

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 because there are no direct links between the acts taken by Ms H and the misrepresentation.

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 January 1988. Documents, including the member booklet, benefit statements etc. issued to Ms S during her membership of the Scheme referred to a fixed rate revaluation of 5% on deferred pensions. However, the Scheme Rules were silent as to the rate of revaluation of deferred 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. 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.
7. On 31 January 2013, the Scheme closed to future accrual at which point Ms H became a deferred member of the Scheme.
8. 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.
9. 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 considered that there was no conclusive evidence that BC had ever decided to go beyond the statutory minimum level of revaluation.
10. 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 £31,592.04 assuming revaluation of pension in excess of GMP at the statutory minimum level of revaluation. The statement

confirmed that had Ms H's pension been revalued at a fixed rate of 5% her annual retirement pension would have been £43,323.84.

11. 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

12. 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.
13. At the time of the merger members were told that the Scheme had more generous benefits than the PCSPS, including fixed rate revaluation.
14. The 5% revaluation formed part of an analysis of pension provision when CBEVE staff joined BC under a TUPE transfer. BC is now failing to honour the agreements made. Trade Union members all decided to stay in the Scheme rather than transfer to the PCSPS as a result of the comparison document produced by BC management.
15. Various historical Trustee reports refer to the rate of 5% per annum increases on benefits in deferment. However, there is no evidence that the Trustees at that time made any attempt to formally introduce the 5% revaluation rate to the Scheme rules as they were obliged to do.
16. BC has been aware of the 5% revaluation issue since the merger and has been aware of the lack of specification in the Scheme Rules since at least 2003, when she was a Scheme trustee.
17. BC has the power to amend the Scheme rules but has chosen not to do so. As a result, the Trustee has applied the minimum revaluation required by law, and this is the cause of the significant reductions in the deferred pensions.
18. The 5% revaluation rate was a rule change that was being applied until 2014 and any rule change should date from the last date on which the previous rule was applied.
19. The PCSPS has provisions for Voluntary Early Retirement (**VER**) unlike the Scheme. In 2009 Scheme members were denied equivalent VER terms on the grounds that they had other compensatory benefits.
20. In 2010, her husband took voluntary early retirement from BC and became self-employed. The main reason they felt able to take the financial risk of self-employment and having lower earnings and a lower pension was because of the level of her projected pension and the financial stability this would give them.

Summary of the Trustees' position

21. 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.
22. The Trustees have made extensive enquiries of BC and have received assurances that all relevant documentation had been disclosed to it.
23. 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.
24. 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.
25. BC offered VER to employees in 2009. Employees who had remained members of the Scheme rather than transfer to PCSPS were not offered the same VER rates. The reason they were given for this was that Scheme members were entitled to more favourable benefits than PCSPS member including 5% fixed rate revaluation.
26. 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

27. She has been a member-nominated trustee since April 2006.
28. 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.
29. 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

30. He has been a trustee of the Scheme since 2004.
31. 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.
32. 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

33. 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.
34. The outcome of 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.
35. 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.
36. 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.
37. 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.
38. At the time of the merger members were advised that pensions in deferment would be re-valued in line with statutory increases.
39. 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

40. 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.

41. 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.
42. Ms H argues that although BC has the power to amend the Scheme rules it has chosen not to do so. 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.” As Ms H states, 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.
43. 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

44. 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 acknowledge the possibility, subject to specific facts in individual cases, that members may have plausible claims for estoppel.
45. 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.
46. 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.”

47. 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.

48. 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.
49. 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.
50. 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 that the 5% revaluation to her deferred benefits was the reason she remained within the Scheme.
51. 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. Although Ms H mentions that, in 2009, Scheme members were denied equivalent VER terms as those provided under the PCSPS on the grounds that they had other compensatory benefits she has not provided any submissions as to why or how this might have affected her. Nonetheless, I feel it unlikely that in 1993/94 when Ms H made the decision not to transfer to the PCSPS that a factor in her decision making would have been the possibility of voluntary early retirement some 16 years later.
53. Ms H says that, in 2010, her husband took voluntary early retirement from BC and became self-employed. She says the main reason she and her husband felt able to take the financial risk of self-employment, and having lower earnings and a lower pension expectation, was because of the level of her projected pension and the financial stability this would give them.
54. Revaluation relates to how Ms H's deferred benefits will be increased at her normal retirement date, in July 2029. The decision, taken by Ms H's husband, to take a reduction in earnings in 2010 has no direct link with Ms H's deferred benefits, due to be paid some 19 years later, from the Scheme and cannot be considered an act she took in reliance on the incorrect information about benefits.

55. In summary, there are no direct links between the acts taken by Ms H and the misrepresentation and so there can be no estoppel by representation.
56. I have also taken into consideration that the misrepresentation occurred for nearly 20 years which, in my view, will have caused a serious level of distress and inconvenience to Ms H. I am satisfied that the Trustees and BC are equally responsible for the misrepresentation and I have made an appropriate direction below

Directions

57. 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

58. **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.”

59. **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.”

60. **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. “

61. **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.