PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mrs Carole Turner
Scheme	Elswick Group Pension Scheme (**the Scheme**)
Respondent	Pitmans Trustees Limited (**PTL**) Legal & General Assurance Society Limited (**L&G**)

Subject

Mrs Turner complains that she was not paid the 50% widow's pension she was entitled to and, further, that her widow's pension was not increased by 3% each year in accordance with her entitlement. She says that arrears have built up which she is owed.

The Pensions Ombudsman's determination and short reasons

Mrs Turner's complaint cannot be upheld against L&G. However, Mrs Turner's complaint can be upheld against PTL, but only to the extent that Mrs Turner has suffered distress and inconvenience as a consequence of PTL's maladministration, because:

- there is no evidence to suggest that had PTL acted more expediently on discovery of Mrs Turner's benefit entitlement in December 2012 they would have been able to secure Mrs Turner's benefit entitlement in full from the assets of the Scheme;
- on the balance of probabilities it seems unlikely that had PTL acted more expediently on discovery of Mrs Turner's benefit entitlement in December 2012 they would have been able to secure Mrs Turner's benefit entitlement in full from the assets of the Scheme; and
- PTL have - in delaying the payment of Mrs Turner's widow's pension, in failing to recognise Mrs Turner's entitlement to 3% yearly pension increases and providing Mrs Turner with gross rather than net figures in respect of the payment of her pension arrears - caused Mrs Turner to suffer distress and inconvenience.

DETAILED DETERMINATION

Material Facts

Background

1. Mrs Turner's late husband became a pensioner under the Scheme with effect from 21 February 1989. He died on 7 April 2009.

2. The Scheme has been in the process of winding up since late 1999. PTL is an independent trustee, appointed in mid-1999 when the Scheme's principal employer, Elswick Plc (**Elswick**) went into liquidation. The Scheme is underfunded and does not have enough money to pay members' benefits.

3. In September 2007 L&G were selected to provide annuities and deferred annuities to the Scheme's members when benefits were finalised under the wind up. The Scheme's assets were transferred to L&G at that time.

4. As a result of the wind-up, benefits for members have to be reduced in (put at its simplest) proportion to the funding level. There is an order of priority in which this must be done. (Some pensions in payment are protected from reduction, but this does not apply to Mrs Turner's pension.)

5. However, due to the timing of the wind-up the Scheme is eligible for assistance from the Financial Assistance Scheme (**the FAS**). The FAS can top-up members' benefits to a level prescribed by law. The Scheme is due to be accepted by the FAS in the coming months. Once accepted, the Scheme will transfer to the FAS. Any top-ups of benefits due under the legislation governing the FAS will be paid at this time. Mrs Turner has been receiving an additional payment from the FAS since June 2013, although it is being paid on a provisional basis until final calculations can be made when the Scheme has transferred.

Relevant correspondence prior to Mr Turner's death

6. Elswick Plc (**Elswick**), the former principal employer of the Scheme, wrote to Mr Turner on 14 May 1987. The letter says:

> "Your own pension and any widow's or children's pension will increase at 3% per annum compound subject to any limitations imposed by the Inland Revenue"

7. That letter also says:

> "If you die after retirement your widow will receive a pension of 50% of the pension being paid to you at the date of your death (but ignoring any reduction made if you exchanged part of your pension for a cash sum). There will be no reduction in the amount of any widow's pension on account of age disparity."

8. Mr Turner received a further letter from Elswick on 15 February 1989 (on this occasion also signed off by the then trustees of the Scheme (which obviously did not include PTL)). This letter said:

> "The benefits payable to you and/or your dependants under the Scheme are calculated in accordance with the ordinary provisions of the Scheme, and subject to the ordinary terms and conditions of the Scheme except as amended by this letter and the letter issued to you by [Elswick] on 14th May 1987."

9. I describe the two letters above as "the Letters".

10. PTL sent Mr Turner (and all other members of the Scheme) a letter on 23 April 2002 providing an update on a settlement that had been reached between the trustees of the Scheme at that time (John Fox and PTL) and the Joint Liquidators of the Ferguson Group. The letter attached "general illustrations" of how the settlement was anticipated to affect members of the Scheme. The illustration said that after the settlement had been concluded pensioner members of the Scheme – such as Mr Turner – would continue to receive their pension in full. The illustration also said that increases to pension payable from 8 December 1999 to the date of the illustration (presumably not yet paid) would be paid in full, as would "increases due in the future".

11. Further, PTL sent Mr Turner an email on 7 November 2003 saying that the administrator of the Scheme at that time had advised them that Mr Turner was entitled to "guaranteed" 3% increases to his pension.

12. In addition, Pitmans Solicitors sent Mr Turner an email on 30 March 2007 saying that they had been advised by the administrator of the Scheme at that time that Mrs Turner's widow's pension entitlement "would be 50% of your [i.e. Mr Turner's] current pension".

Events after Mr Turner's death

13. When Mr Turner died his annual pension was £23,383.44. Accordingly, 50% of Mr Turner's pension at the time of his death was £11,691.72.

14. Mrs Turner was advised on 23 October 2009 that her pension entitlement was £7,307.32 a year. The reason (though it was not explained at the time) that Mrs Turner did not receive 50% of her late husband's pension on his death was that she was more than ten years younger than Mr Turner at the time of his death and that, as a consequence, a 2.5% pension reduction for each full year in excess of 10 years she was younger would apply. (That was the normal position under the Scheme for younger spouses.)

15. Mrs Turner's first widow's pension instalment under the Scheme was paid to her in November 2009.

16. L&G started to pay Mrs Turner's pension directly from 8 October 2010. The pension paid from that date was £7,307.40 a year. An email from PTL to Mrs Turner of 26 November 2012 explains that an audit of the Scheme had been performed by L&G ahead of securing benefits for members. This audit showed that Mr Turner had been overpaid pension of £3,361.65 and that, as a consequence, Mrs Turner's pension had been overpaid by £1,287.73. The email said that "due to the poor funding of the Scheme, it is necessary to recover this overpayment", and, accordingly, Mrs Turner's benefits were to be reduced to £6,590.72 a year until October 2013 to make that recovery.

17. PTL received the Letters from Mrs Turner in December 2012.

18. PTL contacted Mrs Turner by email dated 4 February 2013. This email said that PTL had considered the Letters and concluded that Mrs Turner had a valid claim to 50% of Mr Turner's pension without reduction due to Mrs Turner being more than ten years younger than her late husband. The email said that, as a consequence, Mrs

Turner's benefits required correcting. This correction would be made by the FAS as it was "too late" for L&G to make the correction. The email did not mention Mrs Turner's claim to fixed 3% annual increases to her pension.

19. Mrs Turner was approached by the FAS and duly completed form FAS A2(s), as requested by them.

20. PTL contacted Mrs Turner by email on 6 June 2013. In this email PTL confirmed that Mrs Turner would continue to receive her current pension from L&G and that any excess entitlement (i.e. to make up the shortfall) would be paid by the FAS. PTL also confirmed that no payments of arrears would be made until the "final data" had been confirmed.

21. Although we do not have copies of the correspondence from the FAS, it appears that the FAS contacted Mrs Turner after 6 June 2013 to inform her that she would receive an initial monthly payment of £422.98 from them in addition to her pension paid by L&G. I understand that Mrs Turner was the only pensioner in payment to receive such a top up from the FAS. The FAS normally only top-up entitlements secured from scheme assets after the relevant scheme has transferred to them.

22. PTL contacted Mrs Turner by email on 5 August 2013 in respect of her questions surrounding pension increases. PTL argued that the letter Mrs Turner received from Elswick saying that she would receive fixed 3% yearly pension increases "misinterpreted" the rules of the Scheme. PTL said that the rules of the Scheme provided that pensions in payment in excess of the Guaranteed Minimum Pension deduction would be increased each year in line with the percentage increase in the Retail Prices Index, capped at 3%.

23. L&G contacted Mrs Turner by email on 2 September 2013 to inform her that her pension of £6,590.76 a year had been increased on 6 April 2013 by 2.6% and that L&G had been instructed by PTL "to apply an increase each April linked to the Retail Prices Index capped at 3%".

24. PTL contacted Mrs Turner by email on 3 October 2013. In this email PTL said that they had taken legal advice and concluded that Mrs Turner's accrued spouse's benefit was as Mrs Turner had claimed – a pension of 50% of Mr Turner's pension as

at the date of his death (i.e. which PTL had already established) with fixed increases of 3% per annum. The email said that "…these benefits are special terms that were awarded to your late husband and are outlined in letters dated 14 May 1987 and 15 February 1989 [i.e. the Letters]". The email said that Mrs Turner's benefits would be recalculated and that L&G would "try to secure as much benefit as possible and any shortfall from your full entitlement will be topped up by…FAS". The email also said that, after benefits had been recalculated, Mrs Turner's payment from the FAS would "…either be revised (to take into account the revised amount you are receiving from the Scheme) or stopped (if the Scheme can afford to pay you 100% of your entitlement)".

25. Mrs Turner made a complaint under the Scheme's internal dispute resolution procedure on 28 November 2013. PTL responded to Mrs Turner's complaint by letter dated 20 December 2013.

26. PTL contacted Mrs Turner by letter dated 28 January 2014. The letter said that L&G had completed their calculations and that an annual pension of £11,450 had been secured for Mrs Turner from Scheme assets. This pension would not be subject to any future yearly increases. The letter also said that an arrears payment of £19,765.69 would become payable to Mrs Turner. This arrears payment represented the difference between what Mrs Turner had been receiving and £11,450 per annum since 2009. I understand that the arrears payment has been made.

27. Mrs Turner contacted my office (in respect of PTL's letter of 28 January 2014) by letter dated 29 January 2014 expressing her dissatisfaction at her perceived underpayment of arrears and the fact that no increases would be made to her pension in future.

28. I understand that, to date, Mrs Turner has been paid net pension arrears of £15,980.69 (i.e. the figure quoted by PTL of £19,765.69 was the gross figure) and that her annual pension of £11,450, secured with L&G, came into payment on 6 February 2014.

Summary of Mrs Turner's position

29. PTL (and the administrator of the Scheme, Xafinity) did not pay the first instalment of her widow's pension until seven months after the death of her late husband, which was an unreasonable delay.

30. She is owed an arrears payment greater than the £19,765.69 she has been informed she will be paid in PTL's letter to her of 28 January 2014. In her letter of 29 January 2014 she seeks an arrears payment of £24,867.95.

31. She is owed a yearly pension greater than the £11,450 she has been informed she will be paid in PTL's letter to her of 28 January 2014 as this figure does not represent half of her late husband's pension entitlement at the time of his death.

32. She is entitled to 3% increases to her pension each year, both backdated to her late husband's death and in future.

Summary of PTL's position

33. PTL have said that they regret the delays putting Mrs Turner's widow's pension into payment after her late husband's death but argue that they were not informed of his death until 23 July 2009 and that a change in payroll arrangements at the time contributed to the delays.

34. PTL have consistently said that they have been trying to get Mrs Turner the best possible level of benefits from the share of the fund that is available to her.

35. PTL acknowledged, in their letter to Mrs Turner of 4 March 2014, that she is entitled to 3% increases to her pension each year. However, PTL also said in that letter that there is not enough money in the pension fund to secure payment of future pension increases.

36. During the course of this investigation PTL have said that as benefits from Scheme assets were only secured with L&G in January 2014, it was not possible for them to retrospectively ascertain whether Mrs Turner's "share of fund" would have been greater if PTL had secured her pension when they first became aware of her entitlement in December 2012.

Summary of L&G's position

37. L&G said - in a telephone conversation with my office on 20 March 2014 - that everything they have done in respect of performing the calculation of the benefits to be secured with them from the assets of the Scheme has been undertaken solely on the direct instructions of PTL. Accordingly, L&G argue that Mrs Turner does not have a real complaint against them.

Conclusions

Did PTL warrant/undertake that Mr Turner's pension would be paid in full (with increases) indefinitely?

38. Mrs Turner says that she should be paid her pension in full (including increases) because PTL made "warranties/undertakings" that this would be done in the benefit illustrations attached to their letter to her late husband of 23 April 2002.

39. I have briefly summarised the letter of 23 April 2002 at paragraph 10 above. As I have said there, the benefit illustrations attached to the letter say that, after the settlement is concluded, Mr Turner would receive his pension in full, along with all future increases (which would also be paid in full).

40. However, the letter warns the recipient that the benefit illustrations attached to it are "sample illustrations" and that they "do not cover all possible circumstances" and, as such, "are intended as a guide only".

41. Accordingly, the statements in the benefit illustrations attached to the letter from PTL dated 23 April 2002 do not amount to PTL warranting or undertaking that Mr Turner would receive the benefits described in the illustrations.

When did PTL become aware of Mrs Turner's entitlement?

42. Mrs Turner passed copies of the Letters to PTL in December 2012. However, Mrs Turner says that PTL were aware of her entitlement – as set out in the Letters – prior to December 2012. In her letter to my office dated 23 April 2014 Mrs Turner has provided copies of two emails (described above at paragraphs 11 and 12) that she claims demonstrates that PTL were aware of her entitlement before December 2012. I do not find that they were, however. The email dated 7 November 2003

does not refer to a widow's entitlement but only to Mr Turner's entitlement (to fixed 3% increases). In addition, the email dated 30 March 2007 from Pitmans Solicitors, although it does refer to entitlement to a widow's pension, cannot be said to prove - on the balance of probabilities - that PTL were aware of Mrs Turner's entitlement at that time. This is because it does not refer to the fact that Mrs Turner has a "special" entitlement. The email says Mrs Turner would be entitled to 50% of Mr Turner's pension, which is what Mrs Turner is entitled to under the rules of the Scheme (although, admittedly, Pitmans Solicitors failed to spot that Mrs Turner's widow's pension would have been reduced for age difference under the rules of the Scheme (PTL explain that this was because they did not hold Mrs Turner's date of birth at this time)). Accordingly, I am satisfied that Mrs Turner's entitlement to a 50% widow's pension (without reduction for age difference) and 3% annual pension increase was only confirmed to PTL in December 2012.

43. PTL acknowledged, in their email of 4 February 2013, that Mrs Turner was entitled to a widow's pension equivalent to 50% of her late husband's pension at the time of his death. It took until January 2014 for calculations to be produced to reflect this decision.

44. PTL then acknowledged, on 3 October 2013, that Mrs Turner was entitled to 3% increases to her pension each year. L&G's calculations, communicated by PTL to Mrs Turner on 28 January 2014, provided that no future increases could be applied to Mrs Turner's pension from the assets of the Scheme. It appears that the level of pension paid to Mrs Turner from 6 February 2014 takes account of past increases that she should have received, although it is unclear whether such increases are at the full 3% she is entitled to.

45. The question that I must consider is, therefore, whether the level of benefits Mrs Turner receives would have been improved if PTL had acted more expediently upon receipt of the Letters in December 2012.

L&G

46. L&G were chosen during the wind-up of the Scheme to secure benefits for the members of the Scheme from what remained of the Scheme's assets. L&G, therefore, work on the direct instructions of PTL. There is no evidence that L&G have unduly delayed the process of securing benefits from the Scheme's assets or that there have been any other relevant failures on their part. Mrs Turner's complaint against L&G is, therefore, not upheld.

Level of pension

47. PTL's letter to Mrs Turner dated 28 January 2014 says that Mrs Turner will receive a pension of £11,450 a year, which will come into payment from 6 February 2014.

48. When Mr Turner died his annual pension was £23,383.44. If the Scheme had not been in the process of being wound up Mrs Turner would therefore entitled to be paid a pension of 50% of this figure, which is £11,691.72 a year.

49. PTL say that the pension of £11,450 a year has been secured for Mrs Turner by reference to her "share of [the] fund". What that means, put very simply, is that they will have calculated the value of the benefits that Mrs Turner, and every other member of the Scheme, would have had if it had been fully funded – and they will than have reduced each figure as a result of the funding level of the scheme, applying the order of priorities required by the Scheme's rules.

50. Mrs Turner's pension recalculated based on December 2012 data might have been more or less than the £11,450. However, it would be onerous to reconstruct the figures as at December 2012 - it would require the whole Scheme's benefits to be revalued. And it is unlikely that Mrs Turner's eventual pension would have been significantly different, because the underlying fund value will not have changed dramatically. If her pension would have been more, then everyone else's would have been slightly less - since the fund is finite.

51. In the circumstances of the Scheme's funding it would disproportionate to any benefit to Mrs Turner to go to the significant expense of, in effect, reconstructing the winding-up calculations at an earlier date. I could not anyway make a direction that could result in a significant reduction in other members' benefits. And I could

not direct PTL to make up any shortfall themselves without them relying on an indemnity from the fund. So such a direction would also potentially affect the other members.

Pension increases

52. The Financial Assistance Scheme Regulations 2005 provide that pensions in payment in respect of service prior to 6 April 1997 will not be subject to increases. Mr Turner's pension came into payment in 1989. Accordingly, irrespective of the date that PTL became aware of the Letters, Mrs Turner's widow's pension is not eligible to receive future annual increases from the FAS.

53. PTL's letter to Mrs Turner of 4 March 2014 says that there is not enough money in the Scheme (and, therefore, Mrs Turner's "share of fund") to secure future pension increases. This was also communicated to Mrs Turner by PTL in their letter of 28 January 2014.

54. For the reasons given in relation to the amount of pension, I do not think there is any likelihood that had the allocation of funds been completed in 2012 it would have made any difference to the fact that Mrs Turner will not receive increases.

Delays in payment of pension

55. Mrs Turner complains that there was seven month delay in the payment of her pension on the death of Mr Turner in April 2009. This is clearly an unreasonable delay.

56. PTL, in their letter to Mrs Turner of 20 December 2013, blamed Xafinity for the delay, saying that they only received news of Mr Turner's death from them on 23 July 2009 and that the further delay in arranging payment was caused by a change in payroll arrangements at that time.

57. I have not requested any information from Xafinity as they are not a party to this complaint. Accordingly, I am unable to take a view on Mrs Turner's complaints about Xafinity. Nevertheless, it is clear that the seven month delay Mrs Turner experienced is an unreasonably long period of time. PTL have a responsibility to ensure that the Scheme's administrators are acting in an accurate and expedient

manner. Accordingly, it is my view that PTL should bear some responsibility for Xafinity's failure to make the payments to Mrs Turner at this time.

Distress and inconvenience

58. It is clear that the process of winding-up the Scheme has been complicated and that Mrs Turner's benefit entitlement, being, I understand, on a different basis to any other Scheme member, has added a further layer of complexity. Nonetheless, it is also clear from the correspondence received that PTL (and the Scheme administrator – Xafinity (in respect of whose work PTL were ultimately responsible)) have made a number of errors in respect of the calculation and payment of Mrs Turner's benefit entitlements.

59. Firstly, as discussed previously, PTL failed to ensure that Mrs Turner's widow's pension came into payment in a timely manner upon the death of Mr Turner in April 2009. Further, having received the Letters in December 2012, PTL incorrectly informed Mrs Turner in their email of 5 August 2013 that she was not entitled to 3% increases to her pension, claiming that the Letters "misinterpreted" the rules of the Scheme. Finally, PTL, in their email to Mrs Turner dated 28 January 2014, said that Mrs Turner would receive a payment of £19,765.69 from the Scheme in respect of the arrears owed to her. Mrs Turner actually only received a payment of £15,980.69. PTL had failed to inform Mrs Turner that the figure of £19,765.69 was a gross figure and, therefore, that the amount she would actually receive would be less due to the deduction of tax.

60. Normally I would consider directing that a small sum (perhaps £250 in such a case) be paid to Mrs Turner as compensation for the distress and inconvenience PTL's maladministration has caused her. However, I do not wish to make a direction that will further deplete the Scheme's fund in relation to matters which have caused no financial loss. I am unable to direct PTL to pay such a sum from their own resources if, overriding that, there is an indemnity from the Scheme's funds available to them under the Scheme's rules.

61. So I uphold Mrs Turner's complaint, but only to the extent that she has suffered some distress and inconvenience as a consequence of PTL's maladministration, and I make no directions.

Tony King
Pensions Ombudsman

5 September 2014