PO-4579

Ombudsman's Determination

Applicant	Dr Gordon Kenworthy
Scheme	Campden R.A. Pension Scheme (**the Scheme**)
Respondents	Campden R.A. Pension Trust Limited (**the Trustees**)
	Trigon Pensions Limited (**Trigon**)

Complaint Summary

Dr Kenworthy complains that the Trustees and Trigon, the current Administrator and Actuary of the Scheme, have not calculated the retirement pension available to him correctly in accordance with the consolidated Scheme's Trust Deed and Rules (**the Rules**) and existing sex equality legislation.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against the Trustees and Trigon because I consider that:

- they are fully entitled to use the current method to calculate Dr Kenworthy's deferred pension at Normal Retirement Age (**NRA**) which has been recommended and certified as reasonable by the current Scheme Actuary;
- they have interpreted clause 11.4 of the Rules in a way which is consistent with what the rule actually states; and
- they can continue to defer taking action to equalise GMPs whilst this issue generally remains unresolved.

DETAILED DETERMINATION

Material Facts

1. The Scheme is a final salary pension arrangement which was closed to future accrual of pension rights from 1 January 2011.

2. Dr Kenworthy joined the Scheme on 1 August 1991. At that time, the NRA of the Scheme for male and female members was 62½ and 60 respectively.

3. The Scheme's "Barber window" closed on 17 November 1999, when the NRA for female members was increased to 62½. More details on this "Barber window" can be found in paragraph 11 below.

4. The Scheme's NRA was raised from 62 ½ to 65 on 1 January 2003. Its accrual rate (that is, the rate at which pension rights build up for each year of pensionable service) also changed on this date from 1/60th to 1/67th.

5. The relevant rules implementing these changes as shown in the Rules dated 30 October 2008, are as follows:

> "**8. Drawing of Pension at Normal Pension Date (NPD)**
>
> **8.1. Entitlement to pension**
>
> At NPD a member shall be entitled to draw a pension of an amount calculated in accordance with the provisions of Rule 8.2.
>
> **8.2. Amount of pension**
>
> The annual rate of pension payable to a Member pursuant to Rule 8.1 shall be:
>
> The aggregate of:
>
> (a)1/60th of the Member's Final Pensionable Salary for each completed year of Pensionable Service (and so in proportion to any additional completed months thereof) prior to 1 January 2003 and
> (b)1/67th of the Member's Final Pensionable Salary for each completed year of Pensionable Service (and so in proportion to any additional completed months thereof) after 31 December 2002
>
> **provided that** the proportion of the Member's pension which is attributable to Pensionable Service prior to 1 January 2003 shall not be less than the amount the Member would have been granted at age 62½ under the provisions of the Scheme in force on 31 December 2002 increased actuarially as the Scheme Actuary shall recommend and certify as

reasonable having regard to the period between the Member attaining age 62½ and NPD.

11.4. Entitlement to deferred pension

If at the date of leaving an Early Leaver has completed two years' Pensionable Service…he shall be entitled to a deferred pension commencing at NPD of an amount calculated in accordance with Rule 8.2 hereof based upon Pensionable Service to and Final Pensionable Salary at the date of leaving Pensionable Service **provided that** the proportion of the Member's pension which is attributable to Pensionable Service prior to 1 January 2003 shall not be less than the amount the member would have been granted at age 62½ under the provisions of the Scheme in force on 31 December 2002 increased actuarially as the Scheme Actuary shall recommend and certify as reasonable having regard to the period between the Member attaining age 62½ and NPD…"

6. Dr Kenworthy became a deferred pensioner in the Scheme on 1 August 2010. He received an estimate of the retirement benefits available to him at NRA 65 (that is, on 10 August 2013) with an explanation of how the figures had been calculated from the Scheme Administrator at that time, Aon Hewitt (**Aon**).

7. Aon calculated that Dr Kenworthy's deferred pension at date of leaving and NRA to be £13,551 pa and £17,302 pa respectively.

8. Trigon subsequently replaced Aon as both Scheme Actuary and Administrator.

9. Trigon calculated Dr Kenworthy's deferred pension at date of leaving to be a higher figure of £13,671 p.a. by taking into account an additional two months' pensionable service available to him. They calculated his pension at NRA 65 to be £17,291 pa in accordance with the Rules and performed a "Barber underpin" check showing that he would be entitled to a higher pension of £18,195 pa at NRA.

10. Using Aon's methodology and allowing for the two months' extra pensionable service, Dr Kenworthy's deferred pension at NRA would be £17,451 pa.

11. Trigon explained in their letter dated 12 July 2013, to Dr Kenworthy that:

- following the judgment made in the Barber case on 17 May 1990, defined benefit pension schemes had to provide equal benefits for men and women from this date;
- this meant that Scheme benefits had to be "levelled up" (that is, increased to a level enjoyed by the advantaged sex during the "Barber window" covering

the period from 17 May 1990, to the date when Scheme benefits were equalised, 17 November 1999);

- as he was retiring after age 60, they performed a "Barber underpin" check to ensure that his pension benefits in the Scheme satisfied the minimum requirement;
- the outcome of this check was that he would be entitled to a higher pension at NRA than the one calculated in line with the Rules and past practice;
- currently men and women are entitled to receive their Guaranteed Minimum Pension (**GMP**) from age 65 and 60 respectively (**GMP Age**) and there is no legal obligation to equalise GMPs in the Scheme;
- if a member leaves before GMP Age, statutory revaluation at the fixed rate (of 4%) is applied to the GMP available from the Scheme for each complete tax year from date of leaving until GMP Age;
- if a member retires after GMP Age, a statutory late retirement adjustment is applied to the GMP;
- statutory inflation-proofing (up to 3% p.a.) is also applied to the post 5 April 1988 GMP if paid after GMP Age;
- that part of his GMP taken into account in the "Barber underpin" check was increased in line with statutory requirement (that is 4% p.a. for each complete tax year from date of leaving until GMP Age);
- neither a late retirement factor nor a late retirement adjustment were applied to this part of his GMP because it was being taken at GMP Age;
- there is no evidence of Aon carrying out a "Barber underpin" check in their calculation of his Scheme benefits; and
- even if Aon's approach in calculating the pension relating to pre 6 April 1997 service (where the late retirement factor is applied to the whole pension attributable to this service) is used for the pension calculation, the "Barber underpin" test would still produce a higher pension for Dr Kenworthy.

12. Dr Kenworthy was dissatisfied with Trigon's explanation on how his Scheme pension at NRA had been calculated. He sought the assistance of The Pensions Advisory Service (**TPAS**) to resolve this matter and informed them that:

- the Scheme Actuary who had approved Aon's calculation method was also involved with making the Scheme changes which came into effect on 1 January 2003;

- according to Aon's method, a late retirement factor for two and a half years is applied to the pension (including the GMP) available at date of leaving and the GMP at NRA is subtracted from this to determine the excess over GMP pension at NRA;
- he had calculated the retirement pension available to him at NRA from the Scheme to be £18,668 pa (that is, £473 pa more than what Trigon had calculated that he was entitled to) by incorporating a "Barber underpin" check into Aon's calculation method;
- according to his method, a late retirement factor for five years is applied to that part of his pension (including the GMP) attributable to the "Barber window" calculated at age 60 and the GMP at NRA subtracted from it to obtain the excess over GMP pension at NRA;
- for the "Barber underpin" check, Trigon calculated his deferred pension at date of leaving in respect of the "Barber window" using his final pensionable salary at age 60 and subtracting the GMP at date of leaving from it; and
- they then applied a late retirement factor to this excess over GMP figure for 5 years to calculate the corresponding amount at NRA and revalued the GMP at the statutory rate (of 4%) for each complete tax year between date of leaving and NRA to determine its value at NRA.

Summary of Dr Kenworthy's position

13. The Rules refer to an actuarial enhancement of pensionable service prior to 1 January 2003. As the GMP is attributable to pre 2003 service, the method used by Trigon does not include an actuarial enhancement for all of the pre 2003 service benefits (unlike the method used by Aon). Trigon's method does not, therefore, meet the requirements imposed by Rule 11.4. (The Respondents have strongly refuted this allegation).

14. Trigon has not interpreted Rule 11.4 in a way which is consistent with what the rule actually states. The rule refers to an actuarial increase based upon pensionable service and final pensionable salary. His proposed method of calculating the retirement pension available to him at NRA, i.e. Late Retirement Factor (**LRF**) x Pensionable Service (**PS**) x Final Pensionable Salary (**FPS**) is consistent with Rule

11.4. Trigon's calculation method of (LRF x PS x FPS – GMP) + (Statutory Revaluation Factor x GMP) is not (unless GMP is zero).

15. Prior to 1 January 2003 when the Scheme's NRA was 62 ½, benefits payable by the Scheme between the age of 62 ½ and 65 would have been based on (PS x FPS) and not (PS x FPS – GMP). When the Scheme's NRA was raised to 65 on 1 January 2003, members could not take their pre 2003 benefits between the ages of 62 ½ and 65 unless they were prepared to have their post 2003 benefits actuarially reduced to allow for early payment.

16. If payment of pre 2003 benefits had to be postponed by up to 2½ years, it seems reasonable to him that an actuarial increase should be applied to these benefits between the ages of 62 ½ and 65 based on (PS x FPS) resulting in an actuarially neutral situation for both male and female members. This is exactly what Rule 11.4 stipulates and how the former Scheme Actuary who was involved in making the 2003 Scheme changes had interpreted this rule.

17. Statutory GMP revaluation is not an actuarial increase to the GMP. In his opinion, Trigon agrees with this view in their letter of 12 July 2013, to him. The overriding GMP schedule in the Rules stating that GMPs are "…paid at a rate equivalent to a weekly rate of not less than the guaranteed minimum", in his view, permits increases to GMPs greater than statutory revaluation. A LRF which mirrors statutory GMP revaluation is not actuarially neutral.

18. His interpretation of the wording in Rule 11.4 "…increased actuarially as the Scheme Actuary shall recommend and certify as reasonable" is that the Scheme Actuary is certifying the actuarial assumptions used (and not the method) in the calculation of the Scheme's LRF are reasonable.

19. Only one of the methods used to calculate his deferred pension at NRA can be correct. Trigon has not explained why an increase not considered an actuarial increase in July 2013, became one in April 2014.

20. The way that Trigon and the Trustees are interpreting Rule 11.4 treats male members less favourably than female members. This is incompatible with section 67 of the Equality Act 2010. The previous method used by Aon complies with this Act because the LRFs applicable to both sexes are the same.

21. In the case of Williamson v Sedgwick Group Pension Scheme Trustees Limited (H00177), former Pensions Ombudsman, Dr Julian Farrand, ruled on a point of law as follows:

> "As GMPs are not expressively excepted from the application of the equal treatment rule, then, in my judgement, by virtue of that rule, they must be equalised."

This contradicts the Respondents' position that there is no legal requirement to equalise GMPs.

22. The Equality Act 2010 (Sex Equality Rule) (Exceptions) Regulations only specifies seven situations where prescribed actuarial factors can be different for men and women. In his view, none of them apply to his case and the different treatment in the use of actuarial factors for male and female members in the application of Rule 11.4 is incompatible with the equal treatment rule.

23. He considers that his proposed calculation method:

- is consistent with Rule 11.4 as worded;
- applies a retirement age of 60 to the Scheme's Barber Window;
- applies a retirement age of 62½ to pre 2003 benefit outside the Scheme's Barber Window;
- is consistent with a former Pensions Ombudsman's ruling in the Williamson case;
- meets the requirements of the implied equality rule and
- does not involve actuarial assumptions except for those in determining the Scheme's LRF (which is not disputed)

Summary of the Respondents' position

24. Aon did not apply a "Barber underpin" test for the "Barber window" in their calculations of Dr Kenworthy's benefits. This underpin is not formally documented in the Rules but required in accordance with overriding legislation.

25. Aon also used a different method to allow for the separate underpin applying to benefits accrued prior to 1 January 2003 ("**the 2003 Underpin"**).

26. Dr Kenworthy disagrees with their explanation on how they calculated his pension and the interaction of the “2003 Underpin” with the “Barber underpin”. They do not, however, consider his calculation method accurately reflects the two underpins.

27. It is clear from the Rules that the “2003 Underpin” should not apply to the GMP. The Rules contain a separate GMP schedule applying to the calculation and payment of GMP. The “2003 Underpin” operates to ensure that the level of benefits accrued prior to 1 January 2003, would not be lower than the benefits calculated based on the Rules immediately before the amendment. This is done by applying an actuarial increase in respect of the period between age 62½ and age 65 to the excess over GMP benefits. The “2003 Underpin” did not replace the late retirement provisions which were unaffected by the amendments made in 2003.

28. Even if the GMP can be said to be within the scope of the “2003 Underpin” (which is not accepted as a matter of law and construction) this does not automatically mean that the same factor applying to the excess over GMP must also apply to the GMP.

29. Under Rule 11.4 the overall increase that is applied is such that “the Scheme Actuary shall recommend and certify as reasonable”. The Scheme Actuary has certified as reasonable an increase which ensures members are no worse off in respect of their benefits accrued prior to 1 January 2003, than they would have been if the NRA not changed on this date. The effect of this is to produce an overall level of benefit which applies a LRF to benefits which are in excess of the GMP and statutory revaluation to the GMP. To do so any differently would put members in a better position for this period of pensionable service than they would have been if the NRA had not been increased on 1 January 2003. This is not the intention or proper construction of the “2003 Underpin”.

30. If the GMP fell within the scope of the “2003 Underpin” (which is denied), they would point out that:

    - the rate of that increase is such as the Scheme Actuary shall recommend and certify as reasonable and there is no single correct answer, rather a range of answers that the Scheme Actuary may certify as reasonable;
    - there is nothing to prevent the Scheme Actuary from taking the view that the overall increase may be arrived at by differentiating between GMP and excess benefits; and

- the increase chosen by the Scheme Actuary is consistent with the objective of the "2003 Underpin" which is to protect the value of the accrued benefits of members as at 31 December 2002.

31. Even if the "2003 Underpin" should be re-calculated by applying the LRF to the whole of his pre 1 January 2003 benefits including the GMP, this would still produce a pension calculation identical to theirs.

32. Dr Kenworthy's calculations enhance the "Barber underpin" by applying a LRF to all "Barber window" pensionable service benefits including GMP between 60 and 65. He contends that this approach is based on the method used by Aon which does not apply a "2003 Underpin" at all. His calculations do not consequently achieve the "2003 Underpin" test but changes it instead.

33. The "Barber underpin" is applied by overriding law and there is no reason why it should be changed so that the GMP is subject to a LRF providing a more advantageous position than required by legislation.

34. Dr Kenworthy 's calculations fail to recognise that the "2003 Underpin" and the "Barber underpin" have to be calculated separately and it is inappropriate to treat the GMP in the same way as excess over GMP benefits for the purpose of the "Barber underpin".

35. They have investigated past practice and the historic operation of the "2003 Underpin". There is limited information available about the "2003 Underpin" because in practice, very few members with pre 1 January 2003 pensionable service have chosen to defer receipt of their pension beyond 62 ½ (as they are able to take their benefits on an unreduced basis from age 60). However, from the information available the previous administrative practice was inconsistent.

36. Aon did not apply a" Barber underpin" check and used an incorrect value for Dr Kenworthy's pensionable service when calculating his deferred pension. It also appears that historically Aon sometimes did not carry out "Barber underpin" checks in relation to the benefit available to some other members of the Scheme. They have consequently instructed Trigon to carry out a sample benefit audit to check that pensions already in payment have been calculated correctly.

37. They are not comfortable using Aon's calculation method because of the inconsistencies in their approach of sometimes applying the same method as

current practice and at other times not. It is important to establish a consistent practice for all members going forward. They believe that the current method used to calculate the "2003 Underpin" is consistent with the Rules and achieves its objectives.

38. They have at no time claimed that there is no legal requirement to equalise GMPs. Rather they acknowledge that under current Scheme practice, GMP benefits are not fully equalised between men and women. They do not consider it appropriate to take steps equalising GMPs at the moment whilst the position under law is still unclear. However, they are actively monitoring developments in this area and keeping the position under review.

39. Dr Kenworthy's benefits are calculated differently than for a female member in the same position. This is because he has not yet reached his State Pension Age (**SPA**) whereas a female member in the same position as him would have. This will be the case in respect of the "2003 Underpin" and also the "Barber underpin".

40. If they were to reassess Dr Kenworthy's benefits to take into account the equalisation of GMP, then they would also need to look at the issue more widely. They do not believe that this would be in the best interests of members at the current time given the continued uncertainty surrounding this issue and the ongoing Government consultation on it.

41. Dr Kenworthy has misunderstood the concept of an increase to benefits that is "actuarially neutral". The common meaning of this expression is that it involves a benefit adjustment which has a broadly cost neutral effect on overall scheme funding. Whether the 2003 Underpin is actuarially neutral or not is not in contention. The key issue is whether the "2003 Underpin" operates to protect the accrued rights of members prior to 1 January 2003. This is what is required by the Rules. The current practice of calculating the "2003 Underpin" by applying a GMP revaluation factor to the GMP achieves this objective.

42. In calculating the "2003 Underpin", the Scheme Actuary is, consequently, not required to certify that the method is "actuarially neutral". Rather the Scheme Actuary must be able to certify that the method used is "reasonable". Taking into account the requirements of the Rules and the purpose of the "2003 Underpin", the Scheme Actuary has certified that the method currently in use is reasonable.

43. They have taken advice on the interpretation of Rule 11.4 and are of the view that the Rules have been followed in the calculation method adopted by Trigon. This rule provides that benefits relating to pensionable service prior to 1 January 2003, should be protected so that they are not less than those that a member would have been granted at 62½ (under the Rules applicable as at 31 December 2002) "increased actuarially as the Scheme actuary would recommend".

44. They disagree that Rule 11.4 requires Dr Kenworthy's pension to be calculated using the formula (LRF x PS x FPS). The reference to PS and FPS in Rule 11.4 is in the context of Dr Kenworthy's pension being calculated in accordance with Rule 8.2 and based on his PS and FPS at date of leaving service.

45. There is no requirement under Rule 11.4 to apply the same LRF to the whole of Dr Kenworthy's pension. The Scheme Actuary has flexibility under this rule to decide what calculation method is, in her opinion, reasonable.

46. They do not agree therefore that the method of calculating the 2003 Underpin is contrary to Rule 11.4, or inconsistent with their duties under pension law. There is no suggestion that the current Scheme Actuary has acted unreasonably, or in a way which would require a referral to any regulatory authorities.

Conclusions

Actuarial Certification of the Method Used to Calculate Dr Kenworthy's Pension at NRA

47. Actuaries are advisers on financial questions involving probabilities relating to mortality and other contingencies. They devise sophisticated mathematical and statistical techniques to solve financial problems which greatly depend on their judgment for the assumptions made in their calculations. Actuarial science is therefore not an exact art but relies heavily on the judgment of individual actuaries.

48. Actuaries are members of the Institute and Faculty of Actuaries which has its own Professional Conduct Standards giving guidance on professional conduct to which all actuaries must conform.

49. An actuary must therefore not give actuarial advice unless satisfied of personal competence in the relevant matters which often involve considerable knowledge and experience. An actuary must also:

    - use best judgment in formulating actuarial advice;

- give proper regard to any relevant professional or other guidance; and
- provide a client with service and actuarial advice to a high standard.

50. One should recognise that there is room for differences of opinion in relation to actuarial advice and acknowledge that two actuaries may quite properly hold different professional opinions about a particular matter.

51. It is, therefore, not for me to decide which of the two different methods developed by the actuaries should be the one used in calculating Dr Kenworthy's deferred pension at NRA. Whilst it appears that the former Scheme Actuary formulated a method which did not require an explicit "Barber underpin" check, he would probably have had his reasons for this and only certified his method as reasonable after carefully considering the effect to his method of the Barber judgment and the changes made to the Scheme on 1 January 2003.

52. Actuarial techniques are constantly evolving and being refined over time, however. The current Scheme Actuary was not comfortable using the method devised by her predecessor and decided to formulate her own involving a separate "Barber underpin" check which she deemed reasonable. This was her prerogative as the incumbent Scheme Actuary and it was within her scope to recommend that different rates of increase would apply to the GMP and the excess over GMP benefits during deferment and payment.

53. I, therefore, consider that the Trustees and Trigon are fully entitled to use the current method to calculate Dr Kenworthy's deferred pension at NRA which has been certified as reasonable by the Scheme Actuary.

54. Dr Kenworthy has proposed a calculation method which incorporates a "Barber underpin" check into the method devised by the former Scheme Actuary to calculate a higher figure for his pension available at NRA of £18,668 pa. This is not a method which has been considered as reasonable by either the former, or current Scheme Actuary. In my opinion, it cannot, therefore, be used to determine his benefits at NRA as Dr Kenworthy would like.

Compliance with the Rule 11.4

55. Dr Kenworthy contends that his proposed method of calculating his deferred pension at NRA is consistent with Rule 11.4, as worded, whilst Trigon's method does not meet the requirements imposed by Rule 11.4. The logic behind his

contention is summarised in paragraphs 13 to 17 above. If he was still an active member of the Scheme and Trigon had calculated his pension using the current method, then I would consider his reasoning to be sound. But Dr Kenworthy became a deferred pensioner in the Scheme on 1 August 2010, and Rule 11.4 clearly states that the calculation of his pension at NRA has to be based upon his PS and FPS at this date.

56. Furthermore Rule 11.4 does not state that a uniform LRF must be applied to the whole of Dr Kenworthy's pension (including the GMP). The Scheme Actuary did not, therefore, contravene Rule 11.4 by applying different factors to increase Dr Kenworthy's GMP and excess over GMP pension up to NRA.

57. Consequently, I do not agree with Dr Kenworthy's view that Trigon and the Trustees have interpreted Rule 11.4 in a way which is inconsistent with what the rule actually states.

Equalisation and GMPs

58. Apart from the GMP benefits, the pension benefits available from the Scheme have been equalised for men and women. The Respondents have explained why they do not currently consider it an appropriate time to equalise GMP benefits and I consider their explanation to be reasonable.

59. Dr Kenworthy disagrees and says that Trigon's calculation method is inconsistent with the ruling made by one of my predecessors in the Williamson case and also fails to meets the requirements of the implied equality rule.

60. In the Williamson case (Our Ref:H00177), the then Pensions Ombudsman, Dr Julian Farrand, concluded in January 2000, that GMPs for men and women should be equalised (i.e. based on the same retirement age) on the basis that Pensions Act 1995 s62 was overriding and required occupational pension schemes to be treated as including an equal treatment rule.

61. But In February 2001, in Marsh Mercer Pension Scheme vs Pensions Ombudsman [2001] 16 PBLR, the judge decided that the Pensions Ombudsman did not have jurisdiction to make that ruling. The judge also recognised that nothing in the Pensions Act 1995 repealed those provisions in the legislation relating to the calculation of the GMPs. He was also of the view that equalisation of GMPs was unnecessary; provided that the pension as a whole is equalised, the individual

components do not have to be, but he did not make any definitive ruling on this point. He also left open the question of whether legislation requires GMPs to be equalised and if so, how it should be done.

62. As Dr Farrand's determination in the Williamson case was consequently set aside, Dr Kenworthy cannot rely on it as a precedent to support his complaint.

63. In January 2010, the then Pensions Minister declared that GMPs should be equalised from 17 May 1990, and the Government intended to introduce amending legislation when Parliament time allowed.

64. In 2012, the Department of Work and Pensions (**DWP**) consulted with the pensions industry on draft secondary legislation which, it was hoped, would settle the matter. The pensions industry was concerned with the DWP's approach, particularly in the lack of clarity on how GMP equalisation should be achieved and the potentially disproportionate costs associated with doing so given that the equalisation uplift was likely to be nominal for most plan members.

65. Further DWP comment was expected with an announcement being first delayed until spring 2014 and then into 2015.

66. In my opinion, the Respondent can continue to defer taking action to equalise GMPs until this issue has been resolved.

67. I do not, therefore, uphold Dr Kenworthy's complaint.

Anthony Arter

Pensions Ombudsman
10 July 2015