

Ombudsman's Determination

Applicant	Mr Y
Scheme	The Carillion Public Sector Pension Scheme (the Scheme)
Respondent	Independent Trustee Services Limited (ITSL)

Outcome

1. I do not uphold Mr Y's complaint and no further action is required by ITSL.

Complaint summary

2. Mr Y has complained that the Scheme's trustee at the time (**the Former Trustee**) did not adequately secure his post 60 annual compensation payment (**ACP**). This was following an augmentation payment made to the Scheme by Carillion plc (**the Employer**).

Background information, including submissions from the parties and timeline of events

3. ITSL was not appointed as trustee of the Scheme until March 2018. It was not in place at the time that some of the key events relating to this case took place. However, it is responding on behalf of the Former Trustee to the events that took place both before and after its appointment.
4. Mr Y was a member of the Scheme, which was administered by Barnett Waddingham (**BW**).
5. In December 2015, Mr Y was made redundant by the Employer. He became a deferred member of the Scheme.
6. As part of Mr Y's redundancy terms, he retained the right to the same compensation payments, he would otherwise have received, had he been made redundant by a previous employer. This was the ACP.
7. An extract from the employee arrangements published in a memorandum dated 30 September 1992, (**the Memorandum**), is displayed at Appendix 1. This document detailed how the ACP was to be secured.

8. On 3 August 2016, the Former Trustee agreed to a request made by the Employer to augment Mr Y's benefits in the Scheme to cover his entitlement to the ACP. This agreement was subject to the Employer paying an appropriate contribution to the Scheme.
9. In August 2017, the Employer paid money into the Scheme to purchase the ACP under the Scheme's augmentation provisions.
10. In January 2018, the Employer went into administration.
11. On 16 February 2018, the Scheme entered a Pension Protection Fund (**PPF**) assessment period.
12. On 19 March 2018, ITSL was appointed as trustee of the Scheme.
13. On 7 May 2019, BW wrote to Mr Y. It said that ITSL had stated that the ACP was not covered by the compensation provided by the PPF. This was because the augmentation had taken place after Mr Y left pensionable service.
14. On 17 May 2019, ITSL emailed Mr Y following an enquiry that he had made. It stated that the augmentation payment could not be refunded.
15. On 4 September 2019, Mr Y wrote to ITSL to make a formal complaint. He said that:-
 - He accepted that the PPF compensation did not cover the ACP.
 - Due to its maladministration, the Former Trustee had failed to keep his ACP secure. It should have checked whether his ACP was covered by the PPF levels of compensation.
 - The Former Trustee should have sought to purchase an annuity in his own name to protect his ACP.
16. On 7 November 2019, ITSL provided its response to Mr Y's complaint which it had considered under stage one of the Scheme's one stage Internal Dispute Resolution Procedure (**IDRP**). It did not uphold his complaint. It said:-
 - The ACP was a contractual benefit between the Employer and Mr Y. It would normally have been paid through the Employer's payroll.
 - The Former Trustee had accepted responsibility for the ACP on the basis of the Employer being an on-going concern.
 - It was the Employer that was responsible for the timing of the securing of the ACP under the Scheme.
 - At the time the ACP was accepted into the Scheme, it was not known that the employer would go into liquidation. It was fully expecting to pay the ACP.

- Mr Y's ACP was still an entitlement under the Scheme. The only reason that it could not be paid was that the Employer was in liquidation. Only benefits in line with the PPF levels of compensation could be paid going forward.
- At the time that Mr Y's ACP was secured under the Scheme, it was not the Former Trustee's practice to purchase annuities. Had it done so, it was likely that it would have been secured in the Former Trustee's name, so there would not have been a different outcome.

17. Mr Y made some additional points. He said that:-

- The augmentation payment due from the Employer was not paid until August 2017. The Former Trustee should have followed up matters with the Employer when the payment remained outstanding.
- While the redundancy terms were not a legally binding agreement on the Former Trustee, by accepting responsibility for the ACP, the Former Trustee became responsible for securing it properly.
- The Pensions Regulator (**TPR**) stated that trustees must act in the best interests of the Scheme's beneficiaries. Not securing his ACP properly was not in his best interests.
- The Former Trustee should either have rejected the request from the Employer, if it could not secure the additional benefit properly, or ensured that it was secured appropriately.
- There was no evidence to suggest that the Former Trustee acted prudently. It should have reviewed the impact that an augmentation payment, made after he ceased pensionable service, would have, should the Scheme be referred for assessment under the PPF.
- ITSL had previously commented that it had not been able to locate all of the paperwork dating back to the period before it took over responsibility for the Scheme's trustee duties. He expressed concern that these documents could not be located and considered this to be evidence of maladministration.

18. The Scheme was still in a PPF assessment period on 15 September 2021.

Adjudicator's Opinion

19. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by ITSL. The Adjudicator's findings are summarised below:-

- The provisions of the Pensions Act 2004, document the level of benefits covered by the PPF. An extract from these provisions is displayed at Appendix 2. The

Adjudicator noted that Mr Y's ACP was not covered as it was not a benefit that was in place at the point when his pensionable service ended.

- The Former Trustee was responsible for administering the benefits provided by the Scheme in accordance with the Scheme's Trust Deed and Rules (**the Rules**). An extract from the deed of variation dated 3 November 2008, covering the augmentation of benefits, is displayed at Appendix 3. The Adjudicator took the view that the augmentation of Mr Y's benefits, that took place in August 2017, was undertaken in accordance with the Rules. In the Adjudicator's opinion, the Former Trustee was not acting outside its powers in agreeing to the augmentation of Mr Y's benefits, subject to the payment of the appropriate contribution by the Employer.
- The Adjudicator took the view that it was reasonable for the Former Trustee to administer the Scheme on the basis that it was an ongoing concern. He was not persuaded that, when considering whether to accept the Employer's request to augment Mr Y's benefits, the Former Trustee had a responsibility to take into account what would happen if the Scheme entered the PPF.
- The Adjudicator noted that the event that caused the problem in this instance occurred in January 2018, when the Employer went into administration. This was after August 2017, when the Former Trustee accepted the money from the Employer to augment Mr Y's benefits. The Former Trustee could not, in the Adjudicator's opinion, have been expected to predict that the Employer would go into administration.
- In summary, the Adjudicator took the view that the Former Trustee was not legally bound by the redundancy terms offered to Mr Y by the Employer. His ACP remained as a benefit in the Scheme. However, based on the current situation, it was unlikely that it would be paid to Mr Y as it was not covered by the PPF levels of compensation.
- The Adjudicator then considered the additional points raised by Mr Y. He noted Mr Y's comment that an annuity should have been purchased for him in his own name. As stated in the Memorandum, it was the Employer that had the option of either securing the ACP through an augmentation in the Scheme or by purchasing an annuity for Mr Y. The Adjudicator noted that it was the Employer's decision to select the first approach. The Adjudicator said that he could not assess the Employer's actions and/or omissions as it is not party to the complaint. The Adjudicator was of the opinion that the option of purchasing an annuity for Mr Y was not available to the Former Trustee.
- The Adjudicator noted that Mr Y had expressed concern that the Employer did not make the augmentation payment to the Former Trustee until August 2017, 20 months after he had been made redundant. He also noted that the Memorandum stated that any augmentation payment should have been made within 14 days of Mr Y having been made redundant. The Adjudicator took the view that this was a

responsibility of the Employer. He said that it was not the Former Trustee's responsibility to chase the Employer for the payment. Furthermore, the Adjudicator was satisfied that this delay was not material to this investigation. He said that, had the augmentation payment been made by the Employer within the 14-day deadline, Mr Y would be in the same position as he currently was in.

- The Adjudicator noted Mr Y had expressed concern that ITSL did not have access to all of the historic paperwork relating to his case. The Adjudicator took the view that not keeping complete records amounted to maladministration. However, he was not persuaded that Mr Y had suffered distress or inconvenience, sufficient to warrant an award for redress for non-financial injustice. In addition, the Adjudicator did not consider that there was any uncertainty over the facts relating to this case which these documents would help clarify.

20. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.

21. Mr Y provided his further comments which do not change the outcome. He said:-

- TPR states that trustees must act in the best interests of the Scheme's beneficiaries. The Former Trustee's failure to consider that the Scheme could be referred to the PPF was not in his best interests. Nor was its failure to consider the possible impact of the Pensions Act 2004 on the proposal to augment his benefits.
- In October 1992, he was sent a 'Redundancy payments post-sale' document following a presentation by the Government Actuary's Department and the Trade Unions. In this document it stated that:

"9. Q – Part of my severance entitlements will be taken in the form of a cash sum at redundancy, but the rest will be paid to me as annual income. How can I be confident that this money will be forthcoming? What if the company runs into financial difficulties?

A – The company is legally bound under the 'Employee Arrangements Memorandum' of the Sale Documentation to secure at the time of an employees's (sic) redundancy, any future severance income through the Pension Fund or an Insurance Company. Future payments are thus secure irrespective of the company's position as the income is then paid by the Pension Fund or the Insurance company and not PSA Projects Ltd."

- As well as the information in the Memorandum, the new company, PSA Projects Limited (**PSA Projects**), stated in a letter to all staff dated 1 December 1992 that:

"Your severance rights (which will be deemed to include your statutory redundancy entitlement) are safeguarded. In particular, if upon severance you become entitled to annual compensation payments, the company undertakes that these payments and increases in line with the Pensions (Increase) Act 1971, will so far as possible be paid from the company's

pension scheme and any balance will be secured by an insurance company annuity.”

- The Employer had tried to make some ACP payments via its payroll. However, it reverted to using the Scheme when Prospect, the Trade Union, wrote to it to explain its responsibilities regarding the securing of the ACP.
- During the meeting of the Former Trustee on 23 March 2016, it had asked the Employer for more information on what it was trying to achieve before it accepted the augmentation request. While no response is documented, he assumes that the Employer told the Former Trustee that it needed to secure the ACP in case it ever got into financial difficulties. If this were to happen then the Scheme would also have been likely to have got into difficulties.
- The Former Trustee board members had the same redundancy rights as he did. They would have received the same documentation and would have been aware of the reasons for securing ACPs.
- The Former Trustee had recourse to professional advice. Its advisers were present at trustee meetings. These included a representative from a specialist law firm for pension scheme trustees who would have been familiar with the provisions of the Pensions Act 2004. However, there is no evidence that, when agreeing to the augmentation, the Former Trustee or its advisers carried out any due diligence in relation to whether it would be covered by the PPF.
- Media reports and two profit warnings issued by the Employer in 2017, made it clear that the Employer was having financial difficulties. From this, and their roles within the Employer, the Former Trustee board members would have known that the collapse of the Employer was a real possibility. They should have taken appropriate action to protect the interests of the members.
- The Opinion states that he has not suffered any distress or inconvenience, sufficient to warrant an award for non-financial injustice. As well as the loss of the ACP, he has experienced distress and has spent many hours arguing his case.

22. I note the additional points raised by Mr Y, but I agree with the Adjudicator’s Opinion.

Ombudsman’s decision

23. Mr Y’s complaint concerns his ACP, which he said was not adequately secured for him by the Former Trustee at the time the Employer made an augmentation payment to the Scheme.
24. Mr Y stated that the Former Trustee did not act in his best interests when it agreed to the Employer’s request to augment his benefits. In particular, he said that the Former Trustee and its expert advisers did not consider that the Scheme could be referred to the PPF, resulting in the possibility of the ACP not being paid to him.

25. I acknowledge that, when accepting the augmentation payment from the Employer in August 2017, the Former Trustee and its advisers would, more likely than not, have been aware that the Employer was having financial difficulties. However, it was not their responsibility to predict where these financial difficulties may lead to. I find that the Former Trustee acted reasonably in the circumstances by managing the Scheme on the basis that the Employer was an ongoing concern.
26. Mr Y has drawn my attention to extracts from the Memorandum, the redundancy payments post-sale document and PSA Projects' letter dated 1 December 1992. I am unable to comment on any promises made by past employers of Mr Y in these documents. These are employment matters which are outside of the scope of my investigation. I am satisfied that the Former Trustee is not legally bound by the contents of these documents.
27. Mr Y has stated that the Former Trustee made a request to the Employer for details of what it was trying to achieve when requesting the augmentation. While no formal response is recorded, I note that Mr Y has assumed that the Employer was taking this action in case it ever got into financial difficulties. I am not prepared to comment on this as it is speculation. However, purchasing the ACP in the Scheme was one of two documented options available to the Employer.
28. In his findings, the Adjudicator commented that he was not persuaded that Mr Y had suffered distress or inconvenience sufficient to warrant an award for non-financial injustice. This comment was made solely in relation to ITSL's failure to obtain access to all of the historic paperwork relating to Mr Y's case. This was the only maladministration the Adjudicator considered could be attributed to ITSL.
29. I agree with the Adjudicator's view in this respect, and I acknowledge that Mr Y has been caused considerable distress and inconvenience due to the potential loss of his ACP. However, I find that ITSL cannot be held responsible for this.
30. I do not uphold Mr Y's complaint.

Anthony Arter

Pensions Ombudsman
22 September 2021

Appendix 1

Extract from the Employee Arrangements Memorandum dated 30 September 1992

2. Redundancy Benefits

“(c) unless the Transferred Employee shall otherwise agree, within fourteen days following the Redundancy Date the Purchaser shall:

- (i) pay to the Trustees the Trustees Price (or such proportion thereof as shall not prejudice Approval) upon terms that amounts equal to the Annual Payments (or the same proportion thereof as shall be represented by the portion of the Trustees Price applied under this sub-paragraph (a)) shall be paid to the Transferred Employee out of the Fund; and/or
- (ii) in the case of any part of the Annual Payments which shall not have been secured under sub-paragraph (a) above, purchase from an Insurance Company for the benefit of the Transferred Employee an annuity equal to the amount of the Annual Payments or (as the case may be) the balance thereof which shall not have been provided by the application under sub-paragraph (a) above and pay all costs expenses and commission in connection with such purchase.”

Appendix 2

Extract from the Pensions Act 2004

SCHEDULE 7 Pension Compensation Provisions

Deferred members who have not attained normal pension age at assessment date

“15(5) In sub-paragraph (4) “the accrued amount” means an amount equal to the initial annual rate of the pension to which the deferred member would have been entitled in accordance with the admissible rules had he attained normal pension age when the pensionable service relating to the pension ended.”

Appendix 3

Extract from the deed of variation and restatement adopting consolidated rules dated 3 November 2008

Schedule B - General

“2 Augmentation and Provision of Further Benefit

- (1) The Trustees may, having considered the advice of the Actuary and obtained the consent of the Founder, do one or both of the following:-
 - (a) augment the benefits of any person (or class of persons) entitled under the Plan;
or
 - (b) provide benefits from the Fund for persons not otherwise entitled under the Plan;but in neither case may benefits be provided which would be inconsistent with the Scheme's status as a Registered Plan.
- (2) Where the Trustees exercise their powers under this Rule, the Employers (or one or more of them as appropriate) shall pay any further contributions into the Fund which the Actuary recommends to provide the additional benefits.”