

Ombudsman's Determination

Applicant	Ms H
Scheme	The Central Bureau for Educational Visits and Exchanges Pension Scheme (the Scheme)
Respondent(s)	Capita ATL Pension Trustees Limited (the Trustees) British Council (BC)

Complaint Summary

Ms H has complained that the Trustees and BC have unjustly stepped back from their historic practice of revaluing deferred benefits by 5% per annum.

Summary of the Ombudsman's Determination and reasons

The complaint should be partly upheld against the Trustees and BC because:

- Although BC had the power to amend the Rules, which they did having taken legal advice on the matter, there was a clear representation in a variety of documents and correspondence issued to Ms H over a number of years that revaluation would be fixed at 5% per annum. Finding out that this representation was incorrect would have caused Ms H a serious level of distress and inconvenience which should be recognised.
- However, there can be no estoppel by representation because there is no direct link to the act Ms H took in 2004 and the misinformation and she did not act at all on the misrepresentation in 2007. The act of taking out AVC's was taken in the knowledge that she had been misinformed and so was not taken in reliance of the incorrect information.

Detailed Determination

Material facts

1. The scheme was established by the Central Bureau for Educational Visits and Exchanges (**CBEVE**) in 1972.
2. From at least September 1988, deferred members' benefits were revalued in practice at 5% per annum.
3. Ms H joined the Scheme on 16 August 1984. Documents, including the member booklet, benefit statements, transfer quotations etc. issued to Ms H during her membership of the Scheme referred to a fixed rate revaluation of 5%. However, the Scheme Rules were silent as to the rate of revaluation of preserved pensions.
4. In 1993/94, CBEVE merged with BC and BC became the Principal Employer of the Scheme. At the time of the merger employees were given the choice of remaining in the Scheme or transferring to the Principal Civil Service Pension Scheme (**PCSPS**).
5. Before the merger members of the Scheme were provided with a Q&A document which informed their decision whether to remain members of the Scheme or to become a member of the PCSPS. Among other explanations of the differences between the two schemes, this documentation explained the revaluation rules as then understood. It reflected the Trustees' existing practice on revaluation. A number of BC employees chose to remain members of the Scheme. Ms H was one of them.
6. Ms H ceased to be a member of the Scheme on 29 April 1994.
7. In July 2004, Ms H wrote to BC and said that she had not received a benefit statement for some years. BC responded on 9 July 2004 and advised that as a deferred member Ms H would not receive annual updates.
8. Ms H contacted BC in August 2006 requesting an update in relation to her deferred benefits. BC did not respond and Ms H sent a further letter on 26 November 2006. BC responded on 29 November 2006 and explained that they do not issue annual benefits statements:

“because the figures on the statement issued on the day of leaving do not change until the normal retirement date. The reason is that none of the factors affecting your benefits changes while your pension is preserved. These factors are your length of service, your final salary and the annual increase rate which is fixed at 5%. I am enclosing a copy of the statement that was produced on 29 April 1994...”

9. Ms H contacted BC again in December 2006. BC responded on 6 February 2007, and said:

“I confirm that we have provided you with a benefit statement, in the form of a copy of your early leavers benefit details which was prepared when you left the scheme on 29 April 1994....

...in the case of the Central Bureau pension scheme, the pension increases are fixed at 5% for each year until normal pension age and so was possible to tell you when you left exactly what your pension would be at pension age. This information will not change. I attach for your information a copy of an email [XX] sent you when you left, which explains exactly this point.”

10. The discrepancy between how deferred pensions were revalued in practice and the provisions of the Scheme Rules came to light in 2011 when BC was asked to approve new consolidated Trust Deed and Rules which provided for revaluation of deferred benefits at a fixed 5% per annum.
11. In 2013, the Scheme closed to future accrual.
12. BC did not approve the new proposed consolidated Trust Deed and Rules and, in August 2013, the Trustees and BC sought Counsel's opinion on the rate of revaluation of deferred benefits.
13. Counsel's opinion concluded that the available documentation did not support the view that BC had made a valid amendment to the Scheme Rules so as to introduce a fixed 5% revaluation rate. Counsel also considered that there was no conclusive evidence that BC had ever decided to go beyond the statutory minimum level of revaluation.
14. Members were advised of Counsel's Opinion in March 2015 and provided with revised deferred benefit statements. Ms H's statement indicated that she was entitled to an annual retirement pension of £6,517.32 assuming revaluation of pension in excess of GMP at the statutory minimum level of revaluation. The letter confirmed that had 5% fixed evaluation been assumed Ms H's annual pension at retirement would have been £9,709.68.
15. The Rules of the Scheme were amended by a Deed, dated 7 July 2015, which made the following provisions in relation to deferred benefits:
- “...The pension shall then be increased before payment in accordance with the Revaluation laws.”

Summary of Ms H's position

16. Ms H says she relied on the Scheme correspondence showing that her deferred benefits would increase by 5% per annum until normal retirement date in her financial planning.

17. Financial planning is an on-going exercise, with her husband and financial advisers, and has been for many years – meaning that when she does, or does not, make major financial decisions she does so knowing what the future holds in relation to her retirement income.
18. This means that she does not record conversations with her husband or advisers nor record research undertaken.
19. She contacted BC to ask for an update about her pension when she was moving house, and taking on a larger mortgage, in July 2004.
20. She contacted BC again in 2007 when reviewing her financial planning.
21. She asked about transferring out of the Scheme, earlier than 2004, to her current employer's scheme and was told that because of the differences in them that this was not possible. Therefore, she had no choice but to remain in the Scheme.
22. Since the shortfall in pension became clear she has set up AVC's, but given that she is now approaching 57, these will not cover the difference between £9,271.44 and £6,517.32.
23. She has suffered a loss of 29.7% in her retirement income which should be acknowledged.

Summary of the Trustees' position

24. Having sought the opinion of Counsel the Trustees accepted that no conclusive evidence has yet been found to demonstrate that a decision was taken to introduce a revaluation rate of 5% per annum fixed. There was no option but to administer the Scheme in accordance with the Rules and provide only statutory increases to deferred pensions.
25. The 7 July 2015 Deed adopts new rules that take effect from that date. Clause 3 of the Operative provisions makes it clear that any benefits payable to or in respect of a member who ceased to be in pensionable service before this date shall be calculated under the previous rules. The 2015 Deed does not change the rate of revaluation that was to be applied for accrual prior to its effective date. As pensionable service ceased to accrue from 1 February 2013 the 2015 Deed is irrelevant for assessing the correct rate of revaluation to apply to deferred pensions.
26. At the relevant time the PCSPS offered a measure of inflation protection that was uncapped. Members on fixed rate increases would therefore gain in times of low inflation but lose when inflation rose above 5%. At the time of the invitation to join the PCSPS in 1993 inflation had dropped to 1.6% and the value of a fixed 5% increase would have been apparent to members.
27. Counsel opinion indicated that members had plausible claims for estoppel. Consideration of an estoppel claim should include the impact of the time over which

the applicant has relied on the established practice of applying 5% per annum increases.

Comments submitted by Mrs Y - a Trustee and long serving CBEVE employee

28. She has been a member-nominated trustee since April 2006.
29. At the time of the merger staff were assured that BC would honour all existing arrangements in respect of terms and conditions including pension arrangements.
30. As a member-nominated Trustee she has been contacted by many staff affected by BC's decision to disregard the merger agreements and undertakings. They feel an understandable sense of injustice as they are obviously aware that all previous pensioners have received the 5% revaluation.

Comments submitted by Mr K - a Trustee and long serving CBEVE employee

31. He has been a trustee of the Scheme since 2004.
32. At the time of the merger BC was anxious to maintain the principle and practice of TUPE in relation to the pensions aspect of the merger.
33. In light of the assurances and solemn undertakings given in open meetings, and in writing, the vast majority of CBEVE members decided to stay with the Scheme. Only one member decided to leave and join the PCSPS.

Summary of BC's position

34. Both BC and Capita sought legal opinion on the issue. Wide ranging documentation including the Member's handbook was reviewed as well as the general administrative practice.
35. The outcome of the Counsel's review of the documents and circumstances of this case was that no legal basis for the application of the fixed 5% per annum rate of revaluation for deferred pensions could be established.
36. It would be difficult in the current climate to justify a decision to apply a fixed level of revaluation which far exceeds the current level of inflation.
37. Deferred pensions under the PCSPS are revalued in line with cost of living increases based on the CPI Index. Any decision to apply fixed 5% increases to deferred pensions for a group of former and current employees would be out of step with other current and former BC staff.
38. If the members had chosen to join the PCSPS their Scheme benefits would have been deferred and re valued until payment so it seems unlikely that the rate of revaluation of deferred pensions was a material factor in the decision to remain in the Scheme.

39. At the time of the merger members were advised that pensions in deferment would be re-valued in line with statutory increases.
40. While sympathising with the members' positions our understanding of the purpose of revaluation is to ensure the value of accrued benefits are not eroded by inflation. That objective is met by the statutory provision now incorporated into the Scheme Rules. Strictly, therefore there has been no loss. It is however possible that in some cases a false expectation of the level of revaluation has been provided.

Conclusions

Revaluation and interpretation of the Rules

41. Ms H's complaint is that the Trustees and BC have unjustly stepped back from the historic practice of revaluing deferred benefits by 5% per annum. It is undisputed that until BC and the Trustees sought Counsel opinion, in August 2013, in relation to the revaluation of deferred pensions, Scheme practice was to increase deferred pensions by 5% per annum. Ms H contends that the 5% revaluation rate was an effective rule change that was being applied until 2014 and so the Rules should formally be amended to reflect that.
42. Before the Deed of Amendment dated 7 July 2015, the Rules that governed the Scheme were silent on the matter of revaluation of deferred benefits in excess of GMP. Counsel opined that BC had never made a valid amendment to the Scheme Rules to introduce a fixed 5% revaluation rate and so the statutory minimum level of revaluation applied throughout the period under dispute.
43. Rule 21 of the Rules states "The Principal Employer may (subject to the terms of the Instrument 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." Rule 21 clearly provides BC with the power to amend the Rules of the Scheme and this is what it has now done albeit not in the way Ms H would have liked. Rather, BC has clarified that the method of revaluation to be applied to deferred pensions will continue to be the statutory minimum required by the law.
44. In summary, BC had the power to amend the Rules which they did having taken legal advice on the matter. I do not find their actions incorrect or that this amounts to maladministration.

Estoppel

45. However, there has been clear misrepresentation and there is no dispute that some of the correspondence, announcements and statements issued to members reflected that the revaluation method applicable to deferred members was 5% per annum. Both BC and the Trustees appear to agree that members may have plausible claims for estoppel.

46. To succeed with a defence of estoppel by representation, a person needs to establish an unambiguous representation on which he or she relied in good faith to their detriment.

47. These requirements were elaborated in the case of *Steria v Hutchison* [2006] 64 PBLR. In that case Neuberger LJ said as follows:

“When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it.”

48. An estoppel by convention may arise where parties to a transaction act on the basis of a common assumption as to fact or law so that it would be unjust to allow one of the parties to go back on it. In *Commissioner for her Majesty's Revenue and Customs v Benchdollar Limited and Others* the judge summarised the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings as follows:

- vi) 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.
- vii) 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 on it.
- viii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his independent view of the matter.
- ix) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
- x) 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.

Having considered the Handbook content, the consistent practice of using a fixed 5% in actuarial valuations, the email sent by BC's HR manager at the time of the employer merger, the practice of issuing leaver statements, the explanation of that practice contained in BC's 6 February 2007 correspondence, the payment of benefits on that basis up until 2014, and the inclusion of a rule to that effect within the proposed consolidated Rules, I consider that on the balance of probabilities, the Trustee, BC and Ms H had, between 1993 and the date of scheme closure in 2013, been acting on a common and expressly shared assumption that 5% was fixed and the amount which was quoted in Ms H's leaver statement was what she would get at retirement, that the understanding was expressly shared between BC and the Trustee and Ms H in such a way that she could be expected to rely on it.

49. The same course of dealing also involved clear representations to Ms H that revaluation would be fixed at 5% per annum and it was reasonably foreseeable that she would take decisions based upon them.
50. I understand BC and the Trustee to accept that these elements of the tests for estoppel are made out. However, it remains for Ms H to demonstrate detrimental reliance. I consider that on the evidence presented Ms H cannot demonstrate such reliance for the following reasons.
51. Ms H says she relied on the Scheme correspondence showing that her deferred benefits would increase by 5% per annum until normal retirement date in her financial planning. She says she took it into account when deciding whether to remain in the scheme at the time of the employer merger, and later, specifically in 2004 and 2007. At the time Ms H made the decision to remain in the Scheme inflation had fallen to 1.6%. Given that comparison documents stated that revaluation of deferred benefits in the PCSPS was in line with RPI (on benefits in excess of GMP) if that were the only factor to consider then it would have been a significant one. However, it was not the only factor to consider. There were other differences between the two schemes to which attention was drawn in the comparison document provided in 1993. For example, the accrual rate of pensions is higher in the Scheme, the amount paid on death in service is more favourable in the Scheme, the ill health provision is more generous. Conversely, the lump sum provision is less generous and the calculation of Final Pensionable Earnings is based on final year rather than best of the last three. I cannot therefore accept that the revaluation of deferred benefits was the only factor driving the decision to remain in the Scheme. It was likely to have been one among many.
52. Given that Ms H was an active member at the time, I consider that the more generous provisions for active members would probably have had a far greater bearing on her decision than the fixed rate of revaluation of a deferred pension, particularly since Ms H would at the time have been unable to predict when or whether or not she would in fact become a deferred member. I am also unable to conclude that remaining in the scheme was an act which caused her loss. I have no comparison evidence about the long-term value of membership in one scheme or the other.

53. Ms H points out that she contacted BC in 2004, when she was moving home and taking a larger mortgage, and again in 2007 when reviewing her financial planning. In 2004, Ms H was some 17 years away from her normal retirement age and I find it unlikely that the predicted level of her retirement benefits at that point would have been a factor when considering whether, or not, to increase her mortgage. I have seen no evidence to that effect. I therefore do not find Ms H's decision to increase her mortgage was an act she took in reliance on the incorrect information about her benefit level.
54. In relation to Ms H's contact with BC in 2007, she was again given incorrect information and a very firm assurance that she would receive the amount stated on her leaver statement because the rate of increase was fixed, but I have no evidence that the information caused her to do or not do anything in particular. I accept that Ms H's ability to plan properly has been impeded generally, but I cannot make a finding that specific financial loss has been incurred unless there is evidence of a particular course of action or decision having been taken in reliance on the misrepresentation.
55. Ms H has commented that she also asked about transferring out of the Scheme, earlier than 2004, to her current employer's scheme and was told that because of the differences in the schemes that this was not possible. She says that she therefore had no choice but to remain in the Scheme; in that sense the matter was 'out of her hands'. I have considered this point, but I do not see how it can have affected Ms H's decision not to transfer out of the Scheme to the PCSPS in 1993. She had the option to transfer to the PCSPS then and chose not to do so.
56. Ms H says that after the shortfall in pension became clear she set up AVC's, but says that these will not cover the difference between £9,271.44 and £6,517.32. This is not an act taken in reliance of the misrepresentation because Ms H was aware of the correct facts when she took the act. She has also suffered no detriment as a result of setting up the AVCs. Rather, if Ms H had suffered losses this would be considered an act taken to mitigate some or all of them.
57. In summary, there is no direct link to the act Ms H took in 2004 and the misrepresentation and she did not act at all on the misrepresentation in 2007. The act of taking out AVC's was taken in the knowledge that she had been misinformed and so was not taken in reliance of the incorrect information. For these reasons there can be no estoppel.
58. In assessing the extent of distress and inconvenience caused by the misrepresentation, I have taken into consideration that it occurred for nearly 20 years which, in my view, will have caused a serious level of distress and inconvenience to Ms H.
59. I am satisfied that the Trustees and BC are equally responsible for the misrepresentation and I have made an appropriate direction below.

Directions

60. Within 21 days from the date of the determination the Trustees and BC shall each pay Ms H £500 in recognition of the serious level of distress and inconvenience the misrepresentation will have caused her.

Karen Johnston

Deputy Pensions Ombudsman
13 March 2019

Annexe

Relevant Documents

61. **Scheme rules (1986)**

“21. Amendment of the Scheme

The Principal Employer may (subject to the terms of the Instrument 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.”

62. **The 7 July 2015 Deed**

“5. **Benefits for deferred members**

5.2 Preserved Pension at Normal Retirement Date

...The pension shall then be increased before payment in accordance with the Revaluation laws.”

63. **Member’s Handbook**

“Introduction

The Scheme is established under trust and governed by formal rules. If there is any difference of interpretation between this booklet and the formal rules the provisions of the rules will be followed. Copies of the rules are available for inspection by the Members.

After Completion of two years’ qualifying service

(A) (2) ...those proportions of your pension entitlements relative to service after 1984 which are in excess of your Guaranteed Minimum Pension calculated at the date of leaving service, will be increased by 5% per annum compound for the number of complete years between the date of your leaving service and your Normal Retiring Date. “

64. **Document headed- Comparison of the Central Bureau Staff Superannuation Scheme (CBSSS) and the Principal Civil Service Pension Scheme (PCSPS).**

This was issued in 1992 and showed benefits at Normal Retirement date were based on an accrual rate of n/60ths under the Scheme and n/80ths under the PCSPS. It stated that increases on non GMP pensions in deferment was 5 % under the Scheme and that both GMP and Non GMP elements were subject to increases in line with RPI under the PCSPS.