PO-27501

Ombudsman's Determination

Applicant	Mrs T
Scheme	Prudential Staff Pension Scheme (**PSPS**)
Respondent	Prudential Staff Pensions Limited **(the Trustee)**

Complaint Summary

Mrs T contends that the temporary additional pension available to her from the State Spreading Option (**SSO**) in the PSPS should be paid by the Trustees up to her new State Pension Age (**SPA**) of 66 and not cease at age 65 as originally intended.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against the Trustee because I am satisfied that the information which it supplied Mrs T in March 2009 was correct at the time and adequate for her to make an informed choice on whether selecting the SSO would be in her best financial interests.

Detailed Determination

Material facts

1. Prudential sent Mrs T a quotation on 4 March 2009 showing that the benefits available to her from the PSPS assuming she retired on 1 March 2009 were:

   - a pension of £4,317.96 pa; or;
   - a maximum tax-free cash sum of £21,480.01 with a reduced pension of £3,222.00 pa

   Both options had an attaching spouse's pension of £2,158.92 pa payable on her death after retirement.

2. This quotation also provided details of a "Levelling Option" as follows:

   "The Basic State Pension (**BSP**) does not become payable until State Pension Date (**SPD**), which for you will be 9 January 2023. To take account of the period until this is payable, you could choose to boost the initial pension you receive from the PSPS, if you wish, through a temporary increase, and take a reduced pension from your SPD onwards. This is known as the Levelling Option (SSO)…

   If you select the Levelling Option, your initial pension figure…would be adjusted as follows:

Your additional pension to SPD per year	£1,897.40
Reduction in your pension from SPD per year	£2,328.43

   If you choose this option, your scheme pension (excluding annual increases) would be as follows:

Pension until SPD per year	£5,119.40
Pension from SPD per year	£ 893.57

   *You will receive the BSP from 9 January 2023, smoothing your retirement income either side of your SPD).

   These figures assume that the maximum tax-free cash is selected…

   <u>Notes</u>

   (a) All of the figures quoted…assume that you will be entitled to the full basic State "old age" pension. If not, your income will not be level before and after SPD.

   (c) Any percentage increase awarded to your PSPS pension in retirement prior to SPD will be applied to both your temporary pension and the additional reduction.

(g) SPA is currently 65 for men and 60 for women however, for women this will change from 2020 to age 65. This will be phased in over a 10-year period from 2010.

3. Mrs T decided to apply for the SSO on 8 March 2009. By doing so, she accepted that her decision was irrevocable once payment of the additional pension commenced.

4. Prudential notified Mrs T in its letter dated 17 March 2009 that she was entitled to a pension of £5,119.44 pa from 1 March 2009 which would reduce to £893.57 pa once she reached SPA. No specific SPA was shown in this letter.

5. In March 2011, Prudential sent Mrs T a letter which said:

> "…at retirement, you elected to surrender part of your pension entitlement to receive an additional temporary pension under the SSO, at SPA both the additional temporary pension and any increases applied to it will cease."

6. On 3 November 2011, the Pensions Act 2011 (**the Act**) received Royal Assent. The Act accelerated the previously proposed changes to the SPA for men and women. For women, it was gradually increased from 60 to 65 over the period from April 2010 to November 2018. From December 2018, the equalised SPA for both genders incrementally increased to age 66 by October 2020. Mrs T's SPA consequently increased to 66 which she will attain in January 2024.

7. In 2015, the Trustee began to issue information about the implications of the SPA changes to the affected pensioners and notified them of when their temporary additional pensions were due to cease.

8. Mrs T informed Prudential of her concern that her temporary additional pension would still cease on her 65th birthday despite her SPA having increased to 66. Prudential replied as follows:

   - at the time she elected to take the SSO in March 2009, her SPA was 65;
   - all the assumptions and actuarial factors used to calculate the temporary additional pension and the pension amount she would later give up were based on her State pension commencing from age 65;
   - it had not expected any changes to her SPA or the Government's original proposal to increase the SPA to 66 until after 2024 at the time of her retirement in March 2009;
   - it was the Act which accelerated the increase of her SPA to 66 in October 2020;
   - as this change occurred in 2011, it did not have any impact on the pension calculations performed in 2009 which were based on her SPA at the time of 65; and

- it was therefore not possible to extend payment of the temporary additional pension up to her 66th birthday.

9. Mrs T appealed the decision under the PSPS Internal Dispute Resolution Procedure (**IDRP**). Prudential declined her appeal at Stage One and in its letter dated 6 July 2018 informed her that:

> “The SSO offered by the PSPS is an option for a member to choose to surrender part of their pension for life on an actuarially cost neutral basis for an additional pension payable to SPA.
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> The PSPS Rules provides that:
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> “At the written request of a Member who is considered by the Trustee to be prospectively entitled to a pension under the National Insurance Acts 1946-1966 the Trustee to the intent that the Member’s total pension during his or her retirement may remain of an approximately level annual amount may determine that the Member’s pension under the PSPS whilst remaining of the same capital value will be of a varying annual amount, the amount payable (subject to the provisions of the PSPS) until the date determined by the Trustee as being the anticipated date of commencement of the National Insurance Pension being an increased amount and the amount payable (subject to the provisions of the PSPS) thereafter being the reduced amount.”
>
> In your case, the Trustee determined to allow your application to exercise this option by reference to the date which was at that time the anticipated date on which your State pension was due to start being 9 January 2023.
>
> The cost neutral actuarial adjustment of your benefits was carried out on this basis: as you will appreciate, if the additional pension was to be paid for an additional year, the adjustment would have to have been different (with both a lower starting total pension and a lower pension following the application of the reduction).
>
> The quotation letter sent on 4 March 2009, which includes the SSO…makes it clear that the Trustee in determining your SPD was using 9 January 2023, your 65th birthday. The Government’s then proposed increase in SPA would not have affected you (as it would not have applied until 2024).
>
> Although I would agree that the form you signed to accept the SSO only refers to SPD, it does need to read in conjunction with the quotation letter, which defines the SPD being used in the calculation of your entitlement…
>
> In addition to my apologies and in recognition that we did not respond to your complaint within stated timescales, I am prepared to offer to an “ex-gratia” of £150.00...”

10. Mrs T was dissatisfied with the outcome and accepted the ex-gratia payment of £150 only on a without prejudice basis.

11. At Stage Two IDRP, the Trustee did not uphold Mrs T's complaint for essentially the same reasons given by Prudential. In its letter dated 4 September 2018 to Mrs T, the Trustee added that:

> "…there are broadly two ways in which defined benefit schemes may offer integration with the State pension by providing a higher pension for a period followed by a lower pension thereafter.
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> - Some schemes provide, in addition to the accrued pension, an additional pension (funded by the employer) broadly equivalent to the State pension payable until SPA. The PSPS Legal Adviser has confirmed that some schemes he has seen which offered this option were drafted in such a way which meant the additional pension must carry on until age 66 for a member in your position. This is commonly known as a bridging pension…;
>
> - Other schemes such as the PSPS do not provide this benefit but do provide an option for a member to choose to surrender part of their pension for life on an actuarially cost neutral basis for an additional pension until a predetermined age, i.e. in your case age 65.
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> At the date you exercised the Option the maximum age the Trustee could pay the additional pension for was 65.
>
> When the age changed to 66 in 2011, the Trustee had to suspend the option for all members with a SPA of 66 until the relevant tax legislation had been changed.
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> …the documentation provided in connection with the SSO was correct and not misleading at the time of issue and did advise that SPA was changing in 2024. In 2009 the Trustee would not have been aware that the Government would be considering an earlier change date and therefore would not have been in a position to add a caveat around changes to the SPA to SSO correspondence.
>
> …the Trust Deed and Rules of the PSPS provide no power for the Trustee to increase, cease or reverse the Option you elected to take."

Summary of Mrs T's position

12. No SPA at which her additional temporary pension would cease was specified in the PSPS correspondence upon which she made her decision to choose the SSO. She therefore thought that this pension would be paid up to her actual SPA if any changes were subsequently made to it.

13. She was denied the opportunity to make an informed choice about the SSO because there was no disclaimer in Prudential's letter dated 4 March 2009 warning that her SPA could be changed in the future by the Government.

14. The Stage Two IDRP letter issued by the Trustee was unclear. It said that "documentation provided in connection with the SSO was correct and not misleading at the time of issue and did advise that the SPA was changing in 2024" yet the correspondence which she received in 2009 only referred to the change in SPA from age 60 to 65 for women from 2020.

15. She consequently contacted Prudential on 16 October 2018 to seek clarification on this issue. Prudential informed her that it would arrange for a copy of the document corroborating what the Trustee had said to be sent to her in a couple of days.

16. On 23 October 2018, Prudential apologised to Mrs T for the misleading information previously given. It said that it should have informed her that her request would be dealt with by the Trustee and tried to find the evidence which she was seeking before responding. After carrying out a thorough search of its records, Prudential informed her that the requested documentation did not exist.

17. Mrs T says that:

> "When I opted to take my Prudential staff pension, my sole reason for doing so was the fact that it gave me a future income protection guarantee until my State Pension became payable and based on the information provided to me at that time, the SSO sounded like a "good deal". After all you make an informed choice based on the information provided at "point of sale"…I draw your attention to information relating to the Levelling ("State Spreading") Option which was contained within "A Guide to the Prudential Staff Pension - Options at Retirement" (**the Leaflet**) which was sent to me along with my pension quotation dated 4th March 2009.
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> "THE LEVELLING OPTION HELPS TO SMOOTH OUT INCOME EITHER SIDE OF THE SPA TO ENSURE MEMBERS' STANDARDS OF LIVING REMAIN STABLE. IF YOU CHOOSE IT, IN EFFECT, PART OF YOUR PENSION WILL BE BROUGHT FORWARD SO THAT -
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> 1. IT IS INCREASED TEMPORARILY FROM YOUR RETIREMENT DATE UP TO SPA; THEN,
>
> 2. ONCE YOU ARE IN RECEIPT OF THE BSP IT IS REDUCED FOR THE REMAINDER OF YOUR RETIREMENT. OVERALL, YOUR LEVEL OF INCOME WOULD BE APPROXIMATELY THE SAME THROUGHOUT YOUR RETIREMENT".
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> This document also gives an example of a retirement statement showing details of the temporary pension increase to the Scheme pension and any eventual reduction that would be applied. In fact, it states "the factors used by the Scheme Actuary to calculate both the increase and the reduction are based on your age, scheme pension, and THE BSP AT THE TIME OF YOUR RETIREMENT - NO CAVEAT - NO DISCLAIMER - NO AGE MENTIONED -

NO FUTURE CHANGES MENTIONED just simply “the BSP at the time of your retirement”.

Who wouldn’t have opted for the SSO - it seemed like an offer not to be missed? I can honestly say if I had known at the time I signed up for the “Levelling Option” that there was even a slight chance of the Trustee “moving the goal posts” based on the fact that this option could be adversely affected by future State Pension Legislation then I definitely would not have signed up to this - it’s a bit like writing a “blank cheque” - with no idea at the outset what it is going to cost you in the future! As it stands, I estimate it will cost me around £6,000 given the fact that I will have to wait a year after the reduction before my State Pension starts. As previously advised, I would like to point out that financially I did not need to take my Prudential Staff Pension in 2009 as I had a well-paid job with Bank of Scotland earning in excess of £50,000 per annum. Why would I have opted to take my pension early and pay 40% tax on this income if it hadn’t been an “offer I could not refuse”. I was prepared to pay the additional tax then in exchange for the peace of mind it gave me as a single person knowing that I was getting a guaranteed future income until my State Pension started….

…the Trustee frequently refers to a similar complaint made by Mr K which was not upheld and…I can understand up to a point the rationale behind their decision…but my individual complaint is not based on the Trustee and its awareness of proposed legislative changes affecting the SSO as was the case with the K complaint. My complaint is…that the Trustee’s reason all along for not upholding my complaint was the fact that they believed they had put me in a fully informed position with regards to the SSO back in 2009 and had advised me that the SPA was changing in 2024. As we now know quite categorically this was not the case…”

Summary of the Trustee’s position

18. The documentation sent to Mrs T in March 2009 made it clear that the benefits available from the SSO were calculated using a SPA of 65. This was correct at the time and remains the position despite the subsequent change made to her SPA.

19. The Pensions Ombudsman concluded in his determination of a similar complaint made by Mr K (reference number PO-20627) against the Trustee that its awareness of proposed legislative changes is irrelevant because it can only pay benefits to a member in accordance with the PSPS Rules and legislation in force at the time. It cannot be expected to try predicting future legislative changes.

20. It waited until 2015 to inform members such as Mrs T of the increase made to their SPA in 2011 by letter because it was not strictly necessary to do so. It has already apologised to Mrs T if she did not receive this letter.

21. There was no separate correspondence sent in 2009 informing Mrs T that her SPA would be increased further to 66 in 2011. It should like to apologise to Mrs T for any

confusion which may have been caused by what it said in the Stage Two IDRP letter on this issue.

22. For Mrs T's detrimental reliance claim to succeed she will need to demonstrate that she has received incorrect information and suffered actual financial loss flowing from the actions she chose to take based on it.

23. The documentation provided to Mrs T in March 2009 correctly explained the effect of future known changes to SPA which were expected to come into force from 2020. Furthermore, it could not have anticipated at the time that the Government would increase the SPA again in 2011 and therefore be expected to provide disclaimers for future legislative changes in its correspondence.

24. In any case, Mrs T has a legal duty to mitigate any financial loss which she feels that she has incurred. She was notified in March 2009 that her temporary additional pension would cease in January 2023. It subsequently informed her that her SPA had increased to 66 in its annual pension increase letters sent to her since 2015. She has therefore been given some eight years to plan for the perceived loss of the additional temporary pension for one year before her State Pension becomes payable in January 2024.

25. In response to the point raised by Mrs T about the Leaflet, the Trustee says that:

> "…as Mrs T states, it explains that "The factors used by the Scheme Actuary to calculate both the increase and the reduction are based on your age, Scheme pension and BSP at the time of your retirement." The point of this statement was to make it clear that this calculation was carried out at a particular point in time and so any changes thereafter (for example, further accrual of state pension due to other employment) would not affect scheme benefits. In Mrs T''s case, at the time of her retirement her BSP was expected to be paid from age 65 and calculations were carried out on that basis…it was not until the 2011 Act was passed that it was clear that there would be changes to the SPA - so Mrs T could not have been informed in 2009 that her SPA would change from 2024.
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> As you expect, there is also a statement…"You should bear in mind that this leaflet only gives you a brief overview of your choices at retirement. Nothing in this leaflet overrides the PSPS Rules, which will apply in the unlikely event of any conflict.""

Conclusions

26. The PSPS Rules clearly stipulate that the higher benefits available to Mrs T under the SSO are only payable until the anticipated date she reaches her SPA. When she retired early in March 2009, her SPA was expected at the time to be 65. Whilst this anticipated SPA was not specified in the correspondence sent to Mrs T in March 2009, in my view, it could easily have been deduced from the SPD shown, 9 January 2023, which is her 65th birthday.

27. The amount of pension she surrendered in exchange for the temporary additional pension was calculated on the basis that it would only be payable until she attained 65. Subsequent legislative changes did not affect the date upon which this temporary pension would cease.

28. Mrs T argues the SSO is meant to provide a 'balance to income' until SPA even if it was to be altered by legislation. She contends that the retirement information which she received from the Trustee only referred to SPA and that was ambiguous. I do not consider that the information sent was incorrect. The documentation which Mrs T received in March 2009 clearly stated that the temporary additional pension would cease at her SPD of 9 January 2023, her 65th birthday.

29. The amount of lifetime pension that must be surrendered to obtain the additional temporary pension is calculated when the member retires from the PSPS. It is intended that this exchange is "cost neutral". This means that, at the time of calculation, the additional temporary pension that is granted is expected to be of equivalent value to the lifetime pension that is given up in exchange. The calculation of the pension to be surrendered is based on the additional temporary pension being payable until the member's anticipated SPA which is the SPA applying at the time the calculation is carried out.

30. Mrs T contends that she has made a loss as a result of relying on what she was told. I disagree. The effect of her choice has been to alter the timing of payments, not to deprive her of any payment to which she would otherwise have been entitled. Even if it was permissible to recalculate Mrs T's benefits available from the SSO to her new SPA of 66, the same total amount of pension would be paid, at a lower rate, over a longer period. If the Trustee agreed to pay her temporary additional pension for an additional year at the same level (which under the rules it has no power to do), it would actually be paying her more than her actual PSPS entitlement.

31. The information which the Trustee provided Mrs T in March 2009 reflected the position under PSPS Rules that the additional pension would only be payable until her anticipated SPA as determined at that time. Arguably the information could have been clearer in explaining that the calculation of the temporary additional pension was based on an anticipated SPA. I note, however, that the Leaflet does include a proviso stating that it only summarises the main provisions of the PSPS. It also clearly refers Mrs T to the PSPS Rules, which describes in full the PSPS benefits and overrules the non-legally binding Leaflet, should there be any discrepancies.

32. Legislation may be altered substantially before it passes through Parliament or may be deferred indefinitely due to a lack of Parliamentary time. The Trustee could only have amended the PSPS Rules after the Act had received Royal Assent and the changes were certain. In any event, the change to SPA did not entitle the Trustees to apply the scheme rule any differently to the way that they did and did not entitle Mrs T to amend her choice.

33. I accept the Trustee's position that it could not possibly have foreseen at the time the subsequent change which the Government would make in November 2011 to accelerate the increase of the equalised SPA from 65 to 66 by October 2020. That decision was made several years after Mrs T's retirement and her receipt of benefits from the PSPS.

34. Where an applicant brings a complaint based upon having been given incorrect information, I will usually consider two legal concepts: 'negligent misstatement' and 'estoppel'.

35. The starting point where incorrect information has been provided is that a scheme is not generally bound to follow incorrect information, a member is only entitled to receive the benefits provided for under the scheme rules. Broadly, I will provide redress following incorrect information if it can be shown that financial loss has flowed from the incorrect information given. For example, the member may have acted differently in the expectation of receiving the higher benefits, such as retiring early.

36. With regard to estoppel, I will not allow either party to rely on a fact contrary to that which they have previously represented, or contrary to a common assumption that something is true, if it would not be fair to do so. This may mean that a respondent will be prevented from arguing that something they said before was wrong and will, instead, have to give benefits as though what was said were true.

37. I am satisfied, however, that the information which Mrs T received in March 2009 was correct at that time and adequate for her to make an informed choice on whether selecting the SSO would be in her best financial interests. I do not consider that "negligent misstatement" or "estoppel" arguments can therefore be used by Mrs T in support her complaint.

38. It is regrettable that the statement made by the Trustee in its Stage Two IDRP decision letter said that "the documentation provided in connection with the SSO… "did advise that SPA was changing in 2024". As the Trustee has accepted, that part of the IDRP reasoning cannot have been correct because when it provided the documentation the Trustee would not have been aware that the Government was or would in future be considering a further change to SPAs which would take effect before Mrs T reached her SPA. However, the IDRP reasoning also explained that the documentation provided to Mrs T was correct and not misleading at the time of issue, and I agree with that conclusion. The Trustee has apologised for the incorrect statement which was provided as part of the IDRP decision and I consider that is sufficient remedy for the error which occurred.

39. The fundamental duty of a trustee is to give effect to the provisions of the trust deed. A trustee who fails to do this is in breach of trust. One of the main duties of a trustee is to pay out the right benefits at the right time which in my view is what has happened here.

40. I conclude that there has been no maladministration on the part of the Trustee which has caused Mrs T any unremedied injustice. I therefore do not uphold Mrs T's complaint against the Trustee.

Karen Johnston

Deputy Pensions Ombudsman
16 January 2020