purport to amend the rules; secondly noted that the courts had held in previous cases that for a valid amendment to be made the strict formalities of the amendment power needed to be followed; and thirdly looked at whether the 'principle of regularity' was of any assistance in determining whether a resolution had been entered into by the Employer to amend the rules and concluded it was not.

70. In relation to the principles of regularity, Counsel cited the discussion of that principle in a pensions context in *Entrust Pension Ltd v Prospect Hospice Ltd* (No 2) [2013] PLR 73 (**Entrust**) at [38]-[39]:-

    a) The principle describes the readiness of the Court to draw certain repeated inferences as a result of common human experience.

    b) It does not only apply where there is no proof one way or another, and probably adds little to the power which the Court had anyway to make a finding of fact on the balance of probabilities based on inferences drawn from circumstantial evidence.

c) The principle is no more than a rebuttable statement, founded on common sense and experience of the inference which will normally be appropriate to draw in a given situation where primary evidence is lacking.

d) Counsel was of the opinion, while this principle can be of assistance where, for example, there is no evidence as to whether a technicality in the completion of a resolution (such as due notice to directors or proper delegation of the signatory to the resolution) has been complied with, it will not apply here to make up for the absence of any evidence that the Board of the Employer had resolved to amend the Scheme in the terms of the announcements and other documents.

71. In Counsel's opinion, the Court will not use its common sense and experience to infer that the Employer must have resolved to make the changes, either through its board of directors or by a properly delegated representative of the board. This is because experience shows that parties to amendment powers in occupational pension schemes have in the past often failed to comply with the formalities of amendment powers and it was a view commonly held by pension practitioners in the 1980s and 1990s that it was sufficient to amend a pension scheme by means of an informal announcement to members.

72. On the contrary, such evidence as there is counts against the inference, given that the Rules themselves were adopted by a resolution of the board of directors of the Employer made at a meeting of the board held on 17th March 1986, a certified copy of which was annexed to the Rules. Counsel considered that this demonstrated that, at least at the outset, the Employer was fully aware of the requirement to alter the terms of the Scheme by means of a formal resolution of its board of directors.

73. Counsel concluded that in his opinion, based on the evidence, he had seen, (and Counsel may not have had access to all of the 1,000 plus pages of documents I have been asked to review) none of the aspects in issue were validly introduced under the governing provisions of the Scheme by way of amendment.

Counsel's opinion - contract

74. In relation to contract Counsel accepted that it was well established that it is possible for a member of a pension scheme to become contractually bound to accept benefits less than those to which he would be entitled under the rules of the scheme. In *South West Trains Ltd v Wightman* [1998] PLR 113, it was confirmed that a member would be entitled to rely on contractual terms which resulted in greater benefits than under the rules of the Scheme.

75. Counsel considered that the documents in issue in the case bear a close similarity to those on which a contract argument was based in *Briggs v Gleeds (Head office)* [2015] Ch 212 (**Gleeds**) where a new money purchase section was set up in an existing defined benefit scheme:-

a) In that case, members of a defined benefits scheme who wished to transfer into a new money purchase section had to complete an application form which included

the words “I hereby apply for membership of the Scheme” and “I agree to abide by the rules and I authorise the deduction of appropriate contributions from my salary”. New entrants also completed application forms in more less identical terms.

b) The employer argued that those application forms constituted offers to be bound by the terms of the money purchase section and that the employer and the trustees accepted the offers by permitting the applicants to join the section and accrue benefits in it;

c) Newey J rejected the argument, holding at [148] that, viewed objectively, the members were doing no more than exercising rights under the scheme, which did not constitute the making of a contractual offer to the employer;

d) Newey J also rejected the relevance of the authorisation for the employer to deduct members’ contributions from salary, holding that there was no more than an administrative act on the basis of the employer on what the parties considered were the existing terms of the scheme.

76. Similarly in Counsel’s opinion, the members of the New Scheme and the Previous Scheme who signed the application forms annexed to the November 1997 Announcements and the October 1997 Announcements were doing so on the basis of the terms set out in those announcements, which they and the Employer would have (wrongly) regarded as changes which had been validly made to the governing provisions of the Scheme on the basis of terms which differed from those applicable under the Scheme.

77. Further, both announcements stated that all benefits are payable in accordance with the Rules. In Counsel’s opinion this gives rise to a strong argument on behalf of the members and/or the Employers that, to the extent that the payment of benefits under the terms of the announcements conflicted with the Rules, the latter were intended to prevail.

78. For these reasons Counsel concluded that the Trustee could not safely administer the Scheme on the basis that any of its members are contractually bound by the terms set out in the November 1997 Announcements and October 1997 Announcements.

Counsel’s opinion - estoppel

79. Counsel then went on to analyse in detail whether an estoppel by convention arose. Broadly estoppel by convention can arise when both parties proceed on the basis of an underlying assumption on which they conduct their dealings between them, neither of them will be allowed to go back on the assumption when it would be unfair or unjust for him to do so (*Amalgamated Investment & Property Co Ltd v Texas-Commerce International Bank Ltd* [1982] QB 84).

80. Counsel then cited *Revenue and Customs Commissioner's v Benchdollar* [2010] 1 All ER 174 where Briggs J summarised the principles applicable to the assertion of an estoppel by convention in the following terms at [52] as follows:

> "It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

81. Counsel then noted that in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustee Ltd* [2010] PLR 411, Briggs J made an adjustment to paragraph (i) of that summary. He said at [37] that the crossing of the line between the parties may consist either of words or conduct from which the necessary sharing can be properly inferred.

82. In *Redrow v Pedley* [2002] PLR 339, Sir Andrew Morritt VC observed at [63] that more than mere passive acceptance was required in order to establish the requisite mutual course of dealing, going on to say:

> "The administration of a pension scheme on a particular assumption as to the yardship by which contributions or benefits are to be calculated may give rise to a relevant assumption on the part of the trustees. I suggest that it requires clear evidence of intention of positive conduct to bind the general body of members as to such an assumption. I doubt whether receipt of a contribution, without more, can be enough. It must not be overlooked that if the principle is applicable it may be used to increase the liability or reduce the benefit of a member as well as, in this case, the opposite".

83. Counsel considered that where the only evidence is the announcements and the other documents referred to above, there is nothing to indicate that the parties put a particular interpretation on the Scheme's governing documents or acted on an agreed assumption that they had different rights to those to which they were entitled to under those documents. Therefore, there was nothing to suggest that the members did more than passively accept the fait accompli presented by the Employer on the basis of the announcements. Existing members were told that changes were taking place, not asked to agree to them, and new entrants were simply enrolled in the Scheme in the form it was understood to have at the material time.

84. Moreover, Counsel considered that the Employer relied on any assumption shared between them and the relevant members of the Scheme. While the Employer might have relied on the application forms submitted by the members, that is different from relying on the members as regards the terms of the Scheme, or more specifically, the effectiveness of the changes referred to in the announcements. The Employer will have acted on the basis of the views it will have arrived at independently of members, probably on the strength of professional advice.

85. In relation to estoppel arguments based on the 1989 New Scheme booklet or 2002 booklets Counsel noted that they both contained so called “health warnings” which require the formal rules of the Scheme to prevail in the case of conflict with the terms of the booklet. In such circumstances no estoppel will be applied so as to permit the terms of the booklet to override the rules. *Steria v Hutchinson* [2002] PLR 291 at [69] (**Steria**) per Mummery J.

86. Counsel concluded, in relation to the issue of estoppel. that the Trustee cannot administer the Scheme on the basis that members and the Employer were estopped from relying on terms other than those contained in the announcements.

Counsel’s conclusions

87. Counsel was then asked to consider whether, in terms of the underpayments and overpayments made, and the state of the Employer’s covenant, it was reasonable to administer the Scheme in accordance with the trust instruments.

88. Counsel concluded that he could not advise the Trustee to act in a way which departed from the terms of governing provisions of the New Scheme, irrespective of whether they or the Employer considered it reasonable to do so.

89. Counsel noted that of course it was open to the Employer to permit the Trustee to administer the Scheme in a way as to incorporate the benefit increases which would otherwise not apply to members, but he recommended that this be done by way of formal or retrospective amendment to the Rules, or else pursuant to the augmentation power.

90. If no accommodation was reached, then no amendments could be made which would result in a reduction in benefits because of section 67 of the 1995 Act or breach section 91 of the 1995 Act.

What happened next?

91. With hindsight it would have been helpful if all of the legal issues relating to the revised benefit structure (for existing New Scheme members and also transferring Previous Scheme members) and also relating to the failure by the Employer to document the promised benefits had been addressed by making an application to the Court under the representative beneficiary procedure. There appear to have been discussions between the Trustee and the Employer about the best way forward. An announcement was sent to members by Quantum Advisory dated 22 May 2017 (the

Quantum Announcement) telling them of the outcome of the review of the New Scheme rules and that the revaluation of pensions in deferment, equalisation of pension benefits and increases to pensions in payment had not been granted in accordance with the Rules. Quantum Advisory told members that it had recalculated pensions on the correct basis. In many, but not all of the cases, this meant that members had been overpaid (see the copy of Quantum Announcement in Appendix 1). The approach taken to rectification of benefits is set out in more detail in Appendix 2.

92. Accompanying documentation also confirmed that the Trustee had been able to agree with the Employer that no member's current pension would be reduced but rather it would be frozen at the current level, unless or until the current pension exceeded the corrected pension. The benefits were corrected with effect from 1 July 2017. I assume that this was documented by way of an amending resolution or through the use of the augmentation power as recommended by Counsel, but I have not seen a copy of any such document.

93. I understand that Mr H was not overpaid but has still been told that he will not receive any further increases on pre-6 April 1997 benefits other than to his GMP once in payment. The reason Mr H was not overpaid was that a mistake had been made about the number of years of revaluation of his pension in deferment which should have been taken into account when his pension came into payment. The deferred pension had only been revalued for 15 years when in fact 16 years of revaluation should have been applied. Also, apart from the original increase to his pension for a part year in April 2015, no further increases were granted in April 2016 and April 2017 while the potential overpayment issue was resolved. So, in Mr H's case, unlike many other members, I understand there is no 'franking' of future increases against past overpayments.

IDRP

94. On 22 May 2018, Mr H complained to the Trustee under stage one of the Scheme's internal dispute resolution procedure (**IDRP**). He argued that irrespective of what the governing provisions of the Scheme said about increases, he was entitled to those increases by reason of:

    a) his benefit entitlement under the Previous Scheme; and

    b) the promise made at the time he transferred from the Previous Scheme to the New Scheme (with effect from 1 January 1998) that he would receive the same benefits as he was entitled to under the Previous Scheme.

95. The complaint was rejected by the Trustee on 8 August 2018. It said that having taken advice from its legal advisor and following the opinion of Counsel, it had decided to take the corrective action outlined in the Quantum Announcement.

96. Following this response, Mr H took his complaint to stage two of the IDRP.

97. On 1 August 2019, the Trustee issued its final response to Mr H's IDRP stage two appeal.

98. Having outlined the factual background, already noted in this Decision, the Trustee considered that Mr H's complaint required two issues to be determined, namely:

    a) what was his right to increases to pensions in payment under the Previous Scheme at the time of his transfer to the New Scheme; and

    b) whether the New Scheme assumed the liability for such increases on his transfer to the scheme.

99. The Trustee said that it had been advised that the passage of the Previous Scheme Special Member benefit summary which dealt with increases to pensions in payment in excess of GMP, constituted the increase to which Mr H was entitled under Rule 8.2 of the Previous Scheme rules while he was a member of the Previous Scheme. The Trustee had not seen any document which superseded or overrode the benefit summary.

100. Accordingly, as a member of the Previous Scheme, Mr H was only ever entitled to annual increases to pensions in payment at the rate of the lower of 5% or RPI. There was no evidence that he was entitled to increases at the rate of 5% fixed.[2]

101. With regard to whether the right was assumed by the New Scheme, the first question was whether the documents referred to constituted an amendment to the governing provisions of the New Scheme, pursuant to the amendment power. The Trustee did not consider that the documents constituted such an amendment, as those documents did not disclose any intention to amend the governing provisions of the New Scheme. On the contrary, they were written on the basis that the changes would occur in the future, which was inconsistent with the documents themselves bringing those changes into operation.

102. The only other way in which the documents could legally require the New Scheme to provide Mr H with different pension benefits was if they bound the Trustee either as a matter of contract or by reason of an estoppel arising from a representation as to the provision of those benefits under the New Scheme.

103. In order to mount an argument to that effect, it would first be necessary to establish that a relevant promise or representation had been made by or on behalf of the Trustee, as it was the Trustee who was required to provide the benefits under the Scheme and therefore only the Trustee could undertake the provision of such benefits.

104. However, neither of the documents referred to was from the Trustee. One document was from an employee of the Employer, and the other was from the administrators of the New Scheme. Neither of those parties had the express or implied authority to bind

[2] It is unclear to me why the Trustee reached this conclusion at this stage in the process. The Trustee and Employer later took the position that Mr H was not entitled as a matter of right to any increases under the increase rule governing the Previous Scheme.

the Trustee so that any promises or representations made in those documents could not give rise to additional pension rights under the New Scheme. Whether the documents were sufficient to establish a separate contract claim against the Employer was not a matter within the scope of Mr H's complaint, which related to his benefits under the New Scheme.

105. In any event, the New Scheme could not be bound (through an estoppel) by reason of a representation by the Trustee that Mr H would get different benefits to those set out in the New Scheme's rules, as that would require the Employer to have exercised the amendment power. A court would not permit such a result which would be to impute to the Employer a decision to exercise the amendment power which it had not in fact made. The Trustee relied on the case of *Catchpole v Alitalia Pension Trustees* [2010] Pension LR 387 (**Catchpole**) at 56 per Warren J.in support of this proposition.

106. The Trustee argued that it was therefore unnecessary to consider any further whether the statements in the relevant documents amounted to the required promise or representation or whether they would give rise to a binding contract or valid estoppel.

107. The Trustee therefore did not uphold Mr H's complaint at stage 2 of the IDRP.

Mr H's complaint to The Pensions Ombudsman

108. Mr H's complaint is made against the Employer and the Trustee (as the current trustee of the New Scheme).

109. The complaint relates to the decision of the Employer and the Trustee to remove all future annual increases to his pension as communicated to him in May 2017.

110. Mr H says the decision has affected his accrued benefits, as 16 of the 17 years of pensionable service in the New Scheme accrued before 6 April 1997. In this connection Mr H notes that his pension originally accrued in the Previous Scheme. Mr H believes that the decision to remove the increases is wrong.

111. Mr H believes he has incurred a loss from the time his pension came into payment and for the duration of his pension payments – at least discretionary inflation-based increases to his pension and corresponding increases to any attaching spouse's pension.

112. Mr H is seeking one of the following remedies:

a) a direction for annual increases for pre-1997 pensions in payment to be determined annually by the Employer and the Trustee; or

b) a direction to provide for fixed annual increases to pre 1997 pensions in payment to reflect estimated inflation over time; or

c) a one-off increase to the current amount of annual pension as compensation in return for agreement that no future annual increases will be applied; or

d) financial compensation in the form of a lump sum to reflect loss of inflationary increases to current and future pension in payment.

113. In addition, Mr H is seeking:-

a) Compensation for maladministration due to the purported removal of all future pension increases by way of a letter communicated to members in May 2017.

b) An award for distress and inconvenience resulting from the amount of time he has spent trying to obtain information from the Trustee and Employer and seeking the proper increases to his pension.

114. The Trustee's position in its response to the complaint is broadly as follows:-

a) The Trustee's decision to cease to pay increases on pensions in excess of GMP in respect of pre-6 April 1997 pensionable service was taken following legal advice confirming the level of increases payable in accordance with the New Scheme's governing documentation.

b) The Trustee is legally required to pay benefits in line with the New Scheme's governing documentation and this does not provide for increases in respect of pre-6th April 1997 pensionable service.

c) Following Mr H's transfer to the New Scheme from the Previous Scheme, the New Scheme's governing documentation was not amended to vary the benefits payable to him. Mr H's benefit entitlement is as set out in the Previous Scheme's governing documentation and this does not provide for any increases in respect of pre-6 April 1997 pensionable service.

d) Consequently, the Trustee believes it is paying Mr H the correct pension increases in accordance with the New Scheme's governing documentation.

e) The Trustee cannot pay benefits which are not provided for by the New Scheme's governing documentation and indeed doing so would be in breach of trust. Any separate contractual arrangements that might exist between Mr H and the Employer would fall outside the trusts of the Scheme and would be a matter for the Employer.

f) The Trustee's decision, following legal advice, to cease paying 'discretionary' increases to which members were not entitled under the Rules does not affect Mr H's accrued rights under the Previous Scheme, because he was not entitled to those discretionary increases under the Previous Scheme's governing documentation.

115. The Trustee pointed to Counsel's Opinion, which set out the background to the events which are the subject of Mr H's complaint.

a) Counsel's Opinion related primarily to whether benefits have been effectively equalised and whether the various announcements were sent to members about beneficial changes in relation to the manner in which pensions would increase in

payment before 1 January 1998. These changes were however never documented by a rule amendment. Counsel's Opinion also dealt with the position of the members who transferred their benefits from the Old Scheme in late 1997 and joined the New Scheme with effect from 1 January 1998.

b) Counsel concluded that, in the absence of a rule amendment in accordance with the amendment power, there was no valid amendment and members were only entitled to minimum statutory increases from 6 April 1997 onwards.

c) Members could not rely on estoppel or contract against the Trustee to argue that they had a legal entitlement to higher increases. Counsel concluded therefore that in his opinion the Trustee ought to administer the Scheme on the basis that members were only entitled to those increases to pensions in payment required by legislation.

116. The Employer submitted its response to Mr H's complaint (the response was 84 pages long, and was sent with 1000 pages of supporting documentation, and is one of the key reasons for the length of this Determination). It opposed Mr H's complaint. Given the size of its response, I set out only the key grounds below.

a) The Pensions Ombudsman (**TPO**) does not have power to direct the Employer to provide substantive relief to Mr H. If Mr H had brought a court application a limitation defence would have been raised. *Arjo Wiggins*[3] was cited as authority.

b) Mr H does not have a right to an annual increase under the Previous Scheme to his pension in payment in excess of GMP for pre-6 April 1997 service. None of the documents which Mr H has referred to in support of his complaint confer on him a right automatically to an increase in pension in payment for pre-6 April 1997 service in relation to benefits in excess of GMP.

c) The only rule which could result in an increase in pension in payment in excess of the GMP is a rule of the New Scheme which contains a discretionary power which the Employer alone can choose to, or not to, use. The Employer has not exercised the discretionary power to confer on Mr H a right to an automatic increase in excess of GMP for service pre-6 April 1997.

d) The Trustee of the New Scheme has, since 1 April 2017, administered the Scheme in line with its rules and as a result no longer applies a pre-6 April 1997 annual increase.

e) Before 1 April 2017, the increases granted were in breach of trust.

f) Mr H made his own choice to transfer to the New Scheme. Mr H had been a member of the Previous Scheme. Mr H could have chosen to leave his Previous Scheme benefits in the Previous Scheme.

[3] *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198 (Ch)

g) In relation to the transfer payment the sum could only be used to credit Mr H with rights as set out in the New Scheme. The sum of money would not be used to exactly replicate the pension rights he had in the Previous Scheme before 1 January 1998.

h) The Employer did not make a statement to Mr H, in or around November 1997, that, if he had a pension in payment under the New Scheme, an Annual Pre-97 increase would be applied as of right.

i) There is no contract or other kind of binding agreement between the Employer and Mr H which governs his transfer to, and his becoming a member of, the New Scheme. The Employer has not been Mr H's employer since 10 June 1998.

j) The change, from 1 April 2017, that resulted in the Trustee no longer automatically applying an annual increase to pensions in payment in excess of the GMP for pensionable service before 6 April 1997 had no impact on Mr H's pension benefits, as Mr H had no right to those benefits in the first place.

k) Mr H's contract was terminated on 10 June 1998. Since then, the Employer has not owed any duty or been under any obligation in respect of Mr H as an employer.

l) There was only a discretionary power to increase pensions in the Previous Scheme. On 1 January 1998, when Mr H made the transfer to and became a member of the New Scheme, the rules of the Previous Scheme did not contain a provision that the Trustees of the Previous Scheme or the Principal Employer should automatically apply an annual increase to pensions in payment under the Previous Scheme in excess of the GMP for pensionable service before 6 April 1997.

m) The Employer is not liable for any act or omission of the Previous Employer as the principal employer of the Previous Scheme. The Employer is a separate company to the Previous Employer.

n) It is accepted that section 51 of the 1995 Act requires Mr H's pension in payment for pensionable service on and after 6 April 1997 to be increased in accordance with the statutory minimum under that Section. Section 109 of the Pension Schemes Act 1993 (**1993 Act**) requires Mr H's GMP for pensionable service from 6 April 1988 to 5 April 1997 to increase in accordance with the statutory minimum under that Section.

117. The Employer also provided various supporting analysis and argument in relation to the key contentions set out above. The supporting analysis and argument are not repeated in full this Determination as the summary above is sufficient to set out the Employer's key grounds for opposing Mr H's complaint.

118. Mr H provided the following comments on the Trustee's and Employer's responses:

a) His complaint relates to loss in the future value of his pension resulting from the Employer's and Trustee's decision communicated to him in 2017 to remove (forever) their ability to award discretionary increases to pensions in payment (accrued pre-April 97) by the New Scheme's representatives.

b) The Employer and Trustee of the New Scheme have implemented the decision despite the fact that:-

i. The New Scheme had for many years proactively applied annual increases (of varying rates subject to economic circumstances) to member's pensions in payment.

ii. The governing rules of the Previous Scheme under which he had worked and accrued his benefits clearly prescribed that annual increases to pension shall be applied each year (albeit at the discretion of the employer and trustee, in each year).

iii. The employer and trustee obligation under the Previous Scheme and New Scheme was to consider, each year, increases to pensions in payment (this appears to have been disregarded since 2017).[4]

iv. Basic inflationary increases to pensions in payment are a significant part of the value of the individual Member's pension. They were specifically drafted into the Previous Scheme rules and expressly permitted (not prohibited) in the New Scheme rules and were in practice paid by the New Scheme for many years.

v. The Previous Scheme and New Scheme issued (and he had received) over the course of many years regular clear correspondence stating that his pension accrued pre-April 97 would be increased annually in consideration of inflation.

vi. Mr H was presented with detailed benefit options when approaching his retirement which clearly set out a pension fund transfer option which expressly included an allowance for annual increases to his pension in payment (evidencing that this was an integral part of his benefit).

vii. The decision disregards the fundamental principles of the transfer proposal offered by Mr H's employer to the Member in 1997/98 which was supported by several written documents between the Employer and the then trustees and Mr H (see records of New Scheme increases to pensions in payment from 1998).

119. Given the status of the Employer (whose New Scheme liabilities needed to be fully supported by an overseas parent company) Mr H understands that the removal of

[4] I disagree with Mr H's analysis and also the Employer's analysis of the Employer's and Trustee's duties under the increase rule and the operation of the increase rule. See below

any potential future increases to pension in payment (accrued pre-6 April 1997) seems to have been driven by the Employer's intention to reduce scheme administration obligations and future funding obligations.

120. It is clear, in fact, that Mr H would have been better off in the Previous Scheme (from which the Employer proposed him to transfer his benefits). It is understood that the Previous Scheme continues to provide increases to pensions (accrued pre-April 1997) in payment.

121. Mr H also contends that there has been maladministration in relation to the 18-month IDRP process.

122. Mr H considers that the Employer's 84-page response is difficult to follow but makes high-level comments on certain aspects of the specific observations made by the Employer in its response, as set out in paragraphs 123-128 below.

123. *Employer's contention that the complaint is time barred.*

The complaint is not time barred as it was made within the three-year period permitted under Regulation 5 of the Personal and Occupational Pension Scheme (Pensions Ombudsman) Regulations 1996 (**Ombudsman Regulations**). The *Arjo Wiggins* case is not relevant as it was a civil court case based on contractual and tortious claims brought 20 years after the relevant cause of action.

124. *Employer's contention that Olivetti UK Ltd is not a party against which the Member can complain*

The Employer is the sponsoring employer of the New Scheme. The sponsoring employer has obligations, powers and responsibilities in relation to the New Scheme (as the Previous Employer had in relation to the Previous Scheme) together with the trustees. Many decisions require employer involvement, consent and financing. If Olivetti UK Limited is not the scheme employer, the Employer should inform the parties of the identity of the scheme employer. It is irrelevant to Mr H's complaint that the scheme employer may have been succeeded by other Olivetti group companies over the years, his complaint is rightly against the parties to the New Scheme, responsible for the May 2017 decision letter.

125. *Employer's contention that Mr H was not able to produce all the Scheme documents.*

Mr H did not have access to all documents but managed to obtain them over time and extract sections relevant to his case (the Trustee and Employer should have all the documents in full format and readily available but unfortunately this was not the case). The Employer has not provided any further documentation that contradicts the Member's complaint or provides a defence for the Employer.

126. *Employer's contention that Mr H has claimed that he has an automatic right to a certain rate of annual increase to his pension in payment in each year.*

The Employer wrongly alleged this and seems to have misunderstood the issue; this is not his claim.

127. *Employer's contention that there could only have been a binding agreement between Mr H and employer if he had approached the employer with an offer.*

This is not correct and Mr H does not agree on a factual or legal basis.

128. *Employer's contention that Mr H was a Member nominated trustee for a short period 2017-2018.*

This is irrelevant.

129. Mr H provided a detailed response to the Trustee's further submissions. He said:-

a) The Trustee's response is largely based on Counsel's Opinion obtained in 2015 which covered a variety of different matters in relation to the New Scheme with limited references to awarding increases to pensions in payment. The Opinion was not focussed on the specific issues raised by him.

b) In any event:-

i. The Trustee acknowledges that the New Scheme is permitted to award increases to pensions in payment and there are several ways under the rules which it could be done.

ii. It was clear that his consent was not "informed" and would not have been given if he had understood that the pension increase rule would later be removed.

iii. The announcements to members gave details of increases to pensions in payment based on the permissive power in the New Scheme trust deed and rules.

iv. It is not clear how Counsel could have opined in July 2015 that the award of increases to pensions in payment was prohibited when such action was: permitted by the trust deed and rules; considered and approved by the trustees and employer year on year; and not prohibited by the rules or legislation. Increases were in fact awarded and paid to members over the years; were included in scheme funding assumptions over the years; and were included in the calculation of his pension quotation which he did not choose to action, instead being content for those benefits to be paid from the New Scheme.

v. It is irrelevant to his case that there was no statutory requirement to pay increases to pensions in payment accrued pre-April 1997. This did not mean that the pension scheme rules could not provide for such increases to be

paid. On the contrary, the lack of statutory prescription strengthens the argument that the Previous Scheme rules deliberately intended to provide increases to pensions in payment, otherwise what would be the purpose of Rule 8.2?

vi. The Trustee acknowledges that there may be a separate contractual agreement between him (as employee) and the employer, although the employer now seems to deny this.

Conclusions

General jurisdictional issues

130. Legislation gives me the power, among other things, to consider and determine:

a) a complaint by an actual or potential beneficiary that he has sustained injustice as a consequence of maladministration by the trustees, managers, administrators or employers of an occupational pension scheme (section 146(1)(a) of the 1993 Act); and

b) any disputes of fact and law between an actual or potential beneficiary and trustees, managers and administrators and employers of occupational pension schemes (section 146(1)(c) of the 1993 Act).

131. The Trustee is a trustee for the purposes of my jurisdiction and the Employer is an employer for the purposes of my jurisdiction. This is not, as has been argued by the Employer, affected by the fact that Mr H is a former employee. The definition of employer used in section 146(8) of the 1993 Act extends to persons who are or have been an employer in relation to an occupational pension scheme.

132. It is well established, so far as I may make a finding that an individual has sustained financial injustice as a consequence of maladministration (involving an infringement of a legal right) or make a finding of breach of law, that I must do so in accordance with established legal principles and determine the complaint or dispute in the same way a court would approach it.[5] I will consider this further below in relation to the Employer's submissions (in paragraph 116(a) above) that I do not have jurisdiction to offer substantive relief.

133. I have power under section 151 of the 1993 Act to direct any person responsible for the management of the scheme to which the complaint or dispute relates to "take, or refrain from taking, such steps as I may specify in my determination of the complaint or dispute or as I may otherwise specify in writing". The section 151 power extends to making reasonable awards for non-financial injustice sustained as a consequence of maladministration which are separately identifiable from a breach of law[6].

[5] *Arjo Wiggins Ltd v Henry Thomas Ralph* [2009] 079 PBLR at [13] and [14]
[6] *Westminster City Council v Haywood [1996] 2 All ER 467 (obiter) as confirmed in City and County of Swansea v Johnson [1999] 17 PBLR; and Baugniet v Capita Employee Benefits (Teachers' Pensions) [2017] 059 PBLR (019) & Smith v Sheffield Hospitals [2018] 004 PBLR (011) & Arjo Wiggins v Henry Thomas Ralph [2009] 079 PBLR*

134. I would also note at this stage that my jurisdiction to make findings that an individual has sustained injustice as a consequence of maladministration and my jurisdiction to make findings of breach of law do overlap but are not co-terminous. Many breaches of law amount to maladministration, but there may be circumstances where a breach of law does not necessarily amount to maladministration for example taking the wrong view of the legal position (See *Glossop v Copnall* [2001] 53 PBLR at [8] to [24]).

Can the Pensions Ombudsman investigate and determine the complaint and offer substantive relief?

135. The Employer contends that I do not have jurisdiction to investigate and determine Mr H's complaint and offer substantive relief. I will therefore consider this issue first before determining whether Mr H has an entitlement to mirror benefits under contract or under the terms of the trusts governing the New Scheme and, if he does have such a right, how the increase rule should be interpreted (in essence 'what is the mirrored right').

136. There are specific time limits for bringing a complaint or referring a dispute to my office. These time limits can be found in Ombudsman Regulations, Regulation 5 (**Regulation 5**). Broadly, these time limits provide that a complaint must be brought within three years of the act or omission, or three years from the date the applicant knew or ought reasonably to have known of the act or omission. Where it is reasonable for a complaint not to be made within three years of the act or omission or three years from the date the applicant knew or ought reasonably to have known of the act or omission, I may investigate it if it is referred within a further reasonable period. Mr H's various disputes and complaints have been brought within three years of him becoming aware that pension increases would cease to be granted to his pension in the manner he was expecting, and so there is no Regulation 5 issue and Mr H's complaint has been made within time. This is on the basis that his complaint to my office was made on 20 April 2020, which was within three years from the date Mr H was notified that his Employer would not provide increases on his pre-6 April 1997 benefits. This occurred on 22 May 2017 when the Quantum Announcement was sent to Mr H.

137. However, my time limits are different from the Courts. The Employer cites the High Court case of *Arjo Wiggins* and submits that I cannot direct any financial remedy or payment for legal loss where the court would be prevented from doing so by virtue of a Limitation Act 1980 defence.[7] In general terms the Employer is correct – however, this restriction does not preclude me from investigating and determining the complaint or dispute where a limitation defence is raised. In fact, *Arjo Wiggins* is authority that a matter which would be time barred in Court proceedings does not necessarily preclude my investigation.

[7] *Arjo Wiggins* at paragraph [26]

138. It was noted by Mr Justice Lewison in *Arjo Wiggins* at paragraph 20 of his judgment that:

> "If a limitation defence is raised, even in relation to a dispute involving the infringement of legal rights, the Pensions Ombudsman will at least have to investigate the dispute in order to see whether the defence is well founded. If he decides the respondent has a good limitation defence, and declines to award relief on that ground, why has he not determined the dispute? In my judgment he has. I do not, therefore accept the first way in which Mr Topham put his case. In my judgment the Pensions Ombudsman has jurisdiction to investigate and determine a complaint or dispute even where the comparable cause of action would have been dismissed on the ground that it was statute barred."

139. Mr Justice Lewison also said at paragraph 26 of his judgment that:

> "It seems to me, therefore, that whether a limitation defence is regarded as part of "the substance of the dispute" or as a "procedural safeguard" the Pensions Ombudsman is bound to give effect to it. Otherwise, he would be deciding the legal rights and obligations of the parties according to a unique system of law, rather than according to the law of England and Wales (or, for that matter, Scotland where he also has jurisdiction). The result of a dispute would therefore differ according to whether it was decided by the court or by the Pensions Ombudsman, and the courts have consistently set their face against that result. In my judgment therefore, in determining a complaint the Pensions Ombudsman must give effect to a valid limitation defence. To give effect to a valid limitation defence is to determine the dispute. It is determining it in accordance with the law. Accordingly, although I consider that Regulation 5 gives the Pensions Ombudsman power to investigate and determine a complaint that would be dismissed on the ground of limitation if brought in court, I do not consider that Regulation 5 is clear statutory authority enabling him, in the course of determining the dispute, to refuse to give effect to a valid defence in law. On the contrary, the determination of a complaint in accordance with the law is itself a determination. However, as mentioned, in the case of pure maladministration, there is no applicable limitation period, with the result that the Pensions Ombudsman can award whatever remedy is appropriate for pure maladministration even if the claim is stale, although the staleness of the claim will no doubt be relevant to the exercise of his discretion."

140. Therefore the fact that it has been held that the Ombudsman cannot direct compensation where a court could not award compensation if a limitation defence were raised in court proceedings, does not prevent the Ombudsman making an award for non-financial injustice sustained as a consequence of maladministration where a court would have to give effect to a Limitation Act 1980 defence.[8]

141. It is not, in my view, appropriate in this case to determine as a preliminary issue (as the Employer submitted to my office) whether a Limitation Act 1980 defence applies

[8] *Arjo Wiggins* at [20]

against the Employer in relation to all or any of Mr H's complaints and disputes. This is because it is necessary to first consider the legal basis of Mr H's various complaints and disputes. It is only by doing so that it is possible to establish which limitation defences could potentially apply in relation to each of Mr H's various complaints and disputes. Therefore, interrogation of the evidence and the factual background is necessary to reach such a conclusion.

142. Furthermore, for the reasons set out below, I do not consider that I am precluded on limitation grounds from investigating and determining Mr H's various complaints and disputes. Nor am I necessarily prevented from granting a substantive remedy in relation to any of the complaints or disputes (alleging an infringement of a legal right) raised by Mr H.

143. In relation, in particular, to the breach of contract claim or an estoppel claim, I am satisfied that this would not be time barred if brought before a court under the Limitation Act 1980, for the reasons which follow.

144. In relation to the position under the transfer in rule I consider, for the reasons set out below, that there was an effective decision to grant mirror benefits at the point of transfer so again there is no limitation issue under the Limitation Act 1980.

Was the harmonised benefit structure and the commitment to provide mirror benefits given to Mr H ever documented by way of rule amendment?

145. I agree with the Trustee that in the absence of any evidence that a resolution was entered to amend the rules to give effect to the harmonised benefit structure (or the special terms offered to Mr H) it would not be reasonable for me to infer that such a resolution was entered into merely from the fact that pension increases were subsequently granted in the New Scheme to transferring members, in accordance with the announcements about the harmonised benefit structure. In essence, I agree with Counsel's Opinion that the formalities required for a valid amendment, and lack of evidence suggesting those formalities have been met, suggest to me that no such amendment was made.

146. In Mr H's specific case, given that the Employer committed to provide him with a mirror 2/3rds pension promise after 25 years, this might have been achieved by an individual amendment attaching the announcement or by the use of the augmentation power. However, there is no evidence that this was ever done despite the fact that SBJ when advising on the harmonisation of benefits, set out an action point that the lawyers would need to update the rules.

147. I would also agree, in so far as it is relevant to Mr H's complaint/dispute, that none of the other changes outlined in the October 1997 and November 1997 Announcements were ever documented by way of rule amendment at the time. I turn later, and separately, to the nature of the mirror benefits and whether it can be inferred that there was a direction in force under the pension increase rule (as opposed to the amendment power in the New Scheme) to provide increases in the Previous Scheme at the date of transfer to provide increases at the rate of RPI capped at 5%.

Is there a legally enforceable contract between Mr H and the Employer to provide mirror benefits?

148. The next issue I need to consider in determining this dispute is whether there is an enforceable contract between the Employer and Mr H to provide mirror benefits.

149. In my view (and I find as a matter of law) there is an enforceable contract between the Employer and Mr H to procure that Mr H is offered membership of the New Scheme on terms that mirror[9] his membership, as a Special Member, of the Previous Scheme (including terms relating to increases). This also included, if he agreed to transfer his past service benefits, mirror rights in respect of his past service.

150. To have a binding contract it is necessary to have offer, acceptance, intention to create a contractual relationship and consideration. In my view, all the elements are present here:-

    a) Mr H was offered membership of the New Scheme on the basis that he would be granted mirror benefits in the letter dated 28 November 1997 from Mr Bissell on behalf of the Employer (who was Mr H's employer at the time) to Mr H. This was also confirmed by SBJ who were acting for the Employer at the time and would have had ostensible authority to make the statement on behalf of the Employer.

    b) Mr H accepted those terms by completing the election to join the New Scheme and to pay contributions to the New Scheme.

    c) There was an intention to create legal relations (and more specifically contractual relations).

    d) Consideration was provided by virtue of the fact Mr H continued to work, paid employee contributions and transferred past service benefits on the basis he would be provided with mirror benefits in return for the transfer rather than remaining entitled to deferred benefits in the Previous Scheme.

151. This is not a case where Mr H was merely offered membership of the New Scheme on the basis he would be entitled to the benefits set out in the rules from time to time. Rather, at the time that Mr H was issued with the invitation to join the New Scheme, the new benefit structures promised to the various categories of members, as set out in the documentation pack prepared by SBJ, had not yet been documented. Indeed, none of the changes announced to any category of member appears to have ever been subsequently documented in breach of the commitments given to those members.

[9] Other than in relation to contracted out rights, which under the New Scheme were to be calculated on a protected rights basis

152. His situation was very different to that available in the New Scheme. Mr H was not accruing benefits at 1/60th, but rather had a 2/3^{rds} pension promise at 60. He had a normal retirement date of 60 and not 65. He had special early retirement reduction terms and had a different definition of final salary for determining his benefits to those provided for at that point in time under the existing rules of the New Scheme for existing members. None of the other changes announced to other transferring Previous Scheme members or to the various changes announced to existing New Scheme members (to achieve a common benefit structure post-merger) had yet been documented (nor indeed have they ever been documented)[10]

153. I do not agree with the Trustee's Counsel that the analysis applied in *Gleeds* is applicable to Mr H in relation to the New Scheme (although, in fairness to Counsel, it is not clear that he was asked to consider Mr H's specific and unique circumstances). *Gleeds* concerned the creation of a money purchase section in an existing scheme and governed by existing rules. As members' benefits were already governed by those rules, there needed to be a rule amendment which would have required compliance with the formalities of the amendment power, including the agreement of both the trustees and the employer. In *Gleeds* the application forms signed by existing members for membership of the new money purchase section included the words "I hereby apply for membership of the scheme" and "I agree to abide by the rules and I authorise the deduction of appropriate contributions from my salary," Newey J concluded that, viewed objectively, all the members were doing was no more than exercising their existing rights under the scheme, which did not constitute the making of a contractual offer to the employer. I do not disagree with that conclusion.

154. However, in Mr H's case the circumstances are different for a number of reasons:

    a) the Employer can unilaterally give effect to the proposed amendment in the New Scheme;

    b) Mr H was told that, with effect from 1 January 1998, the Employer was pleased to offer him membership of the New Scheme in the place of his existing Scheme;

    c) Mr H was sent a copy of the announcement relating to the New Scheme and told that it offered "similar" and "mirror" benefits to those of the Previous Scheme and contained an explicit statement that the pension earned from 1 January 1998 would be increased in line with inflation subject to a maximum of 5%;

    d) Mr H was also told that the announcements needed to be read in conjunction with the Previous Scheme Supplement (which set out his 2/3rds promise); he

[10] I acknowledge that the Employer has agreed effectively to augment the benefits of the pensions in payment at the date the Trustee carried out its correction exercise as it is not seeking to reduce the pensions in payment to the level they would have been under the old pre-1 January 1998 benefit structure. This however is not the same as amending the rules to document the pre-1 January 1998 changes. The Trustee is keeping two parallel records one showing the "Corrected Benefits" and one the pension in payment at the date of the correction and is only paying any increases where the Corrected Benefits plus increases (if any) exceed the pension in payment at the date of the correction exercise. Effectively, in relation to other members, the future statutory pension increases are being franked against the initial benefits in payment at the date of the correction exercise. In Mr H's case it would appear however that the pension in payment at the date of the correction exercise was less than he was entitled to so there is no franking.

was told that “in other words your membership terms will mirror those under the Previous Scheme” except that the contracting out basis would change from the Previous Scheme;

e) he was told that to join the New Scheme he needed to complete and return the attached form.

f) as the Employer itself said (see paragraph 116(f) above), Mr H made his own choice to transfer to the New Scheme and could have chosen to leave his Previous Scheme benefits in the Previous Scheme;

g) he signed an application form to join the New Scheme, which was countersigned by his New Employer, under which he elected for membership of the New Scheme and asked for his pension benefits earned up to December 97 under the Previous Scheme to be transferred to the New Scheme; and

h) he had a follow up meeting with SBJ on 22 December 1997 (who were the benefit consultants acting for the Employer in relation to the harmonisation exercise (and in my view would have ostensible authority to make that statement) who confirmed that having reviewed their records it was confirmed that on transferring his membership his accrued and future Pensionable Service benefits would mirror those that would have been available under the Previous Scheme.

155. In my view (and I find as a matter of law) the Employer, by sending Mr H the invitation to join the New Scheme on mirror terms to his existing scheme, contractually committed to procure that the rules of the New Scheme would be amended to ensure the provision of the promised mirror benefits. It was not intended to offer him membership of the New Scheme merely on the existing (unamended) terms and not give effect to the promise.

156. Unusually, in the New Scheme there was a unilateral amendment power permitting the Employer to document the changes by resolution. Trustee consent was not required to make the changes - although there is evidence that the Trustee did have sight and knowledge of the various announcements. It was, and importantly still is, possible for the Employer to give effect to the contractual promise without Trustee agreement and to do so with retrospective effect. Unlike the position in relation to benefit cuts (as in the *Gleeds* case) there are no section 67 (of the 1995 Act) issues making retrospective amendments to document promised benefits.

157. In my view (and I find as a matter of law) the contractual obligation to procure mirror benefits in the New Scheme is a continuing contractual obligation to document the promised benefits, and there was no breach of the obligation until 22 May 2017 (the date of the Quantum Announcement– see paragraph 91 above). The Employer was able at any point in time after 1 January 1998 to document the promised mirror benefits with retrospective effect and even after Mr H’s pension came into payment. It is also, in my view, an implied term into the contract that neither party would do anything to frustrate the performance of the contract, which would include failing to

document (or otherwise provide by way of augmentation) the promised benefits.[11] Failure to take steps to make those changes, on discovering the failure to document, also in my view amounts to a breach of the implied duty of good faith (i.e. to not, without reasonable and proper cause, conduct themselves in a manner calculated to destroy or seriously damage the relationship of trust and confidence between employer and employee), which in a pension context can apply to employers' obligations to deferred members and pensioners.[12] It is not strictly a contractual test.

158. The Employer points to Mr H no longer being an employee of the Employer, and the lack, as it sees it, of continuing obligations to Mr J. However, the position in relation to enforcement this contractual obligation is, to my mind, no different to the enforcement of post termination "non-compete" clauses or any other contractual obligation which is capable of continuing to exist once employment has ended. In the pensions context, it is similar to the ability of a former employee's ability to enforce an unfunded pension promise many years after that individual left employment.

159. For the reasons set out below at paragraphs 161-162 any claim in contract is not time barred and so I am able to direct that effect is given to the contractual promise.

160. I will consider further below whether Mr H had a right to increases or only a right to be considered for increases, and what obligation the Trustee and the Employer are under to provide pension increases.

If there was a contractual obligation to procure that mirror benefits are provided, am I able to direct a remedy for the breach of contract or does the Employer have a defence under the Limitation Act 1980?

161. Mr H was only told that the Employer would not provide increases on his pre-6 April 1997 benefits on 22 May 2017. Mr H made an IDRP complaint on 22 May 2018 and a formal complaint to TPO about this on 21 April 2020. The complaint was therefore made within the three-year time period under Regulation 5(1) of the Ombudsman Regulations as, for the reasons set out below, I consider that the breach of contract did not occur until 22 May 2017 (the date of the Quantum Announcement).

162. The Employer is correct that as a matter of law the Courts have held that it is not generally open to the Ombudsman to make a direction that a court could not make in relation to a breach of law or a complaint of maladministration (involving an infringement of a legal right), other than an award for distress and inconvenience. Accordingly, if a court would be required to give effect to a limitation defence under the Limitation Act 1980, I must also give effect to such a defence. However, as discussed, this does not prevent me from investigating and determining a complaint or dispute which would be time barred under the Limitation Act 1980 (see paragraph 137 above).

[11] *South West Trains v Wightman [1998] PLR 113; [1997] OPLR 249 at [102]*
[12] *See Imperial Group Pension Trust v Imperial Tobacco [1991] 2 All ER 597 (Lord Browne Wilkinson) and IBM UK Holdings v Dalgleish paragraphs 353 to 358*

163. The Employer argues that the latest possible date on which a breach of contract could have occurred is 10 June 1998, which is the date Mr H's contractual notice expired.

164. In my view (and I find as a matter of law), the Employer's legal analysis is not correct that the obligation on the Employer to procure that Mr H was granted mirror benefits under the New Scheme ended by Mr H giving notice in accordance with the terms of the contract. As noted previously, a contractual obligation to procure that Mr H is granted mirror benefits is capable of continuing to exist after the end of a contract which is terminated in accordance with its terms. Or, if a contractual pension promise is made by an employer to provide a pension from, say, age 60 while the individual is employed at, say, age 30, it is capable of continuing to exist contractually after he leaves service or retires.

165. The contractual agreement to provide the mirror benefits was in my view (and I find as a matter of law) a continuing obligation and not breached until much later.[13] In my view, any breach of contract would not have occurred until the Employer indicated that it would not provide the promised benefit on 22 May 2017 by issuing the Quantum Announcement.

166. Accordingly, any claim for breach of a contractual duty to procure that the promised mirror benefits are provided (including any increases) would not occur until 22 May 2017, which was the moment when Mr H was told that the Employer was not going to honour the commitment to provide LPI or mirror benefits. The leaving service benefits granted to Mr H under the Scheme did in fact mirror the benefits he would have received under the Previous Scheme, so there was no breach until at least 22 May 2017.

167. But even if I am incorrect, and the breach occurred much earlier on the basis that the reasonable time for implementing the obligation was more than six years before the date of making the complaint, this would only bar a 'damages' claim and not a claim for 'specific performance'. Section 36(1) Limitation Act 1980 disapplies the usual six-year contractual limitation period for any claim for specific performance or for other equitable relief[14].

[13] I recognise that the law is unclear about when there can be a continuing breach. In cases such as *Midland Bank Trust Co v Hett, Stubbs & Kemp* [1978] Ch 384 (a solicitors negligence case, where the breach of duty concerned a failure to register an option to purchase land) it was argued that the duty must have been to register the option within a reasonable time and that period had elapsed more than six years before the date the action was brought. However, Oliver J held that the only duty on the solicitor was to effect a valid registration of the option. Consequently, the breach occurred only at the moment when this became impossible. In contrast, *Bell v Peter Brown & Co* [1990] 2 QB 495 took a different approach, albeit on a different set of facts. Here, the negligence took the form of failure to obtain a declaration of trust in respect of a matrimonial home and register a caution. The settlement occurred in 1978 but the claim was not made until 1987. On the contract point, it was held that the contract action accrued in 1978, as this was the date of the breach. It was not correct, the court said, in that case to say there was a continuing breach which occurred each day. The case law in this area is helpfully reviewed in McGee's text on Limitation Periods (9th Edition) at 10:.034-10-038 whose conclusion was that a judgement needs to be made in each case as to whether there is the necessary continuing quality about the obligation. In this case I am satisfied that there is such a necessary continuing quality.

[14] Except in so far as any time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940. It has been confirmed in *P&O Nedlloyd BV v Arab Metals Co, The UB Tiger* [2005] EWHC Civ 1717 [2005] 1 WLR 3733 that the usual contractual limitation of 6 years under section 5 does not apply by analogy under section 36(1) to a claim for specific performance. It follows that there is no applicable limitation period for bringing a claim for specific performance for a breach of contract.

168. On being notified that the Employer was not willing to give effect to its contractual obligation to provide mirror benefits (including increases), and that a correction exercise would be carried out, under basic contract law Mr H had two options if he went to court:

    a) to affirm the contract and seek specific performance of the contract; or

    b) if the breach was sufficiently serious, to seek damages.

169. In his complaint to the Ombudsman, Mr H has effectively sought a remedy equivalent to specific performance of the contract, with a remedy equivalent to damages as an alternative remedy if specific performance is not available. I therefore do need to consider what is the most appropriate remedy in the circumstances of the case, given that I have discretion as to the form of remedy I can offer under section 151 of 1993 Act (as long as the court is capable of offering the same remedy in similar circumstances).[15]

170. It used to be the case that specific performance would generally only be granted where damages were not an appropriate remedy. In more recent cases the courts now ask whether specific performance was the most appropriate remedy in the circumstances of each case[16], and whether specific performance will do "more perfect and complete justice than an award of damages"[17].

171. In the current case, in my view specific performance is the most appropriate remedy, and damages will not provide the same level of justice as directing the Employer gives effect to the promise to provide increases under the New Scheme. Justice can be best served by ensuring that the promised mirror benefits are provided through the New Scheme. It would be difficult to quantify what increases the Employer would grant under the increase rule (see below), particularly where the Employer has to make decisions about the level of increases to be granted from time to time, and to buy out equivalent benefits on this basis.

172. In *Henderson v Stephenson Harwood* [2005] 03 PBLR – [2005] EWHC 24 (Ch), Park J held at paragraphs 40-48 that the then Ombudsman could direct a form of conditional specific performance by directing that an employer provide the former employee with deferred membership of the Stephenson Harwood pension scheme if the Ombudsman considered the remedy was more appropriate than damages. This was even where, unlike the current case, the remedy had not been specifically sought by the applicant. The case therefore recognises that a remedy equivalent to specific performance is an appropriate remedy that the Ombudsman has power to direct in a pension case, and a court will not generally interfere with such a direction, even if monetary damages was an option the then Ombudsman considered.

[15] See the helpful review of specific performance as a remedy in Chitty on Contracts 33rd edition at Chapter 27:011 – 27-209 in particular 27:15 and 27:16.
[16] For example in *Cohen v Roche* [1927] 1 KB 169
[17] *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349 at 349 (and see subsequent proceedings [1975] 2 Lloyds Rep 373) and also *Araci v Fallon* [2011] EWCA Civ 668 at [42]

173. Compensation for breach of contract is not in my view the most appropriate remedy in this type of situation, where there is a direction making power as to the level of increase to be provided from time to time and I do not consider a sum for liquidated damages would be an appropriate remedy in the circumstances.

Are the Employers and the Trustee estopped from arguing that Mr H is entitled to the promised benefits?

174. Given my conclusion that there is a contractual obligation to provide the promised benefits I have not gone on to consider the issue of estoppel by convention in any detail. I would, however, note that in my view this may be one of the unusual cases where estoppel by convention may apply in the pensions context. In particular, it was clear that the Trustee, the Employer and Mr H all acted on an agreed assumption that they had different rights to those to which they were entitled to under those documents, and in the expectation that the Employer would document them properly in due course. They also conducted their relationship on the basis of this continued assumption - as demonstrated by SBJ's confirmation (on behalf of the Employer and Trustee) that Mr H was indeed entitled to these benefits.

The Trustee's obligations – is the Trustee under an obligation to provide 'mirror' benefits to Mr H, or only to consider providing increases?

175. The Employer argues, among other things, that as the various increase changes announced in:

a) the May 1988 Announcement, the February 1997 Announcement; and

b) the announcements issued to existing members of the New Scheme and transferring members of the Previous Scheme in 1997,

were never documented, the Trustee is only obliged to provide the benefits set out in the 1986 Rules of the New Scheme. Moreover, the Rules of the Previous Scheme do not give a right to increases, only a discretion to be considered for the increases.

176. The New Scheme Trustee also contends that neither:

a) the memorandum from Mr Bissell to Mr H on 28 November 1987, which was sent by the Employer; nor

b) the statement from SBJ dated 22 December 1997 confirming Mr H's benefit entitlement under the New Scheme,

can bind the Trustee to provide the promised benefits or give rise to an estoppel against the Trustee, as neither constitute a valid rule amendment (as rule amendments could only be made by the Employer). The question of whether those documents are sufficient to establish a separate contract claim against the Employer was not a matter within the scope of Mr H's IDRP complaint against the Trustee

which relates to his benefits under the Scheme. On that basis, and in accordance with Counsel's Opinion, the Trustee is of the view that it has no obligation to pay 'mirror benefits' to Mr H (whatever those mirror benefits may be).

177. The evidence I have seen is that Mr H was paid benefits by the Trustee, in the New Scheme, on the basis he was entitled to the other 'Special Terms', other than in relation to the pension increases. This is notwithstanding those benefits not being, specifically, provided for in the New Scheme's rules. The Trustee has confirmed (see Appendix 2) that Mr H was recorded in the Scheme administration records as being in a special category of membership. It is my understanding from the documents that the Trustee has not sought to recover the difference between Mr H's special benefits and the basic 1/60th accrual benefits he would have been entitled to if he had been granted benefits as a standard member of the New Scheme. This, I assume, is because that Trustee has augmented Mr H's benefits, with the agreement of the Employer, so he will receive the higher of his "corrected benefits" (as increased from time to time in relation to the part of the benefit subject to statutory increases) and the pension in payment at the date of the correction exercise. The only issue currently in dispute, I understand, is whether LPI increases should be granted to the benefits transferred in from the Previous Scheme.

178. However, I am not convinced that the Trustee has no power to pay increases in respect of benefits granted in respect of the period up to 1 January 1998.

179. This is because, the past service benefits paid to Mr H would also have been granted under the Transfer in power. The Transfer in power under Rule 16 of the 1986 Rules has two limbs. Broadly:

a) the Member shall be entitled to receive out of the Scheme such further benefit as the Trustee (who will be the administrator for tax purposes) shall consider to be justified by the said transferred sum; or

b) alternatively, the Member may be granted additional years of Pensionable Service under the Scheme.

178. In this rule, the first limb appears to be the 'default' position, with additional years of Pensionable Service under the Scheme in the second limb a discretionary alternative. In Mr H's case, his benefits are quite different from those of members covered by the then existing benefit structure under New Scheme. The evidence we have from the SBJ statement and Mr Bissell's letter is that, at least in respect of past service, he was granted mirror benefits to those he was entitled to under the Previous Scheme. On that basis he cannot have been granted additional years of Pensionable Service, as the credit would not correspond to, or "mirror", his entitlement under the Previous Scheme in relation to pensionable service up to date of transfer. It would amount to a significant reduction in the value of those benefits if he were only entitled to accrual at 1/60th as opposed to a two thirds pension promise. This finding is also consistent with the evidence from the New Scheme administration records that Mr H was recorded as being in a special category of membership

179. Evidence of the benefits granted to Mr H in relation to past service can also be seen from the subsequent leaving service statement issued to him very shortly after transferring. We also have a near contemporaneous letter from SBJ, who were the administrators and actuaries to the Scheme at the time (so would have had ostensible authority to act on behalf of the Employer and the Trustee), confirming that he was to be granted mirror benefits. We also have evidence that the past practice of the Previous Scheme at the point of transfer was to grant LPI increases.

180. The transfer in rule is broad enough to allow benefits to be provided in a different form to those contained in the main body of the rules. In Mr H's case, there is extensive indirect evidence from which it is reasonable for me to infer that the Trustee did exercise this transfer in power to accept the transfer, as it accepted the transferred in sum paid by the Previous Scheme trustees, part of which related to Mr H. The Trustee has, since then, been paying benefits in a different form to the main body of the New Scheme's rules, seemingly in accordance with that power. Accordingly, I find that the benefits are being provided under the first limb of the transfer in rule and therefore the Trustee is required to provide mirror benefits under that rule to those provided for Mr H as a Special Member under the Previous Scheme. This includes, to the extent that Mr H has a right to any increases (or to be considered for increases) under the Previous Scheme, increases in respect of pre-6 April 1997 pensionable service.

181. Moreover, the Trustee would be estopped in my view from arguing in relation to Mr H's claim to be entitled to the promised benefits in relation to the transfer in, that it did not, as a matter of fact, exercise its power to grant mirror benefits given that it accepted the transfer in with, on the balance of probabilities, knowledge of the content of the announcements via their agents SBJ who was advising both the Employer and the Trustee.

182. I accept that in relation to the period of pensionable service from date of joining the New Scheme until Mr H left pensionable service, Mr H's benefits would be governed by the New Scheme rules (in the absence of a valid rule amendment or augmentation so he was entitled to special terms, a legally effective estoppel against the Trustee, or a subsequent retrospective amendment to or augmentation of his benefits).

183. The corollary of this finding is that there are no limitation issues in relation to any breach of trust claim if the Trustee fails to provide mirror benefits (which I will discuss further below). Under section 21(1)(b) of the Limitation Act 1980, no period of limitation shall apply to an action by a beneficiary to recover from a trustee trust property in the possession of the trustee. This would potentially cover an obligation to provide the increases, if indeed there is an obligation to provide these increases (see below for further discussion of these issues). See paragraphs 364 to 381 of *Lloyds Banking Group Pension Trustees v Lloyds Bank* [2021] 010 PBLR and paragraphs 56 to 74 *Punter Southall Governance Services Limited v Jonathan Hazlett* (Ch) [2021] 047 PBLR (078).

What benefits did the Employer and/or the Trustee promise to provide Mr H with, in terms of increases?

184. The next issue I need to consider, is what increases Mr H is entitled to under the Previous Scheme rules - and therefore what increases he was promised by the Employer contractually, and/or by the Trustee under the Transfer in rule in respect of pre-6 April 1997 pensionable service. This is a difficult question and depends on how the existing Rule 8.2 increase rule should be construed. It is a key issue. As I have decided that there is an obligation to provide 'mirror benefits' (and in this case, we are only looking at the increase provisions for Mr H), we still need to determine the nature of the 'mirror benefit' that needs to be provided.

185. In my view, the letter from Mr Bissell and the other documentation issued to Mr H at the time of transfer places a contractual obligation on the Employer to procure that his benefits granted in the New Scheme at the point of transfer would mirror those in the Previous Scheme (subject to the changes relating to the contracting out basis). To the extent that these benefits, which appear to have been paid, have not been documented they still need to be properly documented and paid in accordance with the properly documented rule.

186. The evidence shows that the Previous Scheme provided Retail Price Index increases capped at 5% on each 1 April (or occasionally higher) after the date the pension came into payment on the excess over GMP. This increase was set for all pensioners from time to time and was notified to members. There is also evidence from Mr H's leaving service statement and also the response from the Trustee at Appendix 2, that the New Scheme continued to provide a minimum of Retail Prices Index increases on excess over GMP capped at 5% on benefits attributable to pensionable service up to the transfer date of 1 January 1998 for Previous Scheme members who transferred. For benefits attributable to pensionable service on and after 1 January 1998 the increases provided were the statutory increases as described in paragraph 62. Existing New Scheme members benefits who were members before the merger and the harmonisation of benefits continued to be increased (once in payment) at the rate of 3% per annum on pension attributable to pensionable service up to 6 April 1997.

For the period from 6 April 1997 to 5 April 1998 statutory increases (CPI capped at 5%) with a 3% pa underpin were payable to these members[18]

187. There is a note in the summary of Special Benefits issued to Mr H which stated:

"ESCALATION

After retirement, the pension in payment will be increased at the rate of 5% per annum compound or the change in Retail Prices Index, if lower. After State Pension Age (65, for men, 60 for women) escalation will only apply to that part of the pension in excess of the Guaranteed Minimum Pension (GMP) The State Pension Scheme will provide for increases to the GMP by reference to any rise in prices.

...

Further details of the benefits above will be found in the main Pension Scheme booklet which you should refer to as necessary."

188. The statement of Special Benefits therefore refers to the Scheme booklet, which in turn refers to the rules, and states that the Scheme booklet is subject to the rules. The reference to the fact that pensions will be increased at the rate of 5%, or RPI if less, therefore cannot give Mr H a right to those increases if the rules do not provide for this.

189. The increase provisions are, as noted previously, contained in Rule 8.2 of the 1992 Rules. At the point of transfer the increase rule provided:

"8.2 Increases in Member's pension
On each 1 April that part of the Member's pension under rule 3 which exceeds the Member's Guaranteed Minimum Pension shall increase at such percentage rate per annum compound as may be fixed from time to time by the Trustees at the direction of the Principal Employer and advised in writing to Members. The whole of any pension payable to the Member before State Pensionable Age shall increase at such percentage rate per annum compound as may be fixed from time to time by

[18] The Employer argues in its response dated 16 August 2024 that my finding reached in my Preliminary Decision that there is evidence that the Scheme continued paying LPI increases for Previous Scheme members including Mr H is incorrect as in fact Mr H received 3% increases. The Employer relied in part in reaching this conclusion on paragraph 28 of the Instructions sent to leading counsel, that the basis of administration until the correction exercise took place was that members were entitled to increases of 3% on pension earned by service prior to 6 April 1998 and to increases "in line with inflation" subject to a maximum of 5% on pension earned by subsequent service on and from 6 April 1998. It is important to remember however that the focus of the instructions to counsel was primarily in relation to existing New Scheme members. My understanding is that this statement in the instructions is referring to the position in relation to New Scheme members who were previously members of the New Scheme before the merger. It does not refer to the position of members, such as Mr H, who transferred from the Previous Scheme. The Trustee has subsequently clarified that Mr H was misclassified as always having been a New Scheme member (see Appendix 2), and initially granted a 3% increase from 1 April 2015, so I now agree that Mr H was in fact (albeit on the basis of a mistake) paid 3% p.a. increases, and not RPI capped at 5% on increases in excess of the GMP for benefits attributable to pre 97 pensionable service in respect of 5/12ths of a year from 1 April 2015. The increases were then suspended until the outcome of the correction exercise was known, However, the evidence from the Trustee in Appendix 2 confirms that in relation to the other transferred in members until the correction exercise there was a practice of granting RPI capped at 5% on the excess of GMP. This is also what Mr H was told he would receive at date of transfer of his benefits, and in his leaving service statement, even if in practice a mistake was then made and he was misclassified as always having been a New Scheme member for the purposes of the increase rule. I therefore remain of the view that there was a practice of granting RPI capped at 5% on the excess over the GMP in relation to pre-1 January 1998 service for transferred members, and it can be imputed from this that the practice in the Previous Scheme of granting such increases continued in the New Scheme for transferred members until the date of the correction exercise.

> the Trustees at the direction of the Principal Employer and advised in writing to Members up to 1 April falling immediately before the day on which the Member reaches State Pensionable Age. If on any 1 April a Member's pension has been in payment for less than one year, the increases will be adjusted in proportion to the period during which it has been payable."

190. The Employer is correct that the fact that the rules of the Previous Scheme were amended, with retrospective effect from 6 April 1997, by a later 20 October 1999 deed replacing the Previous Scheme rules, to give members a right to increases at RPI capped at 5% on the excess of the GMP, does not give Mr H such a right. Pensioners would only be entitled to increases in accordance with any previous directions made under Rule 8.2 (or any replacement mirror Rule 8.2).

191. Rule 8.2 requires the pension (or elements of it) "…shall increase at such percentage rate per annum compound as may be fixed from time to time by the Trustees at the direction of the Principal Employer and advised in writing to Members up to 1 April …". I do not unfortunately have a copy of any formal direction from the Previous Employer under this Rule 8.2, fixing the rate of increase, but I do have evidence from the SBJ report (which compared the benefits in the two schemes) that at the time of transfer increases of RPI capped at 5% were being provided to Previous Scheme members at the time of transfer. This was also the rate which was shortly afterwards subsequently formally documented in the replacement rules of the Previous Scheme. Similarly, I also have evidence in the form of the Supplement and 1990 Booklet indicating that increases of RPI capped at 5% were being provided (which also go to the requirement in the Rules that the rate fixed should be notified to the Members in writing).

192. In *Entrust* (as noted in paragraph 70) it was said that in determining whether a particular discretion was exercised, it is necessary to examine all the relevant secondary evidence, and a court is not necessarily assisted by any presumption of regularity. However, if it is concluded that on the evidence that trustees did operate a discretionary policy there may be modest scope for the application of the presumption of regularity in relation to more formal issues such as whether a valid decision to adopt a policy had been taken. In *Shannan v Viavi Solutions UK* [2018] (CA) Lady Asplin agreed at [88] with Henderson J 's analysis in *Entrust* that the presumption of regularity is no more than a rebuttable statement, founded on common sense, of the inference which it would normally be appropriate to draw in a given situation where primary evidence is lacking. She also agreed that it is reflected as to formality rather than intention.

193. I am satisfied in the current case that I can reasonably infer, on the balance of probabilities, on the surrounding circumstances that a direction from the Previous Employer to provide increases capped at RPI capped at 5% was made and in force in the Previous Scheme at the time of transfer.[19]

Employer's interpretation of the Rule

194. The Employer notes first that Rule 8.2 states that:

> "… that part of the Member's pension…which exceeds the…Guaranteed Minimum Pension shall increase at such percentage rate …as may be fixed from time to time by the Trustees at the direction of the Principal Employer and advised in writing to Members"

195. It contends that the following words in Rule 8.2:

a) "at such percentage rate";
b) "as may be fixed from time to time"; and
c) "by the Trustees at the direction of the Principal Employer"

operate as conditions to the words "...shall increase…"

196. The Employer further argues that the conditions mean that a pension in payment under the Previous Scheme (not under the New Scheme) would have increased but only if the Principal Employer of the Previous Scheme (not the Employer) had:

a) chosen at any particular point in time to use Rule 8.2, which the Principal Employer was able to do as Rule 8.2 was a discretionary power;
b) fixed a percentage rate to increase pension in payment; and
c) directed the Trustees of the Previous Scheme to apply an increase.

197. If the Previous Employer did not do all of these three things, a pension in payment under the Previous Scheme in excess of guaranteed minimum pension would not have increased.

198. The Employer further contends that as Rule 8.2 "makes it clear" that the Previous Employer was able "from time to time" to apply an increase, the Principal Employer had the flexibility to choose:

a) which rate of increase to apply at any one point in time;
b) to apply a different rate of increase at a different point in time; and
c) not to apply any rate of increase at a different point in time to the same pension for the same member or other beneficiary.

[19] Please see comments in the footnote to paragraph 186 above which address the additional comments of the Employer made after the issue of the Preliminary Decision.

199. The Employer argues that Rule 8.2 only makes sense as a discretionary power which the Previous Employer was able to choose to use to apply an increase to a pension which was already in payment under the Previous Scheme at the point in time when the increase was actually paid.

200. The Employer further argues that Rule 8.2 did not, when Mr H was a member of the Previous Scheme, create a beneficial interest or expectation that the discretionary power would be exercised in his favour to apply any increase to his pension if it came into payment under the Previous Scheme.

201. Moreover, Rule 8.2 does not somehow now create a beneficial interest or expectation that a discretionary power should be exercised in Mr H's favour to provide any increase to pension in payment under the New Scheme.

Mr H's interpretation of the Rule

202. Mr H's lawyer originally took the position that Rule 8.2 required the pension to be increased each year as it provided for annual increases to pensions in payment, relying on the statement that pensions "shall increase".

203. Mr H has subsequently clarified the position and now argues:-

a) The governing rules of the Previous Scheme under which he worked and accrued his benefits clearly prescribed that annual increases to pension shall be applied each year, albeit at the discretion of the employer and trustee.

b) The employer and trustee obligation under the Previous Scheme, and by extension the New Scheme, was to consider, each year, increases to pensions in payment. This appeared to have been disregarded since 2017.

204. Mr H is therefore not arguing that he has a right to the increases, but rather a right to be considered for the increases in each of the years from 2017 onwards.

Correct construction of Rule 8.2

205. Rule 8.2 is not clear. If the draftsperson of the rule intended that the Trustee is simply required to follow the direction of the Principal Employer, and so has no role in setting the amount or timing of the increases, the rule could have been drafted without any reference to the Trustee at all. The words shown in square brackets below could have been struck through:

> "On each 1 April that part of the Member's pension under rule 3 which exceeds the Member's Guaranteed Minimum Pension shall increase at such percentage rate per annum compound as may be fixed from time to time by [*the Trustees at the direction of*] the Principal Employer and advised in writing to Members. The whole of any pension payable to the Member before State Pensionable Age shall increase at such percentage rate per annum compound as may be fixed from time to time by

> [*the Trustees at the direction of*] the Principal Employer and advised in writing to Members up to 1 April falling immediately before the day on which the Member reaches State Pensionable Age."

206. Also, it is difficult to reconcile the words "shall increase at such percentage rate per annum compound", which indicate that an increase must be granted and the words "as may be fixed by the Trustees at the direction of the Principal Employer", which indicate that the Trustee has some form of discretion in the process of fixing the increases, albeit following the directions of the Principal Employer (with my emphasis in each case). Similarly, it is also difficult to reconcile the words "shall increase" (and placement of those words in the overall clause), with an interpretation of the rule which would permit the Principal Employer to give no increase at all - as the natural meaning of "shall increase" would not include granting no increase. A "zero increase" is not an increase.

207. The Courts have given guidance as to the interpretation of pension trust deeds in a series of cases including *Wood v Capita Insurance Ltd* [2017] UKSC 24; AC 1173; *Barnardo's V Buckinghamshire* [2018] UKSC 55 paragraphs 13-18; *Britvic Plc v Britvic Pensions* [2021] EWCA Civ 867 at 29 and 33 (**Britvic**) and *De La Rue v De La Rue Pension Trustee* [2022] 014 PBLR 46-48.

208. In *Britvic*, Sir Geoffrey Vos MR emphasised the importance in a pensions context of starting with the language used and avoiding, if possible, a strained meaning. He said at [29]:

> "As it seems to me, however, the approach indicated by, at least, Rainy Sky, Arnold v Britton, Wood v Capita, and Barnardo's is clear. In construing a pension scheme deed, one starts with the language used and identifies its possible meaning or meanings by reference to the admissible context, adopting a unitary process to ascertain what a reasonable person with all the background knowledge reasonably available to the parties at the time would have understood the parties to have meant. If, however, the parties have used unambiguous language, the court must apply it (see Lord Clarke at [19] in Rainy Sky), and the context of a pension scheme deed is 'inherently antipathetic to … [giving] some strained meaning to … the words used' (Lord Briggs at [22] in Safeway, approved by Barnardo's at [15])."

and at [33]:

> "Moreover, the process of corrective construction adopted, in the alternative, by the judge at [137] is only normally adopted where there really is an obvious mistake on the face of the document. There is no obvious mistake here as there was, for example, in Mannai as to the date or in Doe d. Cox v Roe as to the name of the public house. The objective observer might well think that the power could have been more felicitously drafted, but that is not enough to allow the court to depart from the clear language, on the unequivocal authority of Rainy Sky and the later Supreme Court decisions I have cited. That is particularly so when the rules of a pension scheme are being interpreted."

209. Therefore, in interpreting the rule case law indicates that I should start with the language used in the rule and identify its possible meaning or meanings by reference to admissible context, adopting a unitary process to ascertain what a reasonable person with all the background knowledge reasonably available to the parties at the time would have understood the parties to have meant. If the parties have used unambiguous language the court (or the Ombudsman) must apply that interpretation.

210. There were many schemes which in the period before 6 April 1997 gave trustees, and/or employers, or trustees with employer consent, the discretion to grant increases to protect members' benefits being eroded by inflation. The increases were often not 'hard coded' into the rules, so as to avoid having to fund the hard coded increases and/or enabling one of the parties to change the level of increase to reflect the funding position of the scheme. Up until 1994 many schemes had significant surpluses.

211. A possible (and my preferred) construction of Rule 8.2, which gives a reasonable meaning to the words "shall increase" and the words "as may be fixed from time to time" included in the rule, and explains the inclusion of the reference to trustees, is that:-

    a) The purpose of the rule was to increase members' pensions in payment, to protect the value of member's pensions over time. The percentage rate of increase could be adjusted (for a number of reasons, perhaps to reflect the level of inflation, and/or the level of funding in the Previous Scheme).

    b) There is a requirement to increase pensions each 1 April in line with the previous rate of increase "fixed" by the Principal Employer (a zero increase is not permissible as if the increase rate is set at zero there is no increase). This reflects the wording of the rule that requires, first that the pension "shall increase", at, secondly, a rate "as may be fixed from time to time".

    c) However, the words "as may be fixed from time" are intended to give the Principal Employer the sole discretion to change the rate of percentage increase from a previously fixed rate of increase, to start from a future 1 April.

212. In my view, the reference to the "Trustees" has been included in the Rule as it is the Trustee who will have to pay the increases out of Scheme assets when directed by the Principal Employer. However, the Trustee has no discretion at all as to timing or amount of any refixing of the increase rate.

213. In relation to the Employer's contention that Rule 8.2 does not create a beneficial interest or expectation that the discretionary power would be exercised in his favour, in my view it is not correct that no increase has to be provided at all. This is not in my view consistent with wording of the rule.

214. A similar question of construction arose in the *Britvic* case where the court had to decide whether the wording of that particular rule would permit the employer to

decide that a zero increase should be provided. The wording of the increase rule was, however, distinguishable from the Previous Scheme's increase rule as it had two limbs and provided that:

a) each pension under the Plan increases in each year after it starts to be paid; except

b) the part of a pension which exceeds any guaranteed minimum pension in payment is increased on 1 October in each year.

The rate of increase is the percentage increase in the Retail Prices Index during the year ending the previous 31 May but subject to a maximum of 5 per cent. [in relation to Pensionable Employment up to and including 30 June 2008 and a maximum of 2.5 per cent. in relation to Pensionable Employment on and from 1 July 2008] (or any other rate decided by the Principal Employer).'

215. The Court of Appeal in *Britvic* concluded that notwithstanding the requirement for an 'increase' found in the first limb of the rule, it could still accommodate a zero increase when the rule was read as a whole. This was because "even without the employer selecting an alternative rate, the first part of [the second limb] could generate a rate of 0%. This would be the case if RPI were negative for the relevant 12 months" and, as a result, "it would be odd if the employer could not specify a 0% rate under the second part of the rule". (see paragraphs 44-46).

216. The wording of the increase rule in the Previous Scheme is however quite different from that in the Britvic Scheme. On plain textual analysis it seems to provide that an increase shall be granted. Therefore, I do not consider as a matter of construction that under the wording of Rule 8.2 in the New Scheme a zero increase could be granted. I do though accept a very low increase might be granted if that is otherwise consistent with a lawful operation of the increase rule (see below). I note however that the Employer still contends that a zero increase would be possible on the basis of Britvic.

217. In turn, the Employer would be required to consider fixing the rate of increase from time to time, which, for the reasons just discussed, could not be zero. In deciding the percentage rate, the Employer would also be subject to the following legal obligations in relation to the exercise of the Replacement Increase Rule:

a) first, to exercise the direction making power as to the percentage amount and timing of payment for the purpose it was granted (which would remain in force until a new direction was made and could not be zero); and

b) secondly,
   i. in exercising the direction making power to have regard to all relevant factors and no irrelevant factors;[20] and
   ii. not come to a conclusion which no reasonable employer could come to.[21]

218. Moreover, the power must be exercised in accordance with the Employer's implied duty of good faith, which is not to act "irrationally or perversely" which, in this context, is equivalent to acting in a way which no reasonable employer would act in the circumstances in question. [22]

What is the Employer required to do to provide mirror increases?

219. The Employer is correct that no direction as to the level of increases to be applied can have been made under the New Scheme rules as they have not yet been amended to include an equivalent increase rule.

220. However, as noted above, my view is that the Employer contracted to procure that Mr H should be provided with mirror benefits to those Mr H would have been entitled to in the Previous Scheme. The Trustee has also, in my view, granted 'mirror' benefits under the transfer-in rule of the New Scheme.

221. There is indirect evidence that there was a direction in force under the Previous Scheme which required at least RPI capped at 5% increases to pensions in payment and at the point of transfer increases. Members had been notified of the fact that their pensions would increase at this level in the past and it was confirmed in relation to the announcements issued at the time of transfer that the Scheme was providing increases of RPI capped at 5% at the date of transfer. Also, the fact that the New Scheme administrators granted increases capped at 5% for transferred in service is evidence that they were proceeding on the assumption that the Previous Scheme was providing such increases at the point of transfer.

222. If Mr H is to be provided with the mirror benefits he was promised, he should have been granted the increases at the rate of the existing direction under the Previous Scheme, unless or until a further direction was made under the new replacement Rule 8.2 changing the level of increase (which cannot be made with retrospective effect). The Employer has not yet made an alternative direction. Had the Employer given effect to the contractual promise it made to Mr H, this power would have been inserted in the New Scheme rules and, although Mr H would have commenced membership of the New Scheme on the basis that his pension relating to transferred in service increased at RPI capped at 5%, the Employer would then have had an

[20] *Braganza v VBP Shipping* [2015] UKSC 17, Baroness Hale at [30] & *IBM United Kingdom V Dalgleish* (CA) at [39]-[40] [45]
[21] *Braganza* and *IBM (CA)* again at [27] to [38]
[22] See discussion in *Bradbury v BBC* EWCA Civ 114 (CA) at [53] where Gloster LJ concluded that Warren J had (at first instance) been correct to consider both the *Braganza* perversity test and the trust and confidence test when considering whether had been a breach of the duty of good faith.

opportunity to make a further direction to change the rate of increase with effect from a future 1 April.

223. The Employer would need to consider at regular intervals whether to exercise the rules again following an earlier direction or make a new direction if for example:

a) member's benefits were eroded by higher rates of inflation (and by how much); and/or

b) the funding position of the Scheme was eroded.

These would be relevant factors in determining the level of increase to be granted. [23]

224. In relation to the exercise of the Employer's implied duty of good faith, it is established that this is not a duty to act reasonably and an employer can have regard to its own financial interests while still acting in accordance with this duty. The Employer would however have to genuinely consider exercising the power at regular intervals having regard to the purpose for which it was conferred even if it decided not to change the rate of increase on a particular 1 April.

225. The Employer would, when notifying Mr H of any decision to set a new rate of increase, have to give Mr H sufficient information about the reasons it exercised the power, to enable him to satisfy himself the decision had been made lawfully.

Assorted additional submissions by the Employer

226. I agree with Mr H that the fact that he was a member nominated trustee is irrelevant to the complaint.

227. I also agree with Mr H that the fact it took him time to put together all relevant documentation is irrelevant to the complaint.

228. I agree with the Employer that it is not liable for the acts of the Previous Employer. However, this does not affect my analysis of whether there has been a breach of contract.

229. I agree with the Employer that the Previous Employer did not purport to exercise its discretionary power to give Mr H a 'right' to a pension increases at the rate of RPI capped at 5%. However, on the balance of probabilities, I am satisfied that the Previous Employer did exercise its direction making power to grant increases at the

[23] I note that in relation to the Employer's additional submissions dated 16 August 2024 on my conclusions in the Preliminary Decision (repeated above) that the Employer contends that in exercising its discretion it is not limited to the consideration of the rate of inflation and the funding of the New Scheme but can take into account its own financial interests and the potential effect of any increase on its current employees and its business generally. I do accept that these may be relevant factors in setting any future increase rate. However, in exercising the power the Employer does need to exercise the power in accordance with the purpose for which the increase rule was originally included which in my view was to provide a degree of inflation protection (at the time there were no statutory increase provisions) if the funding of the scheme permitted.

rate of RPI (capped at 5%) before Mr H transferred his benefits (see above). Accordingly, if, as I have concluded, the Employer contractually agreed to provide mirror benefits it had an obligation to continue to provide equivalent increases as if such direction were in force until the Employer makes a new direction.

230. I agree that Mr H ceased to be an employee of the Employer on 10 June 1998. However, the fact that Mr H ceased to be an employee of his Employer on 10 June 1998 does not mean that the Employer cannot have continuing contractual obligations going forward 'and/or obligations to act in good faith to a former employer (See above).

231. I agree with the Employer that the rules of the Previous Scheme have not governed Mr H's rights since 1 January 1998. However, this does not affect any obligation the Employer entered into to procure that mirror benefits are provided and/or any right to benefits granted to Mr H under the transfer in rule.

232. I agree with the Employer that Mr H made his own free choice to transfer his benefits to the New Scheme. However, this choice was made on the basis that he was told by the Employer that mirror benefits would be provided. Also, under the transfer in rule, I am satisfied that the Trustee granted Mr H mirror benefits in relation to the period of pensionable service up to the date of transfer (see above). Failure to provide mirror benefits in respect of his pensionable service up to the date of transfer is accordingly in breach of the rules of the New Scheme (see above).

Maladministration and breaches of law by the Employer and/or the Trustee in relation to the matters that are the subject of Mr H's various complaints and disputes

233. To sum up, there has been maladministration and breach of law by the Employer in failing to:

a) procure that Mr H is entitled to mirror benefits in the New Scheme (including those relating to increases) to those he was entitled to in the Previous Scheme with effect on and from the date he joined the New Scheme in accordance with the contractual commitment given to Mr H at the time he agreed to transfer his Previous Scheme benefits to the New Scheme;[24] and

b) document the contractual commitments given to Mr H for a period of almost 20 years and, on discovering the failure, seeking to avoid those commitments in breach of contract.

234. The above failures have resulted in Mr H having to spend a considerable number of years trying to find all relevant documents relating to the pension promise and

[24] I acknowledge that there is an obligation to provide the promised benefits in relation to the period of Mr H's pensionable service up to 1 January 1998 under the transfer in rule.

seeking to resolve the increase issue and has caused him significant distress and inconvenience since the identification of the issue on 22 May 2017.

235. I consider that the level of maladministration by the Employer justifies an award for serious injustice of £1,000.

236. There has been breach of trust by the Trustee in failing to administer the Scheme in accordance with the New Scheme rules in relation in respect of the transferred in benefits following the issue of the Quantum Announcement.

237. Mr H has also sought an award for maladministration in relation to the decision by the Trustee to purportedly take away his right to increases from 22 May 2017. I do not however consider that there has been maladministration by the Trustee in taking the approach it did from 22 May 2017 given that it took advice from Counsel about the legal position and the approach it should take in relation to the failure to fully document Mr H's benefits. It did also engage with the Employer about its failure to provide the promised benefits. It is not necessarily maladministration to follow legal advice which subsequently turns out to be incorrect (in whole or part).

238. I do, with hindsight, consider that it would have been preferable if the Trustee had gone to court for directions in relation to the correct course of action to follow and, in particular, the issue of whether Mr H and other members had a contractual right to enforce the benefit promised made to them. However, I do not consider that the failure to do so amounts to maladministration given the advice received from Counsel.

Form of Determination and Directions

239. The Employer is concerned that any directions I make should not create practical problems for the implementation of the buy-out of the New Scheme benefit with Aviva (the **Buy-Out**), the buy-in having been completed a while ago. In particular in buying out benefits an insurer will require any type of a discretion relating to discretionary increases to be considered as part of the buy-out process.

240. The Employer asked for a direction setting out Mr H's current entitlement under the Scheme, reflecting the conclusions at 236 as to the Trustee's duties in administering the Scheme (which identifies an existing breach of trust on the ground that the Trustee is already obliged to give effect to the promised mirror benefits under the transfer in rule). The Employer considers that such a declaration would be an appropriate basis for the formulation of a revised benefit specification for the purposes of the Buy-out and would avoid the need for any documentation changes. The Trustee, Mr H and Employer were given sight of the Preliminary Decision setting out his entitlement and have made various comments. I have amended the final Determination to reflect these comments. The Trustee has, in particular, confirmed that, subject to a specific issue about the calculation of the contingent spouse's pension which I have confirmed in the Determination is to be calculated by reference

to the pre-commutation pension increased up to date of death, they are comfortable with the figures in the other sections based on my findings made in the Preliminary Decision.

241. The Employer noted in its submissions on my Preliminary Decision (and its draft directions) that if I could set out Mr H's entitlement the Employer and the Trustee would then be in a position to resolve the question of how the benefit specification should be deal with any future discretion over the award of increases for the purposes of the Buy-Out. The Employer has confirmed, for reassurance, and despite its contention that the power to determine the rate of increases under the original Rule 8.2 (as set out above in these representations), enabled it to set a zero increase going forward (which I do not accept for the reasons set out above) that in the event it does choose to change the current pension increases in respect of benefits earned by Mr H's pre 6 April 1997 service from any future 1 April, it would not at the present moment look to reduce those increases to less than CPI capped at 2.5% (which is the rate of pension increases set out in the benefit specification for the Buy-Out applicable to members' benefits earned through pensionable service in the Scheme after 6 April 2005 onwards – so would not strictly apply in respect of Mr H, whose pensionable service ended on 10 June 1998).

242. I am able to determine as a matter of law the benefits that I have concluded Mr H is entitled to as a result of the exercise by the Trustee of the transfer in power. However, this is not the only reason I have reached the conclusion that Mr H is entitled to mirror benefits. I also do still need (albeit this is taking a belt and braces approach given that there is a small period of service not governed by the transfer in rule) in the circumstances to direct that the Employer shall procure that benefits are secured on this basis to give effect to the contractual promise.

243. The Employer in its submissions on my Preliminary Decision asked for confirmation that nothing in the Determination will impact on any members who are not party to the Determination. That is correct, in that the only dispute I am considering in my Determination is the dispute between Mr H (who is, it would seem, in a unique factual position as a Special Member), the Trustee and the Employer – this is not a representative action. Under section 151(2) of the 1993 Act any determination by the Ombudsman of a complaint or dispute, and any direction given by him, under section 151(2) of the 1993 Act is final and binding on:

    a. the person by whom, or on whose behalf, the complaint or reference was made; and

    b. any person (if different) responsible for the management of the scheme to which the complaint relates (which for present purposes includes the Trustee and Employer); and any person claiming under a person falling within paragraphs 151(a)-(c) of the 1993 Act.

Determination and Directions

244. I determine that under the rules of the Scheme (in respect of the issues raised in this Determination, and subject always to there being no further errors being identified resulting in Mr H's pension being less than it should have been if it had been calculated correctly) Mr H is entitled to a pension of £27,704.23 per annum (See Appendix 2) such pension commencing with effect from 17 October 2014, increasing as provided for below, and with the attaching benefits payable on the basis that his benefits under the Scheme mirrored the benefits under the Previous Scheme including without limitation a 50% contingent spouse's pension payable after his death. The 50% contingent spouse's death in retirement pension shall be calculated by reference to what Mr H's pension would have been at date of death (after any increases from date of retirement to date of death) on the assumption that he had not commuted any of his pension at retirement to provide a commutation lump sum. I also determine that Mr H was entitled to a pension commutation lump sum of £182,432 at the date of his retirement.

245. I further determine that:-

    a. From Mr H's State Pension Age, £3,348.25 of Mr H's pension relates to Pre-6 April 1988 Guaranteed Minimum Pension and this portion of Mr H's pension will not increase in payment.

    b. From Mr H's State Pension Age, £3,231.22 of Mr H's pension relates to Post 6 April 1988 Guaranteed Minimum Pension and this portion of Mr H's pension will increase in payment in accordance with statutory requirements;

246. I further determine that until 1 April 2025:-

    a. In relation to the period up to Mr H's State Pension Age any pension payable to and in respect of Mr H that is attributable to pensionable service

        i. up to 1 January 1998, shall increase in accordance with the increase in the Retail Prices Index (all items), or 5% if less, on each 1 April with the first such increase after the date Mr H's pension came into payment being pro-rated. The increase in the Retail Prices Index (all items) shall be calculated by reference to the RPI (all items) increase figures for the period of 12 months ending on the immediately preceding September, for the part year from the date of his retirement on 17 October 2014 to 1 April 2015, and increases should continue to be granted on each subsequent 1 April by reference to the applicable increase in the Retail Prices Index (all items) over the period of 12 months from September to September ending immediately before the applicable 1 April. A check shall also be carried out to ensure that the benefits payable to or in respect of Mr H which are attributable to

pensionable service on or after 6th April 1997 to 1 January 1998 are increased at a rate not less than required by statutory requirements;

ii. from 1 January 1998 to 10 June 1998, shall increase in accordance with the applicable statutory increase requirements.

b. In relation to the period on or after Mr H's State Pension Age the pension payable to or in respect of Mr H in excess of his or his spouse's Guaranteed Minimum Pension that is attributable to pensionable service

i. up to 1 January 1998, shall increase in accordance with the increase in the Retail Prices Index (all items), or 5% if less, on each 1 April with the first such increase after the date Mr H's pension came into payment being pro-rated. The increase in the Retail Prices Index (all items) shall be calculated by reference to the applicable increase in the Retail Prices Index (all items) over the period of 12 months from September to the September ending immediately before the applicable 1 April. A check shall also be carried out to ensure that the benefits payable to or in respect of Mr H which are attributable to pensionable service on or after 6th April 1997 to 1 January 1998 are increased at a rate not less than required by statutory requirements;

ii. from 1 January 1998 to 10 June 1998 shall increase in accordance with the applicable statutory increase requirements.

247. I further determine that from 1 April 2025 (or any future 1 April thereafter) the rate at which the pension payable to or in respect of Mr H that is attributable to pensionable service up to 1 January 1998 (or the pension in excess of the Guaranteed Minimum Pension once Mr H reaches his State Pension Age) may, instead of continuing to increase as above, increase on each 1 April at such percentage rate per annum compound as may be fixed by the Trustee at the direction of the Employer (as Principal Employer of the New Scheme) in like manner to that in which the trustee at the direction of the sponsoring employer of the Previous Scheme had power to fix the rate of increases under Rule 8.2 of the Previous Scheme (as it existed immediately before the date Mr H transferred to the New Scheme). For the avoidance of doubt, any increase so granted shall be subject to any minimum applicable statutory increase requirements applicable to benefits attributable to post 5 April 1997 pensionable service. This determination shall however not preclude the Trustee buying out Mr H's benefits on the basis that the rate of increase in force at the date of completion of the buy-out remains in force for the remainder of the life of Mr H and his spouse or other dependant following the Buy-Out.

248. I direct that to the extent that any amendment to the rules or augmentation of Mr H's benefits under the New Scheme is required to give effect to the benefits payable to and in respect of Mr H as set out above the Employer shall amend the Scheme rules or augment Mr H's benefits to give effect to the contractual promise it made to Mr H at the date he transferred his benefits to the New Scheme as described above.

249. I further direct that within 28 days of this Determination the Trustee shall pay Mr H any arrears of pension and commutation lump sum which arise as a result of failure to provide a pension of £27,704.23 from 17 October 2014 (a pension of only £27,364.92 was initially provided – see Appendix 2) and all the subsequent accumulated increases- thereon which should have been paid as described above on the corrected pension of £27,704.23 from 17 October 2014 until the date of this Determination. The Trustee shall be given credit for any increases which were provided under the Scheme after 17 October 2024 (whether as a result of Mr H being incorrectly classified as an original New Scheme member or otherwise) and also credit for the £156.05 shortfall payment already made. Any arrears of the original pension which should have been paid from 17 October 2014 and any arrears of any subsequent pension increases which should have been paid on the corrected pension of £27,704.23 shall be paid to Mr H together with interest at the base rate from time to time declared by the Bank of England from the due date of each payment until date of settlement. The corrected pension (taking into account any increases which should have been granted up to the date of this Determination) shall then be paid going forward with further increases being granted in future calculated in the manner set out above.

250. I direct that within 28 days of this Determination the Employer shall pay Mr H the sum of £1,000 for the serious non-financial injustice (distress and inconvenience) sustained as a consequence of its maladministration.

Dominic Harris
Pensions Ombudsman
14 November 2024

Appendix 1

Various documentation relating to Mr H's joining the new scheme and transferring his benefits from the old scheme

Letter dated 27 November 1995 from Olivetti UK Ltd to Mr H

"Dear [Mr H]

The Olivetti Group is reorganising its legal structure in the UK on 1st January 1996 and from that date the present business activities of Olivetti UK Ltd will be split between 3 companies.

I am now writing to advise you that your employment is being transferred on 1st January 1996 to Olivetti Lexikon UK Limited which will incorporate the present commercial activities of Triumph Adler UK Ltd and the Supplies and Office Products Division of Olivetti U Ltd

Fuller information on the structure and organisation of this company will be given to you in due course. In the meantime, if you have any queries regarding this formal notification please speak to your manager or to Derek Boettger in Human Resources Department in Putney.

Yours sincerely

JP Edward

Director of Human Resources"

Letter dated 29 November 1995 from Olivetti UK Limited

"Dear [Mr H]

Following my letter of 27th November, advising you of your transfer to Olivetti Lexikon UK Ltd on 1st January 1996, I am now writing to outline the situation with regard to your Pension arrangements.

At the present time the Company's advisers are examining the Pension Scheme in operation at Triumph Adler UK Ltd (the core company from which Lexikon will be formed) in order to determine the practicality of transferring your entitlements to that scheme. Under review is the possibility of all of Lexikon's employees becoming or remaining members of the Olivetti Scheme.

This process involves a lot of detailed actuarial work and no decision is expected to be reached before the middle of the first quarter of 1996.

As an interim measure, arrangements have been made for you to continue as a member of the Olivetti UK Scheme up to 31 March 1996, and your new employer,

Lexikon will collect your employee contributions and contribute its employer contributions, forwarding those to the Scheme Administrator.

Please be assured that as soon as more information is available on this subject you will be notified.

Yours sincerely

JP Edward

Director of Human Resources”

Letter dated 24 June 1996 from Olivetti UK Limited

“Olivetti UK Pension Fund

Further to our letter of 29/11/95, I now write to advise you that a decision has been taken in principle to progress with your transfer of your Olivetti Pension to the Triumph Adler scheme operated by Olivetti Lexikon

To allow time for the necessary arrangements, calculating transfer value and getting your signed authority, your membership of the Olivetti UK Pension Scheme has been extended until the end of September 1996.

We will shortly be writing to you with appropriate details

Yours sincerely

DM Graham

Director of Human Resources”

Memorandum dated 1st July 1996

To [Mr H], [Mr D], [Mr R]

From A Titford

Date 1 July 1996

Ref AT/amh/Pen 1-7

Re Olivetti UK Pension Fund

I enclose letters both for you and your staff regarding the above. You will see from [Mr M’s] letter that the effective date for the transfer of pensions into Olivetti Lexikon has been extended, although a decision in principle has now been taken.

We will obviously keep you informed of progress.

Regards

Alan Titford

NB Letters already distributed

31 October 1997 announcement to Current A and B Plan Members of the Olivetti Pension Scheme

"From Glynn Bissell

With effect from 1 December 1997 the Company is pleased of offer you membership of the Olivetti Lexikon Pension and Life Assurance Scheme in place of your current membership of the Olivetti Pension Scheme

You will note from the attached Announcement that the Olivetti Lexikon Scheme will offer similar benefits to those enjoyed under the Olivetti Pension Scheme. To join the Scheme please complete and return the attached Application Form by **21 November 1997**

The basis of contracting-out of SERPS under the Olivetti Lexikon Scheme differs to that under the Olivetti Pension Scheme. If you decide to join the Scheme, the attached Notices are relevant:

- Notice of intention to surrender the existing contracting-out certificate;
- Notice of intention to elect to contract out (mixed benefit schemes)

…"

Announcement to Current "A" Plan Members of the Olivetti Pension Scheme

"Introduction

As you are aware, Olivetti UK Limited relinquished its interests in Olivetti's office product services division with effect from 1 January 1996. Following this restructure, it has been agreed with the Olivetti Pension Scheme Trustees that with effect from 1 December 1997 you will be eligible to join the Olivetti Lexikon UK Pension and Life Assurance Scheme on similar terms that you enjoyed under the Olivetti Pension Scheme (the existing pension scheme). No further benefits will be earned in the existing pension scheme after 30 November 1997. However, Pensionable Service will be treated as continuous if you agree to transfer the benefits you have earned up to this date to the Olivetti Lexikon Scheme which is outlined below.

What benefits will the Olivetti Lexikon Scheme provide?

A pension for you on retirement

A lump sum life assurance benefit

A pension for your spouse and children on death.

Am I eligible to join?

Current members of the existing pension scheme are automatically eligible for membership of the Olivetti Lexikon Scheme.

To join the Scheme, simply complete the attached Application Form.

If you do not join the Scheme on 1 December 1997 or subsequently opt out, entry/re-entry will be at the Trustee's discretion and you may be required to provide medical evidence.

…

What increases are applied to pensions in payment?

Your pension earned from 1 December will be increased in line with inflation subject to a maximum of 5% pa. The pension earned up to 30 November 1997 will receive increases in the same way as the existing pension scheme.[Ombudsman emphasis in red]

Your spouse's post-retirement pension will increase similarly.

…

General Information

The Olivetti Lexikon Scheme is contracted out of SERPS on a Protected Rights basis. Broadly, in practice this means that the saving (known as a rebate) in National Insurance contributions that both you and the Company enjoy from the Scheme being contracted-out will be notionally invested, together with an age-related rebate paid at the end of each tax year by the Department of Social Security. Ultimately, your pension benefits will be the greater of the formula pension set out above and the value of your Protected Rights plus £1 pa for each year of Pensionable Service that you complete after 1 December 1997.

All benefits are payable in accordance with the Rules and are subject to Inland Revenue limits.

The Company expects to maintain the Scheme indefinitely, but reserves the right to amend or terminate the Scheme at any time.

Any questions?

Should you have any questions concerning the Announcement, please contact Mr Glynn Bissell at Olivetti House

October 1997

Memorandum dated 28 November 1997 sent to Mr H

"To [Mr H]

From Glynn Bissell

Date 28 November 1997

With effect from 1 January 1998, the Company is pleased to offer you membership of the Olivetti Lexikon UK Pension and Life Assurance Scheme (the Scheme) in the place of your current membership of the Olivetti Pension Scheme.

You will note from the attached announcement that the [New Scheme] will offer similar benefits to those enjoyed under the [Previous Scheme]. The Announcement should be read in conjunction with the [Previous Scheme] Special Membership Supplement. In other words your membership terms will mirror those under the [Previous Scheme].

However in accordance with legislation, on retirement prior to age 60 the part of your benefits accrued after 1 January 1995 that is deemed to be Protected Rights cannot be paid until age 60.

To join the [New Scheme] please complete and return the attached Application Form by 21 December 1997.

The basis of contracting out of SERPS under the [New Scheme] differs to that under the Olivetti Penson Scheme. If you decide to join the attached Notices are relevant.

- Notice of intention to surrender the existing contracting out certificate
- Notice of intention to elect to contract-out (mixed benefit scheme"

Extract from announcement on benefits attached to Memorandum

"What increases are applied to pensions in payment?

Your pensions earned from 1 January 1998 will be increased in line with inflation subject to a maximum of 5% per annum. The pension earned up to 31 December 1997 will receive annual increases in the same way as under the existing pension scheme.

Your spouse's post-retirement pension will increase similarly."

British Olivetti Ltd Retirement Benefits Plan – Summary of Executive Member Benefits

"ESCALATION

After retirement, the pension in payment will be increased at the rate of 5% per annum compound or the change in Retail Prices Index, if lower, After State Pension Age (65, for men, 60 for women) escalation will only apply to that part of the pension in excess

of the Guaranteed Minimum Pension (GMP) The State Pension Scheme will provide for increases to the GMP by reference to any rise in prices.

Further details of the benefits above will be found in the main Pension Scheme booklet which you should refer to as necessary."

Member Booklet Extract for new scheme dated 11 November 1999

"Pension increases

In respect of pre-6 April 1988 GMP no increases by the Scheme will be made. In respect of post 5 April 1988 GMP increases in line with the Retail Prices Index (RPI) to a limit of 3% pa compound. In respect of Excess Pension Increases in line with the RPI to a maximum of 5% pa compound."

Application for Membership Mr H

"Olivetti Lexikon UK Ltd Pension and Life Assurance Scheme

Application for Membership

To be completed by the employee and returned to Mr Glynn Bissell – please use block capitals

Surname [Mr H's surname]

Forenames [Mr H's forenames]

Date of birth [Mr H's date of birth completed]

I hereby elect for membership under the Scheme and authorise deduction of contributions from my Pensionable Salary.

I wish/[do not wish – struck through] my pension benefits earned up to 31 December 1997 under the [Previous Scheme] to be transferred to the [New Scheme]

Please delete as appropriate

Signed and dated

To be completed by the Employer

Payroll ……

National Insurance Company …….

Date joined Scheme

Pensionable Salary

Signed…….. Dated ……”

New Scheme booklet dated 2006

“PENSION INCREASES

Leavers after 31 December 97

Benefits in respect of service up to 31 December 1997 were increased by 5% per annum compound. Benefits earned after 31 December 1997 are increased in line with Limited Price Indexation requirements.

Benefits in respect of former Olsy Pension Scheme were increased in line with Limited Price Indexation requirements.”

Letter from SBJ To Mr H 22 December 1997

“Dear [Mr H]

Olivetti Lexikon UK Ltd Pension and Life Assurance Scheme

Further to our meeting on 17 December 1997, I have now reviewed our records and would confirm that on transferring your membership to the above Scheme your accrued and future Pensionable Service benefits would mirror those that would have been available under the Olivetti Pension Scheme.

Yours sincerely

Ian Goodwright”

Extract from Statement of Deferred Benefits – dated 11 November 1999 under cover of letter dated 16 November 1999 from SBJ Ian Goodwright

“The GMP will increase at 6.25% compound for each complete tax year from your date of withdrawal at Normal Retirement Date (NRD) The Excess Pension will increase in line with the Retail Prices Index to a maximum of 5% pa compound for each complete years from date of withdrawal to NRD.”

Extract from Report and Accounts for New Scheme 1998 onwards to 2017

“Benefits in respect of former members of Olsy Pension Scheme were increased in line with Limited Price Indexation requirements.”

CAS-50353-Y4X5

Retirement Quotation 14 August 2014

"Your pension up to age 65 will increase in line with the changes in Retail Prices Index (RPI) to a maximum of 5% pa. From age 65 the following increases will apply

From age 65, £3348.25 of your pension will relate to Pre 6/4/88 ~Guaranteed Minimum Pension and this portion of our pension will not increase in payment

From age 65 £3231.32 of your pension will relate to Post 6/4/88 Guaranteed Minimum Pension and this portion of your pension will increase in payment in line with the cost of living subject to a maximum increase of 3% pa compound

The remainder of your pension will continue to increase in line with changes in the Retail Prices Index (RPI) to a maximum of 5% pa."

Quantum Announcement dated 22 May 2017

"Following a comprehensive review of the Scheme Rules by the Scheme's legal advisers it has been determined that the revaluation of pensions in deferment, the equalisation of pension benefits and increases to pension in payment have not been granted in accordance with the Rules of the Scheme. Further details of the review and the outcome can be found in the appendix which accompanies this letter.

We have therefore recalculated the pension due to you using the correct basis. This calculation shows that the pension you are currently receiving of £27,707.04 per annum is lower than the correct pension you should be receiving,

The Trustees have agreed to increase your pension to the correct level with effect from the monthly pension instalment due on 1 July 2017.

Pension increases

The correct basis for the application of increases to pensions in payment is as follows

GMP accrued prior to 6 April 1988 – Nil

GMP accrued after 5 April 1988 - CPI capped at 3%

Pension in excess of GMP accrued prior to 6 April 1997 – Nil

Pension accrued between 6 April 1997 and 5 April 2005 CPI capped at 5%

Pension accrued after 5 April 2005 PI capped at 2.5%

Appendix – Summary Benefit Position

Background

The Trustees have sought legal advice on a number of aspects of the Scheme Rules. The Trustees received advice from Queen's counsel covering three areas of the Scheme Rules – revaluation of deferred pensions, equalisation of retirement ages between men and women and increases to pensions in payment. In summary this advice stated that the Scheme should be administered in accordance with the 1986 rules without reference to any purported amendments, subject to any overriding legislation.

The Trustees have conducted extensive discussions with the Sponsoring Employer, Olivetti, on how best, and most fairly to members, to implement the outcome of this review. Summary details are now set out below

Pension increases in payment

The correct level of pension increases has been outlined in the covering letter. As a result of reviewing the correct pension increase basis it has been concluded that the majority of pensions have been increased at a higher rate than should have been applied under the Rules. This change will reduce the pensions for those affected

Overall impact

All pensions will now be re-calculated to allow for all three elements of the review, resulting in a Corrected Pension. The overall effect will depend on each member's individual circumstances. Some member's Corrected Pension will be higher, some members' Corrected Pension will be lower.

However, the Trustees have been able to agree with Olivetti that no member's current pension in payment will actually be reduced as a result but rather it will be frozen at the current level unless and until such time as the Corrected Pension exceeds the current pension."

Appendix 2

Approach taken to rectification of benefits as set out in email from Trustees' lawyers dated 10th September 2024

We have set out below the increase rates that were applied for Mr H up to the point of rectification in 2017:

Original pension

- Pension at date of retirement in Oct 2014: £27364.92 (post commutation)
- Increase in April 2015: 5/12ths of (i) 3% fixed on pre-6 April 1997 excess, (ii) CPI min 3% max 5% on 6 April 1997 to 5 April 1998 excess, (iii) CPI max 5% on post 5 April 1998 excess and (iv) fixed 3% pre and post 88 GMP (although Mr H was under GMP Age)
- Pension was not increased in April 2016 or April 2017 in order to avoid creating further potential overpayments of pension

Rectified pension

- Pension was recalculated from first principles where it was discovered that one additional year of revaluation need to be applied. This created a revised pension at date of retirement of £27704.23 (post commutation)
- Increases were then retrospectively applied in line with counsels opinion: (i) nil increases on pre-6 April 97, (ii) CPI max 5% on 6 April 1997 to 5 April 2005 excess, (iii) statutory increases on pre and post 88 GMP (although Mr H was under GMP Age for increases up to April 2017)
- Pensions increased in April 2015 and in April 2016 and April 2017 which, together with the uplift due to an extra year of revaluation, accounts for the underpayment of pension at the point of rectification. Revised pension at 1 April 2017 was £27727.08 and the arrears payment made was £156.05
- Because the pension was underpaid there was no need to freeze future increases to offset overpayments (as may have been the case for other transferred members).

As noted previously, we understand that Mr H was categorised on the scheme administration records as an ex-Lexikon member following the transfer (though there is no evidence to suggest that was in fact the case), which explains why 3% increases were paid on pension accrued pre 6 April 1998 (albeit only for a part of a year in his case).

Also as noted, Mr H was also shown on the scheme administration records as being in a special category of membership, which entitled him to improved benefits. Rectification was undertaken for other transferred members as follows:

Original pension

- Pension at date of retirement
- Increase rates at each April of: (i) RPI max 5% on pre-1 December 1997 excess, (ii) CPI max 5% on post 30 November 1997 to 5 April 2005 excess, (iii) CPI max 5% on post 5 April 2005 excess and (iv) statutory increases on pre and post 88 GMP

- Where relevant, pension was not increased in April 2016 or April 2017 in order to avoid creating further potential overpayments of pension

Rectified pension

- Pension was recalculated from first principles
- Increases were then retrospectively applied in line with counsels opinion: (i) nil increases on pre-6 April 97, (ii) CPI max 5% on 6 April 1997 to 5 April 2005 excess, (iii) CPI max 2.5% on post 5 2005 excess, (iv) statutory increase on pre and post 88 GMP
- Pensions increased in April 2015 and in April 2016 and April 2017 at which point:
  - If there was a net underpayment, an arrears payment was made;
  - If there was a net overpayment of pension, further freezes on future increases are applied until such time as the correct pension catches up with the frozen pension.