Ombudsman's Determination

Applicant	Mr S
Scheme	Clariant Pension Plan (**the Plan**)
Respondent	Clariant Trustees Limited (**the Trustee**)

Outcome

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

Complaint summary

2. Mr S has complained that the rules governing the Plan provide for fixed annual increases of 5% on his pension but the Trustee has restricted the increases to 3% based on obsolete HMRC limits.

Background information, including submissions from the parties

3. Clause 15 of the Barrow Hepburn Group Limited Pension and Assurance Scheme Second Definitive Trust Deed and Rules, 31 December 1971, (**the 1971 Rules**) stipulates that:-

> "(a) The pension payable under the A Fund to a member on retirement at Normal Retirement Date shall not exceed £3,000 per [year] (or such higher figure as will not affect the approval of the Scheme under the 1970 Act less any pension to which he is entitled…and which have been approved under Section 208 of the Income and Corporation Taxes Act 1970…
>
> (d) The total retirement benefits payable under the Scheme to a Member on retirement before or after Normal Retirement Date shall not be so great as to prejudice the approval of the Scheme under the 1970 Act.
>
> (e) A Member's pension benefits may be increased after the date of retirement but not so as to cause the amount of such benefits to exceed the maximum permitted in the foregoing limitations increased in proportion to the increase in the cost of living since the date as shown by the [Retail Price Index]…"

4. Rule 1 of BTP Pension Scheme Fifth Definitive Deed and Rules, 16 November 1995 (**the 1995 Rules**) governing the Plan provides that:-

> …
> "**(d) Limitation of amount**
>
> Any benefits provided under the Scheme, and any other benefits or forms of benefit derived from them, shall be subject to such of the limits set out in Part II of the Schedule to the 1995 Rules as may be appropriate."

5. Part II of the Schedule to the 1995 Rules, (**the 1995 Schedule**) stipulates that:-

> "**Interpretation and Overriding Effect of Inland Revenue Limits**
>
> The provisions of the Inland Revenue limits override any other provisions to the contrary contained in the Trust Deed and Rules.
> …
>
> **Part 4**
> …
>
> **2. Increases of Pensions In Payment**
>
> The maximum amount of a pension ascertained in accordance with Part 1 or Part 2 of this Rule less any pension which has been commuted for a lump sum or the pension equivalent of any benefits in lump sum form and any pension surrendered to provide a Dependent's pension may be increased by 3% for each complete year or, if greater, in proportion to any increase in the Index since the pension commenced."

6. Schedule 1 of the Merger Deed relating to the bulk transfer of BTP Pension Scheme into Clariant Pension Plan dated 25 September 2003, (**the 2003 Merger Deed**), states that:-

> "**2. Transferring Scheme Deferred Members and Transferring Scheme Pensioners**
>
> Transferring Scheme Deferred Members and Transferring Scheme Pensioners are to be transferred under the GN16 procedure with effect from the Transfer Date and retain their existing benefit structure contained in the provisions of…the rules of the Transferring Scheme."

7. Before 6 April 2006 (**A-Day**), the Inland Revenue (**HMRC**) registered some occupational pension schemes for 'approval' which provided tax advantages conditional on scheme benefits being subject to limits set by HMRC. To acquire these tax advantages in full, a pension scheme had to be 'exempt approved' which allowed tax relief for the related employer, members, and the pension scheme itself. From A-Day the requirement for an exempt approved scheme to act in accordance with the HMRC limits was removed.

8. Mr S' membership of the Plan originated from initially having joined Barrow Hepburn Group Staff Pension Scheme in August 1963, following his employment with Barrow Hepburn Group.

9. In 1987 a company called BTP took over Barrow Hepburn Group.

10. On 1 November 1988, Barrow Hepburn Group Staff Pension Scheme was renamed BTP Pension Scheme following a merger involving the two schemes.

11. In 1996, the Plan was established by Clariant UK Limited, a subsidiary of Clariant AG.

12. In 1999, Mr S took his retirement benefits from BTP Pension Scheme.

13. In 2000, Clariant AG took over BTP.

14. On 1 October 2003, BTP Pension Scheme merged with the Plan in accordance with the 2003 Merger Deed.

15. On 25 April 2019, Barnett Waddingham the Plan's administrator (**the Administrator**) wrote to Mr S and confirmed that:-

    - A review of previous increases applied to his pension had been undertaken. This established that before A-Day, his benefit entitlement from occupational pension schemes was subject to HMRC maximum approved pension limits.

    - As his benefit entitlement in the Plan was accrued before A-Day, it remained subject to these HMRC limits. So, the annual increases applied to his pension in April each year would be limited to a minimum of 3% and a maximum of 5%, if the rate of Retail Price Index (**RPI**) increases calculated from the previous September was higher.

    - He had reached the HMRC limit in 2018 and would no longer receive 5% fixed annual increases. So, an annual increase of 3% had been applied in April 2019.

16. On 30 April 2019, Mr S emailed the Administrator and said he had not made any contributions for 20 years. So, it was unclear how any HMRC benefit limit could have been reached in 2018, and the related legislation this came under.

17. On 20 May 2019, the Administrator wrote to Mr S and said:-

    - As part of an annual pension increase exercise, checks are made on each member's payments to determine whether a cap on benefits has been reached. The pension at Mr S' date of retirement amounted to £25,871.28 a year while the HMRC maximum approved pension was £33,953.11 a year.

    - The HMRC maximum approved pension was based on 2/3rds of Mr S' final salary and service to a maximum of 40 years. A comparison was then made between the pension due under the Plan rules with fixed 5% increases against the HMRC maximum approved pension each year to check the limit had not been reached.

- Mr S’ benefits would have exceeded the resulting HMRC limit in 2018 when an uncapped annual pension would have amounted to £65,376.47 but the HMRC limit was £65,052.82 a year.

18. On 1 July 2019, the Administrator emailed Mr S to provide a link to HMRC’s IR12 (2001) Practice Notes (**the IR12 Notes**) regarding approved benefit limits before A-Day, and a copy of the 1995 Schedule.

19. On 15 July 2019, Mr S replied to the Administrator and said he had received confirmation from HMRC that there was no existing legislation limiting contributions in the way that the Administrator had suggested.

20. On 18 July 2019, the Administrator emailed Mr S and said:-

    - The limits set out in the IR12 Notes are no longer compulsory, but the Plan Rules are still based on that guidance when setting limits for benefits payable under the Plan.
    - Rule 1(d) of the 1995 Rules set a limit on retirement benefits and refers to the 1995 Schedule, which states, “The provisions of the [HMRC] Limits override any other provisions to the contrary contained in the Trust Deed and Rules.”
    - This meant that if any rate of increase in the Plan Rules would make the pension value higher than the maximum approvable limit set out in the IR12 Notes, then the rate of increase from the IR12 Notes must be applied.
    - As a 5% fixed annual increase would cause Mr S’ pension to exceed the maximum approvable pension set out in the IR12 Notes, the lower annual increase rate of 3% set out in Rule 1(d) and the 1995 Schedule is applicable.

21. On 19 July 2019, Mr S emailed the Administrator and complained that:-

    - He had received notification that the annual increase on his pension in 2019 was not 5% as had been guaranteed in the Barrow Hepburn Group Staff Pension Scheme Rules. Neither was a 5% increase applied in 2018. However, he had not previously been notified of any change that would have caused this.
    - The Administrator had suggested that his pension had reached its maximum in 2018, meaning he would no longer receive a 5% annual increase, so he would like a copy of the Barrow Hepburn Group Staff Pension Scheme Rules.

22. On 22 July 2019, the Administrator wrote to Mr S and said the issues raised had already been addressed in the email of 18 July 2019. However, Mr S could apply for his complaint to be considered by the Trustee under the Scheme’s Internal Dispute Resolution Procedure (**IDRP**).

23. On 29 July 2019, the Trustee received a complaint from Mr S under the IDRP stage one. In summary, Mr S reiterated his complaint of 19 July 2019 and added that:-

- Barrow Hepburn had made a ‘special’ arrangement under BTP Pension Scheme, which provided for fixed 5% annual pension increases. This was due to a large funding surplus which meant that BTP was subsequently able to temporarily suspend its contributions.

- The Trustee had acknowledged the existence of a ‘special’ arrangement under the BTP Pension Scheme but was unable to provide a copy of the related agreement. So, the Trustee does not know the terms of that agreement and cannot reasonably claim that there is now a cap on pension increases in the Plan.

- It was unclear why Barrow Hepburn would have formed an agreement with BTP to establish a new pension arrangement which had the same benefits structure as the previous scheme. So, the terms of the ‘special’ arrangement are important.

24. On 10 October 2019, the Trustee wrote to Mr S in response and said:-

- The 1995 Rules are such that any benefits payable under the Plan are subject to the limits set out in the 1995 Schedule. This provides that once a member has reached a limit set by HMRC, their pension can be increased by a maximum of 3% for each complete year, or the Retail Price Index (**RPI**) increase rate if higher.

- Mr S had reached the HMRC limit. So, the provisions of the 1995 Schedule are applicable and override the Plan Rule that would otherwise permit 5% annual increases to his pension.

- Although the legislation under which the HMRC limits applied subsequently became obsolete on A-Day, those limits were retained in the Plan Rules under which Mr S’ benefit entitlements are calculated. So, the HMRC limits are still applicable.

- Since Mr S’ complaint related to the way in which his benefits were calculated, the Trustee did not consider that any other conclusion could be reached at stage two of the IDRP. So, Mr S could take this response as being final under stage one of the IDRP and stage two of the IDRP, or appeal.

25. On 18 October 2019, Mr S appealed under the IDRP and said:-

- The Trustee had no longer relied on the suggestion that HMRC regulations prevented 5% increases from being applied to his pension and instead focused on the limits set in the obsolete IR12 Notes. He had received no prior notification that this would be the case, so it was unclear whether the Trustee had breached pensions legislation in that regard.

- BTP had once temporarily suspended its contributions on the basis that if the scheme subsequently became underfunded, BTP would make payments to address the funding deficit. At the time of his retirement BTP said his pension would increase by 5% per year. This remained the case until 2018. So, he would like to see a copy of the agreement made between Barrow Hepburn and BTP at the time of the takeover.

26. On 13 December 2019, the Trustee wrote to Mr S in response to his IDRP complaint and said:-

- The Barrow Hepburn Group Staff Pension Scheme became known as BTP Pension Scheme from 1988. Its rules at the time Mr S retired provided for 5% increases to pensions in payment for certain member categories. However, those increases were limited within the BTP Pension Scheme Rules to the greater of 3%, or in proportion with the RPI, once the member reached the HMRC limits.

- BTP Pension Scheme merged into the Plan in 2003. As Mr S was a pensioner at that date, his benefits including pension increases, continued to be calculated in accordance with the rules that had previously governed BTP Pension Scheme. This meant that the HMRC limits remained applicable.

- The HMRC limits were incorporated into the Plan Rules for members who ceased active service before A-Day. This is why Mr S' pension increases have been capped at the previous HMRC limit. Before A-Day, compliance with the HMRC limits set out in the IR12 Notes was a requirement for pension schemes with exempt approved status.

- From A-Day, legislation came into effect which removed the requirement for pension schemes to be operated in accordance with the HMRC limits for exempt approved status. However, due to the significant increase in liabilities this would have caused, the legislation permitted pension scheme trustees to maintain the existing limits.

- This is what the Trustee chose to do, and it is required to act in accordance with the rules governing the Plan. The legislation that removed the HMRC limits did not require the Trustee to notify members that these limits were being retained in the Plan, since there was no change to the way pension increases would be calculated.

- It had not been possible to locate a copy of the agreement made between Barrow Hepburn and BTP in November 1988. However, the Barrow Hepburn Trustee at the time was unlikely to have been a party to it. The Trustee's duty continues to be the administration of the Plan in accordance with its governing rules, in any case, and not any agreement between Barrow Hepburn and BTP.

- In the 1980s and 1990s it was common for employers to suspend their contributions temporarily if there was a funding surplus in their pension scheme. However, the Trustee's decision as to whether or not pension increases should be capped by HMRC limits was not determined with reference to any historic funding surplus, or whether employer contributions had been suspended previously.

- Any information provided to Mr S by BTP regarding fixed 5% annual increases being applicable did not override the Plan Rules nor change the legislative position that the increases to Mr S' pension had to be applied in accordance with the rules governing the Plan. So, a 3% annual increase cap had correctly been applied to Mr S' pension.

27. On 3 January 2020, the Trustee wrote to Mr S and said:-

- Having taken legal advice, it has been established that the decision to retain the HMRC limits in the Plan Rules was permitted under pensions legislation. So, the 3% annual increase cap applied to Mr S' pension was required to comply with the Plan Rules.

- Historically, application of the HMRC limits was a requirement for a pension scheme to obtain and retain exempt approved status. This has been set out in the Income and Corporation Taxes Act 1988. It required the HMRC benefit limits to be written into a pension scheme's rules otherwise HMRC could deny exempt approved status. Barrow Hepburn Group Staff Pension Scheme had been subject to HMRC benefit limits as written into its Scheme Rules from 1971.

- The pension arrangements for former Barrow Hepburn Group Staff Pension Scheme members are governed by the existing Plan Rules. The takeover agreement between Barrow Hepburn and BTP would not have set out the pension benefits structure for former Barrow Hepburn Group Staff Pension Scheme members. So, that document would not likely be a reliable source of information in place of the rules governing the Plan.

Mr S' position

28. Neither the Trustee nor the Administrator has provided any evidence of an annual increase cap that prevented him from receiving 5% annual pension increases. In 2018 and 2019 his pension did not increase by 5% as had been the case in previous years. However, he had not been informed of the change before it was implemented, or the reasons for the change.

29. Barrow Hepburn made a 'special' arrangement under BTP Pension Scheme for fixed 5% annual pension increases. This was because Barrow Hepburn Group Staff Pension Scheme historically had a funding surplus, which meant that BTP was subsequently able to suspend its contributions temporarily.

30. It did not make sense that Barrow Hepburn would have made a 'special' arrangement with BTP, which had the same effect as existed before the merger between Barrow Hepburn Group Staff Pension Scheme and BTP Pension Scheme. The Trustee had been unable to find the 'special' agreement. So, the Trustee did not know all the rules that would be applicable after the merger.

31. The Trustee’s position is that although the HMRC benefit limits for exempt approved schemes have been obsolete since A-Day, those limits were retained in the Plan Rules, and there was no requirement under pensions legislation to remove them.

32. HMRC has confirmed that there was no regulation which prevented fixed 5% annual pension increases being applied to his pension. So, the Trustee cannot now apply an annual pension increase cap under the Plan.

The Trustee’s position

33. The 1995 Rules governed BTP Pension Scheme at the time of Mr S’ retirement in 1999. Rule 1(d) of the 1995 Rules provides that "Any benefits provided under the Scheme and any other benefits or forms of benefit derived from them, shall be subject to such of the limits set out in Part II of the Schedule as may be appropriate."

34. Part II of the 1995 Schedule sets out the HMRC limits and Paragraph 2 in Part 4 of the 1995 Schedule provides that once a member has reached the HMRC limits their pension may be increased by a maximum of 3% for each complete year or, if greater, in proportion with RPI.

35. BTP Pension Scheme merged with the Plan in 2003. As Mr S was a pensioner at that time, his benefit entitlements, including annual increases continued to be calculated in accordance with the 1995 Rules. From A-Day the requirement for exempt approved schemes to act in accordance with HMRC limits was removed.

36. However, the A-Day legislation permitted pension scheme trustees to retain existing retirement benefit structures if they chose to do so. The Trustee took this option for members who had retired before A-Day. So, pension increases under the Plan continued to be limited to 3% or in line with the RPI once a member’s benefits had reached their HMRC limit.

37. HMRC pension increase limits have always applied to the schemes of which Mr S has been a member; originally Barrow Hepburn Group Staff Pension Scheme, then BTP Pension Scheme, and finally the Plan. The annual increases to Mr S' pension have been correctly applied in accordance with the Plan Rules.

38. Since April 2018, when Mr S’ pension reached the HMRC limit, his annual increases have been limited in accordance with those limits under the Plan Rules. Mr S is not now entitled to fixed 5% annual increases on his pension.

Adjudicator’s Opinion

39. Mr S’ complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator’s findings are summarised below:-

- When Mr S retired in 1999, he was a member of BTP Pension Scheme, which was governed by the 1995 Rules and subject to the 1995 Schedule. The provisions of the 1995 Rules are such that, "Any benefits provided under the Scheme, and any other benefits or forms of benefit derived from them, shall be subject to such of the limits set out in [the 1995 Schedule] as may be appropriate".

- The 1995 Schedule stipulates that, "The provisions of the [HMRC] limits override any other provisions to the contrary contained on the Trust Deed and Rules". Paragraph 2 in Part 4 of the 1995 Schedule provides that, "The maximum amount of a pension ascertained in accordance with Part 1 or Part 2 of this Rule…may be increased by 3% for each complete year or, if greater, in proportion to any increase in the [RPI] since the pension commenced."

- The BTP Pension Scheme merged with the Plan on 1 October 2003 in accordance with the 2003 Merger Deed, which stated, "Transferring Scheme Deferred Members and Transferring Scheme Pensioners are to be transferred…with effect from the Transfer Date and retain their existing benefit structure contained in the provisions of…the rules of the Transferring Scheme."

- So, the annual pension increase cap of 3% or the RPI increase rate, if higher, for members who had reached the HMRC limit was also incorporated into the Plan from the BTP Pension Scheme.

- The Administrator's letter of 20 May 2019 informed Mr S that a yearly 'pension increase exercise' was conducted to establish whether or not a member's benefit entitlement had exceeded their HMRC limit. In Mr S' case the Administrator had found that a 5% annual pension increase in 2018 would have caused a breach of the applicable HMRC limit.

- The Trustee has subsequently confirmed that the provisions of the rules governing the Plan, previously explained, have been correctly applied in limiting the annual increases on Mr S' pension to 3% since 2018. The Adjudicator did not agree with Mr S' assertion that neither the Trustee nor the Administrator has provided any evidence of an annual increase cap that prevented him from receiving 5% annual pension increases.

- The Trustee is required to act in accordance with the rules governing the Plan when determining a member's entitlement to annual pension increases. In the Adjudicator's view, there was no requirement for the Trustee to consider any 'special' arrangement between Barrow Hepburn and BTP when their pension schemes merged in November 1988, nor any historic funding surplus in Barrow Hepburn Group Staff Pension Scheme.

- Even had the Trustee found the 'special' agreement that Mr S has referred to, the Plan Rules would have overridden it. So, provision of this document would not change the fact that HMRC limits are applicable to the increases on Mr S' pension under the Plan Rules.

- HMRC has correctly confirmed that the benefit limits for exempt approved schemes became obsolete on A-Day. In the Adjudicator's view, the Trustee has also correctly concluded that there was no requirement under pensions legislation for the HMRC limits to be removed from the Plan Rules.

- Since the Trustee had used its discretion to retain the HMRC limits in the Plan Rules, there was no requirement to apply 5% fixed annual increases to Mr S' pension, having reached his HMRC benefit limit in 2018.

40. The Trustee accepted the Adjudicator's Opinion, Mr S did not, and the complaint was passed to me to consider. Mr S provided his further comments, which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr S.

Mr S' additional comments

41. There would have been no requirement for a 'special' agreement between Barrow Hepburn Group and BTP relating to the merger of Barrow Hepburn Group Staff Pension with BTP Pension Scheme in 1988, if the retirement benefits structure was intended to remain the same as had existed previously.

42. The loss of this 'special' agreement shows a lack of care by the Trustee. As a result of this, former Barrow Hepburn Group Staff Pension Scheme members could lose the intended continuation of fixed 5% annual increases on their pensions.

43. BTP was able to temporarily suspend its contributions to BTP Pension Scheme following the historic funding surplus that had previously existed under the Barrow Hepburn Group Staff Pension Scheme. However, members continued to make their normal contributions at that time. This shows how large the funding surplus must have been.

44. 'The changes under the 1995 Rules' also affected another pension scheme, but in that case the members were given sufficient time to withdraw their benefits if they wished to do so. However, it was only in the second year of an increase cap being applied to his pension in 2019 that he became aware of it.

Ombudsman's decision

45. Mr S submits that there would have been no requirement for a 'special' agreement between the Barrow Hepburn Group and BTP regarding the merger of the Barrow Hepburn Group Staff Pension with BTP Pension Scheme in 1988, if the retirement benefits structure was intended to remain the same as had existed previously.

46. Mr S has also complained that the loss of this 'special' agreement shows a lack of care by the Trustee. He said that former Barrow Hepburn Group Staff Pension Scheme members could lose the intended continuation of fixed 5% annual increases on their pensions as a result of this.

47. The Trustee is required to act in accordance with the Plan Rules. So, there was no requirement for the Trustee to consider the 'special' agreement that Mr S has referred

to. Even had this document been found, the Plan Rules would have overridden it unless what was provided in the document was incorporated into the Plan Rules. So, I do not consider any loss of the ‘special’ agreement to be significant in the way that Mr S has suggested. Similarly, the Trustee did not need to consider any historic funding surplus that may have existed under the Barrow Hepburn Group Staff Pension Scheme in determining whether Mr S was entitled to fixed 5% annual increases on his pension.

48. There is no evidence, that the Trustee used any subsequent funding deficit under the Plan as a reason for limiting the annual increases on Mr S’ pension. The Trustee has confirmed that Mr S’ benefit entitlements from April 2018 have been established based on HMRC annual increase limits under the Plan Rules, which originated from the Barrow Hepburn Group Staff Pension Scheme.

49. Mr S contends that ‘the changes under the 1995 Rules’ also affected another pension scheme, but in that case the members were given sufficient time to withdraw their benefits if they wished to do so. However, it was only in the second year of an increase cap being applied to his pension in 2019 that he became aware of it.

50. I note that HMRC benefit limits were referred to in the rules that governed the Barrow Hepburn Group’s pension arrangements before the 1995 Rules were implemented. In particular the 1971 Rules refer to a member having a maximum pension that would not affect the Scheme’s HMRC approval, which would then increase in accordance with RPI. These HMRC limits remained in place under the 1995 Rules that governed the BTP Pension Scheme when Mr S retired in 1999, having been retained following the merger with the Barrow Hepburn Group Staff Pension Scheme on 1 November 1988.

51. I find that there was no change under the 1995 Rules that caused the application of a HMRC annual increase limit to Mr S’ pension. The Trustee has simply exercised its discretion to retain existing HMRC limits under the Plan after A-Day, following the merger with the BTP Pension Scheme in 2003, as permitted under pensions legislation. So, the Trustee has correctly concluded that Mr S is not entitled to fixed 5% annual increases on his pension, having reached his HMRC limit in 2018. Also, there was no requirement for the Trustee to confirm the application of a HMRC pension increase limit until Mr S made enquiries regarding this point in 2019.

52. I do not uphold Mr S’ complaint.

Anthony Arter

Pensions Ombudsman
21 December 2021