

Ombudsman's Determination

Applicant	Mr N
Scheme	Sotheby's Pension Scheme (the Scheme)
Respondents	Trustees of the Sotheby's Pension Scheme (the Trustees) Sotheby's (the Employer)

Complaint Summary

1. Mr N's complaint concerns the part of his pension accrued prior to 6 April 1997 which is in excess of his Guaranteed Minimum Pension (**the Pre 97 Excess Pension**). He is unhappy that this element no longer receives increases in payment following the wind-up of the Scheme and purchase of a bulk annuity policy with an insurer.

Summary of the Ombudsman's Determination and reasons

2. The complaint is not upheld because Mr N was not entitled to pension increases as of right on the Pre 97 Excess Pension. Any increases that were granted in the past were discretionary and subject to the consent of the Employer.

Detailed Determination

Material facts

3. 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.
4. On 3 April 1978, Mr N joined the Scheme. Following his redundancy on 31 December 1998, he became entitled to deferred benefits.
5. I am aware that, in 2008, the Employer communicated to members of the Scheme its criteria for the payment of discretionary pension increases. The criteria related to the funding position of the Scheme and the performance of the UK company.

6. In August 2014, the Trustees sent Mr N an 'Important Message about Discretionary Increases'. This said that the Employer had changed its policy on discretionary increases to pensions in payment. The Employer had advised that, in future, such increases would only be granted in exceptional circumstances.
7. The Trustees said that they had communicated their unhappiness in relation to this to the Employer and had informed it that they would continue to request discretionary increases. The Employer agreed to consider such requests.
8. In November 2016, Mr N reached his normal retirement date at age 60, and his retirement benefits were paid from the Scheme.
9. On 3 July 2018, the Trustees purchased a bulk annuity policy in respect of the Scheme's pensioner liabilities from Just Retirement Limited (**Just**). Pension increases to the Pre 97 Excess Pension were not included in the policy as of right.
10. On 1 January 2022, the Employer triggered the wind-up of the Scheme. It said that there would be no further discretionary increases applied to pensions in payment.
11. On 23 January 2022, Mr N emailed the Trustees to raise a complaint. In summary, he said:-

- He was dissatisfied with the announced wind-up of the Scheme.
- The Trustees' stated intention to not provide an annual cost of living review of his Pre 97 Excess Pension meant he could no longer rely on the Scheme to provide the benefits promised when he joined.
- The Scheme booklet dated March 1978 (**the Booklet**) stated in 'Section E. Pension Increases after Retirement':

"It is the intention of the Trustees, as at present, to review the pensions being paid out of the Scheme and to adjust them from time to time in the light of economic conditions prevailing at the time of the review and provided the Scheme's resources permit."

- It also stated elsewhere in the Booklet that:

"The Scheme is constituted as a Trust for you and your dependants, and its assets will always remain quite separate from those of the Company."

and:

"The Company intends to keep the Scheme in force indefinitely, but changing circumstances may call for amendment or even termination of the Scheme and the Company must reserve the right to do so. Neither

amendment nor termination will reduce the value of the benefits secured for you prior to amendment or termination.”

- A letter of 6 May 1987 to Scheme members sent with the Scheme’s annual statement said:

“You are presently a member of a company scheme which has clearly defined benefits on which you can totally rely [...]”

12. On 24 March 2022, the Trustees provided their response to Mr N’s complaint which they had considered under the Scheme’s two-stage internal dispute resolution procedure (**IDRP**). They advised that his complaint had been escalated to stage two of the IDRP given the upcoming wind-up of the Scheme. They had not upheld Mr N’s complaint and, in summary, they said:-

- The Booklet provided a description of the benefits provided by the Scheme at the time it was issued in 1978.
- Mr N’s benefits from the Scheme were being secured by the purchase of an insurance policy (**the Policy**). The Policy would provide the same benefits as detailed in the Trust Deed and Rules that governed the Scheme (**the TD&R**). It was being arranged on the basis that all future pension increases, required as of right under the TD&R and legislation, would continue to be paid. This represented Mr N’s legal entitlement to the benefits that were due to him.
- There had never been a promise to increase Mr N’s Pre 97 Excess Pension. Any increase had always been described as discretionary, including in the Booklet and the TD&R. The Trustees could only provide a discretionary increase with the consent of the Employer.
- This element of Mr N’s pension would not receive increases after the wind-up of the Scheme. In three of the last five years, 2017, 2020 and 2021, no discretionary increase had been applied.
- The Booklet made it clear that the Scheme’s circumstances may change, and it may be terminated in the future. The reference to any termination not reducing the value of Mr N’s benefits referred to the benefits he was entitled to and not the possible exercise of a discretion.
- The Booklet made it clear that Mr N’s entitlement was governed by the TD&R and, in the event of any inconsistency, the TD&R prevailed.
- Its past correspondence to members provided no assurance that any discretionary increases would continue indefinitely.

13. On 15 June 2022, the Scheme's administrators, Lane Clark & Peacock LLP, wrote to Mr N concerning the transfer of his Scheme benefits to Just. It said:-
 - A split would take place creating individual policies for each member. These policies would initially be owned by the Trustees but would then be assigned to each member individually.
 - From June 2022, his pension would be paid by Just. The Employer would no longer make an annual decision on whether to grant discretionary pension increases.
 - The Employer had confirmed that it was not willing to make additional funding available to insure any future increases to members' pensions over and above their legal entitlement under the Scheme.
14. On 24 June 2022, the Policy was assigned direct to Mr N, securing his Scheme benefits with Just.
15. Mr N made the following additional submissions:-
 - The benefit of an inflation protected pension had been used as the justification by the Employer for poor or non-existent pay reviews.
 - Until 2008, with few exceptions, a discretionary increase had been agreed which recently had been linked to the rate of inflation.
 - He would like the Employer to purchase an insurance policy for him that provided pension increases linked to a recognised inflation measure.
16. The Trustees said that, since 1994, the TD&R had a discretionary increase provision giving them the ability to award discretionary pension increases. However, that provision always required the Employer to agree to the payment of such increases. Prior to that, increases would have been granted under the augmentation and/or special contributions provisions, all of which required the Employer's agreement.
17. Mayer Brown International LLP made the following submissions on behalf of the Employer:-
 - All the Scheme booklets state that increases on Pre 97 Excess Pension are discretionary. They also state that the booklets are intended as a guide and the TD&R take precedence.
 - Mr N had referred to the August 2014 letter, which made it clear that discretionary increases were likely to be awarded in more limited circumstances in the future.
 - It had noted Mr N's comments on inflation-proofed increases being used as a justification for poor or non-existent pay reviews. He had not referred to a specific

document or verbal representation made by the Employer in this respect. Even if it was said, there was nothing that constituted a clear representation, a promise or a guarantee that the practice of awarding discretionary increases would continue into the future. Such a guarantee or promise would contradict the TD&R and Booklet.

- The Employer was under no obligation to provide any further funding in relation to the provision of future increases on Mr N's Pre 97 Excess Pension.

18. I issued a Preliminary Decision on 30 May 2023. Mr N made further representations in response to that Decision.

Mr N's representations

19. Mr N submits:-

- As he was made redundant in 1998, his Pre 97 Excess Pension makes up almost the entirety of his entitlement from the Scheme. This element of his pension will no longer keep pace with inflation.
- He is disappointed by the Trustees' reliance on the TD&R, as this took no account of the intention of the Employer when it introduced the Scheme. He considers its intention at the time was to benefit staff. Throughout his employment, he had received regular communications informing him how good the Scheme was and how he would benefit from being a member. As a result, he had entrusted his family's financial future to the Employer. The communications included references to:
 - the Scheme helping members plan for a comfortable retirement, free from financial anxiety; and
 - while increases were not guaranteed, the Scheme having had an excellent record. For instance, between 1974 and 1988, increases on all pensions had been made each year, ranging between 5% and 10%.
- He had been led to believe that, while his Pre 97 Excess Pension may not increase each year, it would keep pace with inflation over time.
- Although he could not recall exactly when, he had a number of conversations with Sotheby's Personnel Director. He had been told that he should consider the Employer's contribution to the Scheme as being part of his compensation package and that securing his retirement income would be of long-term benefit. This was used as justification for why his salary could not be increased in the short-term, which was of little benefit to him in meeting his financial obligations at the time.

Conclusions

20. Mr N has complained that, following the wind-up of the Scheme, he no longer receives increases on his Pre 97 Excess Pension.
21. I have reviewed the provisions of the TD&R dated 30 March 2004. This was the governing document of the Scheme that was in force at the time that the wind-up took place. Within this document 'the Principal Employer' is defined as being Sotheby's and Clause 19 'Winding Up' states:
- “19.2 In the event that:
- (i) The Principal Employer notifies the Trustees of its decision to terminate the Scheme on a specific date [...]
- the Scheme shall be wound up [...]”
22. So, I find that the Employer had the necessary authority to commence the wind-up of the Scheme.
23. Rule B22 'Increases in current pension' states:
- “B22.1 Any pension or annuity currently payable out of the Scheme shall be reviewed annually and may with the consent of the Principal Employer from time to time be increased by such amount and at such times as the Trustees after taking the advice of the Actuary shall decide.
- B22.2 Pensions payable under these Rules shall be increased to such extent and on such dates as is necessary to comply with the provisions of Sections 51 and 54 of the Pensions Act in relation to the increase of pensions in payment.”
24. I have reviewed Sections 51 and 54 of the Pensions Act 1995, an extract from which can be found in the Appendix. These sections make it clear that certain elements of pension are required to increase under legislation, but this does not include the Pre 97 Excess Pension. So, I find that any increases that were applied to this element of Mr N's pension in the past were discretionary, and would have been subject to the consent of the Employer.
25. As the Trustees confirmed in their stage two IDRPs response of 24 March 2022, all future pension increases that Mr N was entitled to as of right under the TD&R and legislation would continue to be paid under the Policy. Mr N was not entitled to increases as of right on his Pre 97 Excess Pension because there was no requirement under legislation for this element of his pension to be increased and the only increases that the TD&R allowed for as of right were the increases required

under legislation. So, I find that there was no requirement for allowance for them to be made in the terms of the Policy.

26. I acknowledge that, historically, the Employer and Trustees had used their powers to apply a discretionary increase to Mr N's Pre 97 Excess Pension on a number of occasions. Also that, over some periods, increases have been granted reflecting changes in the cost of living. I have reviewed historic copies of the Scheme's TD&R and booklets together with other paperwork provided in relation to this complaint. I have found no evidence that the payment of these increases was ever guaranteed. My review included the Booklet and the letter of 6 May 1987 sent to Scheme members that have been referred to by Mr N in his complaint. I find that these were correct at the time they were issued and could not be considered to have misinformed Mr N.
27. Mr N said that the Employer had used the benefits of an inflation-protected pension as being the justification for poor or non-existent pay reviews. In particular, he recalls conversations taking place with Sotheby's Personnel Director in which the benefits of his Scheme membership were discussed. However, no evidence has been provided of exactly what was discussed and, in particular, whether it was said that pension increases on Mr N's Pre 97 Excess Pension would be guaranteed. Regardless, benefits have to be paid in accordance with the TD&R and in the event of any discrepancy the TD&R would prevail.
28. I do not uphold this complaint.

Dominic Harris

Pensions Ombudsman
1 August 2023

Appendix

Extract from the Pensions Act 1995

“51 Annual increase in rate of pension

- (1) Subject to subsections (6) and (7) this section applies to a pension under an occupational pension Scheme if—
- (a) the Scheme—
 - (i) is a registered pension Scheme under section 153 of the Finance Act 2004, and
 - (ii) is not a public service pension Scheme, and
 - (iii) in the case where the pension becomes a pension in payment on or after the commencement day, is not a money purchase Scheme, and
 - (b) the whole, or any part of, the pension is attributable—
 - (i) to pensionable service on or after 6 April 1997, or
 - (ii) in the case of money purchase benefits where the pension is in payment before the commencement day, to payments in respect of employment carried on on or after 6 April 1997, and
 - (c) apart from this section—
 - (i) the annual rate of the pension, or
 - (ii) if only part of the pension is attributable as described in paragraph (b), so much of the annual rate as is attributable to that part,

would not be increased each year by at least the appropriate percentage of that rate.
- [...]
- (2) Subject to sections 51A and 52, where a pension to which this section applies, or any part of it, is attributable to pensionable service on or after 6 April 1997 or, in the case of money purchase benefits where the pension is in payment before the commencement day, to payments in respect of employment carried on on or after 6 April 1997—
- (a) the annual rate of the pension, or

(b) if only part of the pension is attributable to pensionable service or, as the case may be, to payments in respect of employment carried on on or after 6 April 1997, so much of the annual rate as is attributable to that part,

must be increased annually by at least the appropriate percentage.”