

Ombudsman's Determination

Applicant	Mr R
Scheme	Prudential Platinum Pension (the Platinum Scheme)
Respondent	Nomenca / NM Group

Outcome

1. I do not uphold Mr R's complaint and no further action is required by Nomenca / NM Group.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr R's complaint is that Nomenca / NM Group has refused to make up the shortfall in his pension on retirement, following the transfer of his employment under the TUPE Regulations.

Background information, including submissions from the parties

4. Mr R joined the Electricity Supply Pension Scheme (**ESPS**), an 80ths final salary scheme, in 1980 while working for Norweb. Subsequently, he was TUPE transferred from Norweb to United Utilities, from United Utilities to Alstom and from Alstom to Cegelec (now called Quartzelec).
5. Alstom failed to agree pension transfer terms with Cegelec.
6. In June 2007 Cegelec lost the electrical contract with United Utilities to Nomenca. The same month the Cegelec Trust wrote to the HR Director of Nomenca offering to transfer Mr R's Cegelec service into Nomenca's scheme. The offer was not taken up.
7. Around that time, Mr R and three colleagues were disputing that they had been TUPE transferred to Nomenca. In October 2008 an Employment Tribunal decided that they had been and ruled that all employment terms and conditions should be carried over to Nomenca and that it should set up a mirror image pension scheme within six months. Nomenca failed to progress this and ACAS became involved.

8. In February 2010 Nomenca signed an ACAS settlement (**the Agreement**) accepting the 2008 Tribunal judgment. As relevant Nomenca agreed:-

- That Mr R was a Protected Person within the meaning of 'The Electricity (Protected Persons) (England and Wales) Pension Regulations 1990 (**the Regulations**).
- To permit Mr R to participate in a Relevant Scheme or to provide an Alternative Scheme (as defined in the Regulations), no later than six months from the date of the Agreement.
- That future pension rights, in respect of all service after 15 June 2007 to be provided by any scheme should be no worse than his transfer date rights.
- Under paragraph 10 of the Agreement:

'The Second Respondent [Nomenca] shall ensure that all and any contributions which would have been made into the Pension Scheme if the Pension Scheme had been set up and operated by [Nomenca] from 15 June 2007 will now be made up by [Nomenca] together with any further sums as may be required to be paid into the Pension Scheme to ensure that the Claimants suffer no loss of pension benefits at any time now or in the future by reason of the fact that the Pension Scheme was set up pursuant to this Agreement and not in fact from 15 June 2007. For the avoidance of any doubt, this means that [Nomenca] will meet all and any contributions which were payable into the scheme and which should have been paid prior to its set-up by [Nomenca], including all and any contributions due from the Claimants for the period there was no scheme. [Nomenca] shall in any event fully indemnify the Claimants in respect of any such loss howsoever arising.'

9. In 2011 NM Group, Nomenca's parent company, set-up the Platinum Scheme with Prudential and Mr R was credited with pensionable service from 15 June 2007.

10. Mr R was provided with a copy of the 'Member's Booklet' in March/April 2011. Relevant extracts from the booklet are provided in the Appendix.

11. Mr R did not request a transfer of his accrued rights from the Alstom or Cegelec schemes into the Platinum Scheme prior to his normal retirement in July 2014. Mr R has taken his pension benefits with Alstom, Quartzelec and Nomenca.

	Pension (£)	Lump Sum (£)
Alstom	7,158.09	21,555.39
Quartzelec	1,750.32	5,250.66
Nomenca	3,086.34	9,259.01
Totals	11,994.75	35,065.06

12. In March 2016 TPAS wrote to Nomenca that Mr R was seeking compensation comprising the shortfall in his lump sum and pension, plus interest, to cover the period July 2014 until payment. TPAS said:-
- Mr R was entitled to transfer accrued rights from his previous schemes within two years of starting his employment with Nomenca, but had been prevented from doing so by Nomenca's delay in setting up the Platinum Scheme, as mentioned in the ACAS settlement.
 - Quartzelec had explained that it had offered Nomenca a transfer from its scheme to Nomenca's in June 2007, but this was not taken up.
 - As a consequence Mr R was prevented from taking his entire pension benefits from a single scheme and considered Nomenca accountable for that.
 - The ACAS settlement committed Nomenca to make up any further sums required to be paid, to ensure Mr R (and other claimants) suffered no loss of pension benefits owing to the scheme not being set up in June 2007.
 - Mr R's pensionable service covered by the three schemes amounted to 34 years and 1 month. His final pensionable pay was £31,170.62. Therefore, he was entitled to a pension of £13,279.85 $((£31,170.62 \times 34.083) / 80)$ and a lump sum of £39,839.56 $(£31,170.62 \times ((34.083 \times 3) / 80))$.
 - Consequently, Mr R was claiming compensation for the pension and lump sum shortfall, as a result of not being able to transfer his accrued pensionable service to Nomenca in 2007. This amounted to the shortfall in his pension (£1,285.10 per year) and lump sum (£3,774.50), plus interest, for the period from July 2014 until payment.
13. After seeking legal advice NM Group replied that it would not be offering Mr R a settlement in this matter. It accepted that it had delayed setting up an Alternative Scheme. However, all of Mr R's backdated contributions had been paid and he had never requested a transfer of his accrued rights despite expressly being informed of his right to do so in March 2011. It was therefore clear that even if the scheme had been set-up within the two year period Mr R would not have made a transfer request then.
14. Mr R duly complained to the Pensions Ombudsman. Mr R says:-
- On each occasion, prior to his TUPE transfer to Nomenca, he received a letter informing him of the option to transfer his pension pot to the new employer.
 - In 2007 Cegelec lost the electrical contract with United Utilities to Nomenca. Initially, he and three colleagues disputed that they had been TUPE transferred, but an Employment Tribunal decided in 2008 that they had been. The Tribunal ruled that all employment terms and conditions would be carried over and that a mirror image pension scheme should be set-up within six months. Following no

progress in setting-up the pension scheme ACAS became involved and Nomenca had no option but to set-up a mirror image scheme.

- All appeared to be going well until he received retirement quotes from Alstom, Cegelec and Nomenca in 2014. The quotes from Alstom and Cegelec were less than he expected. Nomenca's quote was "spot on".
- At this point he contacted a trustee of the ESPS who assured him that Nomenca (as his final employer) would be responsible for any shortfalls in his pension and that people in his position at Cegelec were being paid the correct amount with the Alstom shortfall being paid by Cegelec. After no success in explaining this to Nomenca he complained and was represented by Unite. Nomenca rejected his complaint.
- He was frustrated in making a transfer-in request by the failure of Nomenca to establish the required pension scheme in 2007.

15. Nomenca Ltd / NM Group is represented by Geldards LLP (Geldard's). Its position, as represented by Geldard's, is:-

- While the Platinum Scheme was not set up until 2011, Mr R was credited with pensionable service in the scheme from June 2007.
- Regulation 6(5) imposes no positive obligation on it as the "new employer" to ensure the transfer of any accrued pension rights. The plain reading of the Regulation is that such an obligation arises either where the employee:
 1. notifies the new employer that he desires to transfer accrued rights; or
 2. is deemed to have notified the new employer in accordance with the terms of the new scheme that he desires to transfer his accrued pension rights.
- There is nothing in the Regulation which sets out when an employee is 'deemed' to have made such a request. The wording refers to the potential for such a 'deeming' effect to arise by virtue of the operation of the terms of the new scheme. This seems to imply that the new employer may have some specific deeming provisions that provide that a transfer request has been made in certain circumstances. However, if the new scheme contains no such 'deeming' provisions, the upshot of this is that the employee needs to make an express transfer request.
- The Platinum Scheme Member's Booklet contains no such 'deeming' provisions. Indeed, the wording of section 1.3 is that the member "may be able" to transfer. There is nothing which provides for an automatic transfer-in.
- There is nothing in the Regulations, which requires Nomenca, as Mr R's final employer, to make up any 'shortfall' with regard to his pension provision along the lines suggested by Unite or the member nominated trustee of ESPS.

- Its only obligation to procure the transfer of accrued pension rights from a previous scheme arises where the protected person has notified it that he wishes to transfer-in such rights. Mr R made no such request up to his retirement date.
- The Member's Booklet notified Mr R in 2011 that he had the ability to transfer-in his benefits from previous schemes into the Platinum Scheme and that the Trustees would be obliged to accept the transfer. But he still did not make any transfer request.
- Therefore, Mr R has not suffered a financial loss as a consequence of any failure by it to effect a transfer-in to the Platinum Scheme of his previously accrued pension rights.

16. Mr R has submitted an email from Unite in which it says:-

- Paragraph 10 of the ACAS agreement should be taken as covering both past and future service rights, pointing to the words that follow the requirement that Nomenca will ensure that all or any contributions due from June 2007 will be made up by it,

"together with any further sums as may be required to be paid into the Pension Scheme to ensure the Claimants suffer no loss of pension benefits at any time now or in the future by reason of the fact that the Pension Scheme was set pursuant to this Agreement and not in fact from...June 2007".

- The Platinum Scheme rules are not really relevant. Nomenca's delay frustrated the two year provision laid down in regulation 6(5) of the Regulations and any attempt to relate this to the rules of the Platinum Scheme which was not set up until much later should be disregarded.
- The distinction made in the Member's Booklet between benefits transferred from the Cegelec scheme and other schemes is not relevant either. All the benefits in question are ESPS benefits and the fact that Alstom failed to agree transfer terms with Cegelec should not frustrate Mr R's right to protected status for a continuous pension for all his employment with the ultimate obligation resting with Nomenca as the final employer. Mr R has a right to a transfer value for all of his ESPS service from Cegelec as the former scheme and not just the part of it relating to his employment at Cegelec.

17. Mr R has subsequently advised that he signed a Cegelec bulk transfer opting out form in 2014. He says he was confused and frustrated at the time and had taken no professional advice. He says he would not have signed the form if he had known what it meant.

18. Relevant extracts from the Regulations and the Prudential Platinum Pension Member's Booklet are provided in the Appendix.

Adjudicator's Opinion

19. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by Nomenca Limited / NM Group. The Adjudicator's findings are summarised briefly below:-

- Regulation 6(5) of the Regulations requires the protected person to notify (or to be deemed to have notified) his new employer in accordance with the terms (if any) of the relevant scheme provided by the new employer, and otherwise within two years of transferring to the new employer, that he/she wishes to transfer his/her accrued rights to the relevant scheme of the new employer.
- The Member's Booklet for the Platinum Scheme includes no deeming provisions. Page 9, 1.3, 'Benefits from other schemes', informed Mr R that he may be able to transfer benefits from other schemes into the Scheme, but that the Trustees were obliged to accept a requested transfer from the Cegelec 2004 Pension Scheme, and if interested in a transfer he should ask for an illustration of the benefits which could be provided.
- It is therefore clear from the Regulations (and the Member's Booklet) that Nomenca / NM Group was not obliged to effect a transfer-in from the Cegelec Scheme without a specific request being made by Mr R. Therefore, the transfer offer made by Quartzec did not oblige Nomenca to accept it.
- While the provision of the Platinum Scheme was delayed, Mr R subsequently had the opportunity to request the transfer of his accrued rights to it, but he failed to do so.
- Mr R says, following previous TUPE transfers, the new employer sent him a letter informing him of the option to transfer his pension pot to the new employer's scheme. The Member's Booklet for the Platinum Scheme in effect did that. Nevertheless, the onus was on Mr R to request the transfer to the Platinum Scheme. Clearly he was aware of the option in respect of previous TUPE transfers so he could have enquired about a transfer-in after he moved to Nomenca, but he did not.
- Mr R says people in his position at Cegelec are being paid the correct amount with the Alstom shortfall being paid by Cegelec. Nevertheless Nomenca / NM Group is not liable to cover that shortfall as it does not result from Nomenca / NM Group not accepting a transfer request from Mr R.
- Mr R has submitted advice he received from Unite and from a member nominated trustee of the original ESPS that the final employer is responsible for any shortfall in his pension.
- Unite refer to paragraph 10 of the ACAS agreement and say this includes past service. I do not think that is right in respect of Mr R's accrued rights prior to June 2007. Paragraph 10 says:

“For the avoidance of any doubt, this means that the Respondent will meet all and any contributions which were payable into the scheme and which should have been paid prior to its set-up by the Respondent, including all and any contributions due from the Claimants for the period when there was no scheme. The Second Respondent [Nomenca] shall in any event fully indemnify the Claimants in respect of any such loss however so arising”.

20. Mr R did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mr R has provided further comments and advice he has received from Unite which do not change the outcome. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Mr R and Unite for completeness.

Unite’s advice to Mr R

21. Unite say:-

- Nomenca from the first sought to resist its obligations to protected persons and had to be forced to comply. It is therefore extremely doubtful that the transfer would have been agreed on the required basis whenever it had been applied for subsequent to the establishment of the Platinum Scheme.
- It is reasonable to presume that if Nomenca had established a scheme in 2007 the members with protected status would have requested a transfer-in since such transfers are clearly beneficial to members’ pension outcomes.
- Paragraph 10 of the ACAS agreement included the words “that the claimant should suffer no less of pension benefits at any time now or in the future by reason of the fact that the pension scheme was set up (late) pursuant to this Agreement”.
- Given the circumstances the Respondent should be regarded as having had an obligation to write to the protected status members in 2011 directly offering them the option of a transfer-in of their past service

Mr R’s further comments

22. Mr R says:-

- Over the 28 years from joining the ESPS he was regularly told that he was in an excellent scheme. At some point he was told that he had become a protected person, but nobody really knew what that meant. Up to 2007 there were three TUPE transfers of up to 500 men. Each time they were written to and advised to transfer their pension pots (albeit at that time they did not actually realise how important it was to do so) and given a tick box to complete to request the transfer.
- In 2007 Nomenca won the contract for test inspection of all United Utilities’ sites. He and three colleagues were TUPE transferred after unsuccessfully objecting

and Cegelec proffered Nomenca the option to pay into the existing scheme to ensure continuity, which it (Nomenca) turned down.

- Over the following months/years Nomenca offered him (and his TUPE colleagues) paltry cash sums to waive his right to a mirror image scheme.
- It took four years to set up the Platinum Scheme. At this point he and his TUPE colleagues were not aware of the two years rule on pension transfers, but even if they had been there was no scheme to transfer to within that timeframe.
- They were given a booklet for the Platinum Scheme, but nobody went through it with them and at no point were they informed of the possibility of a transfer.
- Nomenca appears to be relying on page 9, '1.3 Benefits from other schemes'. But If the scheme had been set up in 2007, as ordered by a court of law, this detail would not have been an issue.
- Approaching his retirement date he received pension quotes and then realised something was amiss. Nomenca was not interested. He then began researching his pension situation and subsequently realised he had a deferred pension respectively with Alstom and Cegelec and a pension with Nomenca and that he could not afford to retire. Unite told Nomenca that it (Nomenca) was responsible for any pension shortfall. But Nomenca has refused to pay.
- Nomenca has not shown any "duty of care" towards him or his three colleagues throughout their employment with the company.
- As a manual worker he should not have been expected to have enough knowledge of pensions to realise the pitfalls associated with the pensions' minefield.

Ombudsman's decision

23. Regulation 6(5) of the Regulations is clear that the protected person is required to notify (or to be deemed to have notified) his new employer in accordance with the terms (if any) of the scheme provided by the new employer, and otherwise within two years of transferring to the new employer, that they wish to transfer their accrued rights to the scheme.
24. Mr R acknowledges that he received the Members Booklet for the Platinum Scheme in 2011, when the scheme was set up. The Booklet clearly referred to the option to request a transfer-in of any benefits under other pension schemes and said that the Trustees were obliged to accept a transfer request in respect of benefits from the Cegelec scheme.
25. Mr R says no one explained the Booklet to him and as a manual worker he should not have been expected to have enough knowledge of pensions. But if he did not understand the Booklet he could have asked and sought advice, such as from the

Pensions Advisory Service, Citizens Advice, Unite or an independent financial advisor.

26. Mr R says in respect of previous TUPE transfers he was written to and advised of his right to transfer. Consequently, he should have been aware of the option when he was TUPE transferred to Nomenca and again when he received the Members Booklet.
27. Unite refer to paragraph 10 of the ACAS agreement. Specifically quoting from it, “that the Claimants should suffer no loss of pension benefits now or at any time now or in the future by reason of the fact that the Pension Scheme was set up Pursuant to the Agreement”, rather than in 2007. But the same paragraph goes on to say “For the avoidance of doubt” that the Respondent’s liability is in respect of all and any contributions which **were** (my emphasis) payable into the scheme and which **should** (again my emphasis) have been paid prior to its set up. That does not include ensuring that Mr R’s pension rights were transferred to the Platinum Scheme in the absence of his request to do so.
28. Unite refer to the two years limit and point out that Nomenca had provided no scheme for Mr R to transfer to within that time period. Nevertheless the Platinum Scheme Member’s Booklet made it clear that the Trustees would accept transfer-in requests from the Cegelec scheme.
29. I agree with the Adjudicator that the onus was on Mr R to request the transfer to the Platinum Scheme and I am satisfied that the Member’s Booklet reasonably informed him of the transfer-in option.
30. Therefore, I do not uphold Mr R’s complaint.

Anthony Arter

Pensions Ombudsman
31 October 2017

Appendix

The Electricity (Protected Persons) (England and Wales) Pension Regulations 1990 (the Regulations)

31. The Regulations say a Protected Employee applies to any person who -

“(1) is an existing employee and immediately before the transfer date is a participant in the Pension Scheme;

is an existing employee and, on or after that date, participates in the Pension Scheme within three months of his attaining the minimum age for such participation;

was formerly a member of the Pension Scheme and, on or after that date, participates in or accrues pension rights under that Scheme in circumstances which, if the date upon which he had ceased to accrue pension rights in that Scheme had been after the transfer date, would not have been treated as a break in his continuity of employment under regulation 5; or

is a person who participates in the Pension Scheme in pursuance of regulations made under paragraph 1(1)(a)(i) or (ii) of Schedule 14 to the Act.

(2) Paragraph (1) shall cease to apply to any person who—

elects under regulation 17(1)(a) or (b) to cease to be a protected person or a protected employee;

ceases to be in continuous employment for the purposes of regulation 5; or ceases, other than at the requirement of his employer, to participate in a relevant scheme(except as provided in paragraph (3)(b) or (c)).

(3) A person shall not cease to be a protected employee—

if, after ceasing to participate in a relevant scheme as a protected employee, he subsequently participates in another relevant scheme as a protected employee and has not, during the period in which he did not participate, ceased to be in continuous employment;

if he would have ceased to be a protected employee as a result of a representation by or on behalf of his employer or prospective employer that the action by that person which would but for this sub-paragraph have caused him to cease to be a protected employee would not have that effect; or

if, following any resolution to wind up the relevant scheme in which that person participates, he transfers to the relevant scheme provided under regulation 10, 11 or 12.”

32. As relevant Regulation 6, ‘Accrued pension rights’ says:

“(4) If a protected person shall transfer or be transferred to a relevant scheme, and if a transfer payment shall be made in respect of his accrued pension rights to that scheme, the employer providing that scheme shall procure that the rules of that

scheme will secure accrued pension rights which, on the basis of good actuarial practice, are at least equivalent in value to his accrued pension rights so transferred from the former scheme.

(5) Any new employer shall also procure that if the protected person notifies or is deemed to have notified his new employer in accordance with the terms (if any) of the relevant scheme provided by the new employer, and otherwise within two years of transferring to the new employer, that he desires to transfer his accrued pension rights to the relevant scheme provided by the new employer, he shall be entitled to transfer to that relevant scheme in accordance with paragraph (4) any accrued pension rights which are capable of being transferred.

33. As relevant Regulation 8, 'Alternative scheme', says

"(1) This regulation applies to any retirement benefits scheme which—...

(c) provides at the request or with the consent of the protected person for the receipt of any transfer payment in respect of accrued pension rights in accordance with regulation 6(4);..."

34. Regulations 15, 'Provision of relevant scheme', says:

"(1) This regulation applies where a protected employee changes his employer—in the circumstances referred to in paragraph (5) of regulation 13; or in any other circumstances not falling within paragraph (1) of regulation 13 or within regulation 14.

(2) If his new employer participates in a relevant scheme, he shall enable the protected employee to participate in that scheme and shall provide future pension rights for the protected employee in accordance with paragraph (4) of regulation 13.

(3) If his new employer does not participate in a relevant scheme, the new employer shall so far as reasonably practicable provide an alternative scheme.

(4) The future pension rights to be provided by any scheme required under this regulation shall be no worse than transfer date rights."

35. "transfer date rights" means:

"the future pension rights provided by the Pension Scheme in the form in which it is on the transfer date, together with all amendments to the Pension Scheme which are made—

by the Electricity Council before the transfer date (regardless of the date on which the amendments take effect); or by regulations under the Act, but excluding any amendments made otherwise and expressed to take effect before or on the transfer date."

36. As relevant Regulation 17, 'Termination of protection' says :

- "(1) A protected employee may at any time elect–
- (a) that he does not wish to be a protected person; or
 - (b) that he does not wish to be a protected employee,"

Prudential Platinum Pension Member's Booklet

37. As relevant the Booklet says:

Page 2,

"This booklet is applicable to members who are employed by North Midland Construction PLC and are **Protected Employees**, who were formerly active members of the Cegelec 2004 Pension Scheme and who joined **Platinum** on 1 January 2011."

'Meaning of Words', says:

Page 4,

"**Employer** means the company or organisation you are employed by."

"**Former Scheme** means the Cegelec 2004 Pension Scheme."

Pages 5 and 6,

"**Pensionable Service** is years and days of service with an **Employer** that you complete after joining **Platinum** as an active member. **Pensionable Service** begins when you join **Platinum** and will end when you leave your **Employer**, notify the **Trustees** that you no longer wish to remain in Pensionable Service, or decide to put your **Platinum** pension into payment. **Pensionable Service** will also include the period of service that you have completed with your **Employer** since 16 June 2007 and the effective date that you joined **Platinum** (1 January 2011).

Pensionable Service can also include service credited to you by virtue of a transfer from a previous employer's scheme (including the **Former Scheme**)..."

"**Protected Employee** means a protected person for the purposes of the **Protected Persons Regulations**.

Protected Persons Regulations mean the Electricity (Protected Persons) (England and Wales) Pension Regulations 1990..."

38. Page 8, 1.1 'Membership of Platinum', says:

"Membership of **Platinum** is voluntary. However, you will automatically become a member of **Platinum** if, immediately before the date you were first employed by your Employer, you were:

(i) a member of the **Former Scheme**..."

39. Page 9, 1.3 'Benefits from other schemes', says:

"You must tell your **Employer** if you have any benefits under other pension arrangements...

You may be able to transfer the cash value of such benefits into **Platinum**, although this is subject to the **Trustees'** approval.

Unless the transfer is from the **Former Scheme**, the **Trustees** are not obliged to accept a transfer...

If you are interested in a transfer, you should ask for an illustration of the benefits which could be provided."