PO-15157

Ombudsman's Determination

Applicant	Mrs S
Scheme	Massey Ferguson Works Pension Scheme
Respondent(s)	Massey Ferguson Works Pension Trust Limited (the **Trustee**)
	AGCO Limited (the **Company**)

Complaint Summary

Mrs S has complained that she was not awarded an unreduced pension on being made redundant in 2015. She considers this to be contrary to the Scheme rules.

Mrs S has also complained that the Company provided incorrect and misleading information to the Trustee. She says the Company provided the Trustee with unnecessary personal data and the personal views of its HR directors, which were not impartial. She also says the Company took too long to respond. Mrs S says she was not provided with information about the internal dispute resolution (**IDR**) procedure until after she had been told the outcome of her claim. She says she was not told she could appeal the decision until she contacted the Pensions Advisory Service (**TPAS**)

Summary of the Ombudsman's Determination and reasons

The complaint is not upheld against the Company or the Trustee because Mrs S negotiated and agreed a valid, legally binding settlement with her employer on the basis that she was being made compulsorily redundant. As such, she is precluded by that agreement from seeking to enforce her contingent rights relating to retirement with consent, and estopped from now asserting that her employment was terminated for reasons other than compulsory redundancy.

The Trustee was, therefore, entitled not to award an unreduced pension to Mrs S.

Detailed Determination

Material facts

1. The relevant governing document is the trust deed and rules dated 10 March 2014. Rule 59.1(3), Section C of the Staff Rules, provides for retirement before Normal Retirement Date (**NRD**). It states:

> "(b) If a Member … retires from Service of his own free will at any time after his 50th birthday prior to Normal Retirement Date … he shall, provided the pension which could otherwise be payable to him … at Normal Retirement Date would exceed the Guaranteed Minimum …, be entitled to a Normal Retirement Pension reduced at the rate of 0.25% for each month by which the date of retirement precedes Normal Retirement Date.
>
> (c) If a Member … retires from Service at the request of the Employer and after his 50th birthday he shall, provided the pension which could otherwise be payable to him … at Normal Retirement Date would exceed the Guaranteed Minimum …, be entitled to a Normal Retirement Pension."

2. Mrs S was employed by the Company, as a HR manager, until 30 April 2015.

3. In 2014, the Company decided to reduce its workforce by 73. At the time, Mrs S was employed in the Company's UK HR department. She was one of three HR managers. The Company intended to replace the three HR managers with two alternative roles.

4. In September 2014, Mrs S received an email from a former colleague containing her recollection of the circumstances relating to voluntary redundancy, settlement agreements and the Scheme. The former colleague recalled having been told that any genuine volunteers for redundancy would be asked to sign a settlement agreement to exclude any future claims for additional pension. Mrs S has explained that she did not contact her former colleague because she did not have her email address. She says she was asked to contact her by the Company's then HR Manager for the UK and Ireland, **Ms T**. Mrs S has pointed out that a paragraph, in which her colleague says she has been asked to contact Mrs S, was deleted from the copy provided to the Trustee.

5. On 30 September 2014, in response to a query from Mrs S, the Chair of the Trustee said, in an email:

> "In answer to your specific question, I believe that <u>if</u> the Company, having asked for volunteers from the entire workforce had gone ahead and then accepted that volunteer without specifying any specific selection units then it would have been assumed that the selection unit was in fact the entire workforce. I believe that a volunteer made redundant in those circumstances would under the scheme rules have been eligible for a non-reduced pension.

> I do not know whether if the employee was asked to sign a compromise agreement giving up the right to the non-reduced pension as a condition of being accepted for redundancy that agreement would 'trump' (override) the Appeal Court judgment, that is a question that would have to be referred to legal."

6. On 7 October 2014, an email was issued to staff which stated that the Company was only prepared to consider applications for voluntary redundancies from "selection pools". The email referred to a previous Court of Appeal case relating to the Scheme[1]

7. A "UK Staff Briefing", dated 15 October 2014, explained that, where a number of roles was to be reduced, employees in the same or similar roles would be pooled together and subject to a selection process. The Company stated that, where there was such a pool and where it considered it appropriate, it might invite volunteers for redundancy from the pool. Employees were given until 29 October 2014 to apply for voluntary redundancy.

8. On 28 October 2014, Mrs S was provided with an early retirement quotation for retirement on 30 November 2014. The benefits had been reduced for early payment and the quotation included the factors which had been applied.

9. Ms T wrote to Mrs S on 2 March 2015. She referred to a meeting she had had with Mrs S. She said:

> "… it is proposed that your current role will not be required under the new structure and that a new role of … will be created. It is therefore anticipated that the redundancy of your role may be necessary and a selection process in relation to the new role will be undertaken.
>
> It was explained to you that whilst the Company is of course prepared to go through a redundancy process, it is appreciated that this will be a time-consuming and stressful process for all concerned and it may be possible to reach an agreed solution that would avoid that. The Company would therefore be prepared to consider an agreed exit …
>
> You would not be required to work out your notice and we would agree internal and external communications regarding your departure. Further, the agree terms would offer you an increased financial package when compared to the package that may be on offer in a compulsory redundancy scenario …
>
> … the proposed agreed exit option would be on the basis of a written Settlement Agreement …"

10. The letter set out the terms of the enhanced package Mrs S would receive if agreement was reached. She was asked to indicate whether she thought the terms

[1] *AGCO v Massey Ferguson Works Pension Trust* [2003] EWCA Civ 1044

acceptable by 20 March 2015. Mrs S asserts the figures quoted in this letter should not have been shared with the Trustee.

11. On 13 March 2015, Mrs S was provided with a further early retirement quotation; this time for retirement on 30 June 2015. Again, the early retirement reduction factors were quoted.

12. In a subsequent email exchange, Ms T said, if it was not possible to come to an agreement, the three HR managers would be invited to apply for the two new roles and the unsuccessful individual would be made redundant. Ms T's email to Mrs S contained details of the enhanced payment she was being offered. Mrs S asserts this information should not have been shared with the Trustee.

13. Mrs S signed a settlement agreement on 30 March 2015. Clause 3 provided that her employment would terminate, on 30 April 2015, "by reason of Compulsory Redundancy".

14. On 10 June 2015, Mrs S wrote to the Company saying she had taken legal advice which had confirmed that it was in breach of the settlement agreement, because it had not paid holiday pay in accordance with the agreed terms. Mrs S went on to say, on that basis, she believed she was entitled to an unreduced pension because she had been placed in a pool and had volunteered for redundancy. In its response, the Company said it did not accept the circumstances supported voluntary redundancy. It said Mrs S had been told voluntary redundancy could not be offered and the settlement agreement recorded her reason for leaving as compulsory redundancy.

15. In an email to the Trustee, dated 22 July 2015, Mrs S referred to the meeting she had with Ms T. Amongst other things, she said she had been given a few days leave to consider her options which were: to leave the Company with a redundancy payment and sign a settlement agreement; or, for the Company to commence a redundancy exercise under which all three HR manager roles were at risk and she would be invited to apply for the two new roles. Mrs S said she had been asked to advise Ms T if she wished to "volunteer for redundancy" by 20 March 2015. She said she had done so. Mrs S also said her settlement agreement did not contain a clause under which she waived any right to an unreduced pension; "unlike in previous years".

16. The minute for the Trustee's decision, dated 27 November 2015, recorded the following points:-

    - The crucial issue was to analyse whether Mrs S' employment was terminated by way of compulsory redundancy or voluntary redundancy. This was a question of fact.

    - The evidence for voluntary redundancy was:-

        - The lack of a formal redundancy process.

- The sentence in the 2 March 2015 letter: “the agree terms would offer you an increased financial package when compared to the package that may be on offer in a compulsory redundancy scenario”.
- Email correspondence between Mrs S and Ms T which explained what would happen if agreement was not reached.
- Mrs S’ evidence that she wished to volunteer for redundancy; albeit she later acknowledged that she was told the Company could not accept volunteers.
- Mrs S’ statement that she chose to leave her employment at the request of the Company, and could have remained and gone through a formal redundancy process.

- The evidence for compulsory redundancy was:-
  - The settlement agreement, which post-dated the letter and emails referred to above.
  - Mrs S was an experienced HR manager and would have been aware of the implications to her pension of compulsory redundancy. She did not raise the issue at the time.
  - Mrs S had taken legal advice at the time of signing the settlement agreement.
  - Mrs S had acknowledged that the restructuring had been explained to her and she had been told that the Company would not be asking for volunteers.
  - It was the Company’s position that Mrs S did not leave voluntarily but as part of a head-count reduction exercise. The Company had stated that Mrs S was offered departure via a settlement agreement with an enhanced package to avoid disruption and to enable her to have a dignified exit. There was no option for all three HR managers to remain with the Company.
  - The Company had said that Mrs S would not have been successful in securing one of the two new roles.
  - The settlement agreement was compelling evidence that a compulsory redundancy had taken place. This, together with the background information, indicated that Mrs S had not agreed to voluntary redundancy; rather, she had taken an exit package which related to her compulsory redundancy.
- It would need cogent evidence demonstrating Mrs S had taken voluntary redundancy in order to move away from the fact that both parties had fully

acknowledged, at the time, that termination was by reason of compulsory redundancy.

17. The Trustee wrote to Mrs S, on 7 December 2015, informing her that it had decided she was not eligible for an unreduced pension. Mrs S responded saying she intended to apply to the Pensions Ombudsman (**TPO**). She also asked for a copy of the Scheme's trust deed and rules. The Trustee provided this and said it was unlikely TPO would accept her case unless she had used the internal dispute resolution (**IDR**) procedure first. It provided details of the IDR procedure and suggested moving to stage two because her case had already been considered by two trustees.

18. Mrs S submitted her IDR appeal on 14 January 2016. She said the Trustee had been provided with incorrect or inaccurate information by the Company. The key points from Mrs S' appeal submission are summarised as follows:-

- There were no redundancy consultations and the Company's redundancy policy was not followed.
- She had not signed anything waiving her right to an unreduced pension.
- There was no reference to pensions in the 2 March 2015 letter.
- She was a HR manager and not a pensions expert. She had not been involved in the previous court case relating to the Scheme and had no knowledge of the legal discussions. All pension questions were referred to either the Company's pensions department or, later, to the outsourced provider. During the 2014 redundancy exercise, she had referred pension questions to Ms T or another individual.
- She had not been involved in any previous settlement agreements. She had only once been involved in drafting a settlement agreement and had followed the ACAS guidance. She had not discussed pensions with the individual involved.
- Her legal adviser had no knowledge of the Scheme rules. The reason for the compulsory redundancy statement had not been explained to her.
- Her claim was based on rule 59(3)(c) and the decision of the Court of Appeal.
- It was irrelevant whether she was made compulsorily or voluntarily redundant. The fact was that she had been asked to leave at the request of the Company and she had a choice as to whether she remained. Her role had not been formally put at risk of redundancy and the Company's redundancy procedure had not been started.
- Had the redundancy procedure been started, she would have been able to volunteer as a member of a pool of three. She referred to an email issued to all employees, in October 2015, which referred to inviting volunteers from pools.

She also referred to a handbook for line managers which said the Company might invite volunteers from a selection pool.

- She disagreed that she would not have been successful if she had been considered for the new roles.

19. Mrs S also said that she had been unaware that she had the right to appeal the Trustee's decision until it had provided details.

20. The Trustee obtained evidence from the Company and also took legal advice. The Trustee was provided with a statement from Ms T. Mrs S disagrees with Ms T's statement. The minutes of the Trustee meeting, on 7 April 2016, record:-

    - It had received legal advice that the supporting documentation did not provide sufficient reason to uphold Mrs S' appeal.

    - The settlement agreement set out the terms of Mrs S' redundancy and one of these was that it was compulsory. This was substantiated by statements from the Company.

    - On the basis of the email correspondence between Mrs S, her former colleague and one of the trustees, it concluded she was aware that there were implications for her pension if she was made compulsorily redundant.

21. The Trustee issued a stage two IDR decision on 12 April 2016. It declined Mrs S' appeal. It said communication from the Company could have been "better structured" during Mrs S' redundancy. However, it was of the view, based on documents presented to it, that her redundancy was a compulsory redundancy and she was not entitled to an unreduced pension.

Summary of Mrs S' position

22. The key points from Mrs S' submissions are summarised below:-

    - She was made redundant in April 2015.

    - The Company did not apply the Scheme's trust deed and rules correctly. She is entitled to an unreduced pension by virtue of her redundancy. She was asked to leave at the request of the Company.

    - She volunteered for redundancy because she was part of a selection pool of three employees who had been invited to apply for two roles. She was clearly advised that she had a choice of taking the redundancy or remaining and being part of a formal redundancy process. She chose to leave.

    - As the Company was not following its formal redundancy policy, the settlement agreement approach was used.

- The Court of Appeal found that, for a redundancy to be deemed “at the request of the employer”, there must be a choice to be exercised. In the 2002/03 redundancy exercise, members did not have a choice and, therefore, did not qualify for unreduced pensions.

- The Court of Appeal accurately pointed out that all redundancy, whether it is voluntary or compulsory, ultimately involves the dismissal of the employee. Rix LJ also said:

  “It is often possible to secure by agreement an arrangement that is more advantageous than the consequence of waiting for all options to be foreclosed. There is no reason why an employer, and a good employer, should not be willing to fund at a special price an arrangement which secures his needs by consensual means, and enables him to avoid compulsory redundancies, or to achieve the lowest possible number of compulsory redundancies; and there is no reason why a pension scheme should not reflect such considerations.”

- Whether a person who volunteers for redundancy is entitled to an unreduced pension is determined by: the process which the Company follows; the number of employees allowed redundancy relative to the size of the selection unit; and the terms under which volunteers are accepted.

- In 2014, following a request for volunteers, four members of the Scheme enquired whether accepted volunteers would be eligible for an unreduced pension. She advised Ms T that her understanding was that volunteers could only be accepted from a selection unit. She advised that she did not know the details and clarification should be sought.

- The Company has stated that she was fully aware of its position regarding voluntary and compulsory redundancies, and of the court case. She would highlight the fact that Ms T was also aware of the process and the court case.

- She did not sign any paperwork to the effect that she was forfeiting her right to an unreduced pension. Previous practice had been for individuals to be required to relinquish their right to an unreduced pension; either by signing a letter or entering into a compromise agreement. Nor was there any reference in any correspondence with her that she would give up the right to an unreduced pension.

- She did not receive any formal notification on how to make an application to the Trustee. Nor did she receive any information about the IDR procedure until she informed the Trustee that she had approached TPAS.

- The time taken to respond to her claim was outside the time frame for the IDR procedure. The IDR procedure document states that, at stage one, an applicant should expect an acknowledgment within one week and a written

reply within two months. She presented her claim to the Company on 10 June 2015 and received a decision on 7 December 2015.

- The Company provided incorrect and misleading information to the Trustee. It also provided a personal statement from Ms T which was unprofessional and unnecessary.
- It was not the role of the Trustee to decide whether she would have been made redundant.
- The Scheme rules do not contain any reference to the signing of a settlement agreement. Therefore, the fact that the Trustee based its decision on the settlement agreement means that it is erroneous.
- She obtained the October 2014 early retirement quotation at Ms T's request to evaluate the service provided by the Scheme administrators following complaints.
- The 2003 announcement also stated that a member, over the age of 50, did qualify for an unreduced pension if their contract of employment was terminated for redundancy in circumstances where they had volunteered and been accepted for redundancy at the invitation of the Company.

23. Mrs S further submits:-

- For contractual estoppel to arise, there must exist a clear and unambiguous statement intended by the claimant to be acted upon by the defendant, or such intention could be inferred. The defendant must have believed the statement to be true and was induced to enter into the contract by such belief.
- A simple representation in a contract, if known to be false, cannot create a contractual estoppel. She cites Diplock J in *Lowe v Lombank* [1960] 1 WLR 1960.
- The actions of the Company, the settlement agreement, letters, custom and practice, and discussions with the Company do not amount to a clear and unambiguous statement.
- The Company had obtained legal advice that, because signing a settlement agreement is voluntary, it was imperative that any agreement included a clause waiving the right to an unreduced pension. She has cited various pieces of internal correspondence which relate to the requirement for such a clause.
- She would not have signed the settlement agreement if it had contained a clause waiving her right to an unreduced pension.

- In her HR capacity, she has a clear understanding of what is meant by a settlement agreement. They are voluntary agreements used prior to undertaking a formal process. The main feature is that they waive an individual's right to make a claim to a court of employment tribunal on matters specifically covered in the agreement.

- Settlement agreements were used on four or five occasions since the 2003 court case. They were in respect of individuals whom the Company wished to dismiss or make redundant without following the formal procedure. The settlement agreements provided for compensation to avoid the time, cost and stress involved in going to an employment tribunal. There were two agreements which required the individual to revoke their right to an unreduced pension. Both individuals were required to provide letters of resignation.

- HR managers were instructed to include all the terms and conditions agreed with the individual in an agreement. ACAS states that simply referred to an agreement being in "full and final settlement of all claims" is insufficient to contract out of employment tribunal and court claims. A settlement agreement has to specifically state the claims it covers.

- She signed the settlement agreement believing that the Company recognised that she had been treated unfairly and any dismissal would automatically be unfair. She would have been eligible for an unreduced pension because she would have been dismissed without cause. The settlement agreement was to alleviate the stress and cost of an employment tribunal for both parties. She did not take any employment tribunal action because she believed she would receive an unreduced pension; this was not excluded by the settlement agreement.

- She believed that, if she did not sign the settlement agreement, she would be made redundant and would be required to go to an employment tribunal.

- After the 2003 court case, the Company put in place a procedure for any redundancy situation. She has provided details relating to this procedure.

- Previously, settlement agreements stated that the reason for termination of employment was resignation; not compulsory redundancy. The term "compulsory redundancy" was not included in the paperwork provided for her.

- At no time was she advised that she would not receive an unreduced pension.

- She acknowledges that she received legal advice but she questions how a legal adviser could have advised on something which was not contained in the settlement agreement. Her legal adviser agreed that she would have a case for unfair dismissal. Her legal adviser had no knowledge of the Scheme's trust deed and rules.

- The use of the term “compulsory redundancy” was not explained to her and was not mentioned in any correspondence or discussions prior to her signing the settlement agreement. It had not been used in previous settlement agreements. It would, therefore, be unreasonable to expect her or her legal advisor to have the requisite knowledge.

Summary of the Company’s and the Trustee’s position

24. The main points from the joint submission made on behalf of the Company and the Trustee are summarised below:-

- Rule 59.1(3)(c) is identical to rule 13(c)(iii) which was considered by the Court of Appeal in *AGCO Limited v Massey Ferguson Works Pension Trust Ltd and others* [2003] EWCA Civ 1044.

- The Court distinguished between two situations:-

  - A member retires from service at the request of the employer if his/her contract of employment is terminated for redundancy where he/she has volunteered and been accepted for redundancy at the invitation of the employer.

  - In cases of compulsory redundancies and other dismissals, other than some cases of constructive dismissal, the employee did not retire from service at the request of the employer.

  The key distinction is between dismissals which are consensual, where there is an offer to go which the employee is free to accept or decline (even if there is pressure) and compulsory dismissals which are not consensual.

- Rix LJ said:

  “The burden is therefore on the phrase “at the request of the Employers”. In my judgment, it is requiring too much of this phrase to suppose that it intended to include cases where the employer not merely requests but successfully enforces retirement. The natural meaning of “request” suggests that the employee can choose whether or not to comply with the request. Such choice is of course entirely compatible with at any rate some element of pressure or coercion. There is hardly any choice in life that is entirely free from pressures of one kind or other. It cannot be the mere existence of some element of pressure or coercion which prevents a request from being a request and turns it into something even more than a demand — for even demands can be turned down. This after all is the truth behind the grim joke about making someone “an offer he could not refuse”. One can refuse an offer, even though some are harder to refuse than others. But an execution is not an offer. Similarly, one can refuse a request, although some are harder to refuse than others. But,

> subject to the peculiar case of a dismissal following an agreement to accept voluntary redundancy, one cannot refuse, indeed one is given no real opportunity to refuse, an out and out dismissal … The case of voluntary redundancy, however, to which I will revert below, is peculiar for the very reason that in its nature it is a matter of choice, even if in its formal execution it takes the form of a dismissal.
>
> … It seems to me to be reasonably plain that para (iii) is intended to enable the employer to offer early retirement on preferential terms to employees over 50. I emphasise the word "offer", for the terms are only available when retirement is "at the request" of the employer. The preferential terms are available as the quid pro quo for the employee's agreement to retire …
>
> … it seems to me that the reality of the situation of voluntary redundancy that it is a consensual dismissal. It is perfectly well described as a retirement at the request of the employer. I would so find …"

- Rix LJ also said:

  "In my judgment, this question has to be answered by looking at the substance and realities of the situation, rather than at the form."

- This approach was restated in *AGCO Limited v Kellaway* [2007] EWHC 3354 (Ch)

- Looking at both its form, and the substance and realities of the case, Mrs S' dismissal was not consensual. She was made compulsorily redundant.

- In her statement, Ms T said she had confirmed that, as she was a member of the defined benefit scheme, Mrs S could not be offered the option to volunteer for redundancy because of the earlier court case. Ms T had said it was implicit in her discussions with Mrs S that she would be made compulsorily redundant. She had said their conversations were about the manner of Mrs S' exit; not about the choice to stay or go. This demonstrates that Mrs S' departure was not consensual.

- An email from Mrs S, dated 29 April 2015, is consistent with Ms T's statement. Mrs S said she could either leave the Company on a settlement agreement, in return for a financial package, or apply for one of the two new roles or a maternity cover role. She noted that, if she was not successful, she would leave the Company without an enhanced package. This confirms that Mrs S' departure was not consensual in the sense that she did not have a choice about whether to stay or go.

- A decision had been taken to reorganise the HR department. There would no longer be a HR manager role. Nor would the role of Global Mobility Manager,

which Mrs S also performed, exist. It was not a case of reducing the number of HR managers with a redundancy exercise applying or inviting voluntary redundancies from a pool. All HR manager roles were being terminated.

- The termination of Mrs S' employment as a HR manager was the consequence of the Company's decision to end that role. It was not a matter of elective choice on Mrs S' part. The substance and reality was that Mrs S' employment was terminated as a consequence of the Company's decision to end her role. Her employment was being terminated whether or not she chose to apply for one of the new roles.

- The possibility of consensual terms, under a settlement agreement, was proposed as an alternative to her entering the selection process for the new roles. It is accepted that this was not well expressed in the contemporaneous documentation.

- The settlement agreement, dated 30 March 2015, did not terminate Mrs S' employment with the Company. Its purpose was to resolve any claims arising out of Mrs S' employment or its termination. It recorded that Mrs S' employment would terminate on 30 April 2015. It was not drafted nor intended to effect a consensual termination of her employment. It recorded that the reason for terminating Mrs S' employment was compulsory redundancy.

- The wording of the settlement agreement gives rise to a contractual estoppel.

- Mrs S entered into the settlement agreement with the benefit of independent legal advice. She entered into the settlement agreement on the agreed terms and having taken the benefits paid under those terms. She is contractually estopped from asserting that her employment did not end by reason of compulsory redundancy. Mrs S is precluded from asserting that her employment ended for any reason other than compulsory redundancy.

- As an alternative, an estoppel by convention arises. It is clear that discussions between the Company and Mrs S proceeded on the basis that the termination of her employment was not through voluntary redundancy nor at the request of the employer.

- Mrs S obtained two early retirement quotations. She would, therefore, have been aware, at the time she signed the settlement agreement, that she would receive an actuarially reduced pension. She did not query this at the time.

- The Company considers that Mrs S understood the pension implications of compulsory redundancy. The Court of Appeal decision, in 2003, was an important event for the Company generally and for members of the Scheme in particular. Mrs S was a part of the HR team before, during and after the case. Her knowledge of the case is evidenced by:-

- An announcement sent to staff, in 2003, explaining the outcome of the Court of Appeal case, which was sent to Mrs S personally.
- Emails to Mrs S from her former colleague and a trustee in September 2014.
- An email issued to staff, in October 2014, which Mrs S later referred in her IDR appeal.

- The Company denies having provided the Trustee with misleading information or that it deleted any part of any email. It accepts that there are minor differences between the original email from Mrs S' former colleague and the copy sent to Ms T. It believes Mrs S made these changes herself.

Conclusions

25. The focus in Mrs S' case has been on whether or not she was made compulsorily redundant. It is accepted by all parties that, following *AGCO*, compulsory redundancy is not retirement "at the request of the Employer". Mrs S seeks to argue that, despite the wording of the settlement agreement, the termination of her employment was by way of voluntary redundancy.

26. Rule 59.1(3) itself does not refer to redundancy nor is redundancy a defined term within the Scheme rules.

27. The question before the Appeal Court, in 2003, was whether either compulsory or voluntary redundancy should be considered retirement "at the request of the Employer". The question arose in the context of a redundancy exercise undertaken by the Company. It is natural, therefore, that the focus should be on redundancy. However, it should be borne in mind that rule 59.1(3) is not restricted to cases of redundancy.

28. In *AGCO*, the Appeal Court found:-

- Redundancy, whether voluntary or compulsory, involves the dismissal of the employee. Without the dismissal, statutory redundancy payments do not apply.
- Where termination of employment is arrived at by mutual consent, there is no dismissal. Rix LJ referred to *Birch and Humber v The University of Liverpool* [1985] ICR 1985. In that case, the judge gave an example of an employer who makes an offer to those who are prepared to resign rather than wait to volunteer for redundancy and supports the offer with financial inducement in excess of the statutory redundancy provision. He said that "… in such a situation, assuming no coercion of any kind, … if that offer is accepted there can be no question of there having been a dismissal."
- The essential question was whether the relevant rule, 13(c)(iii), embraced dismissals.

- The natural meaning of the word “request” suggested that the employee can choose whether or not to comply. This choice was compatible with some element of pressure or coercion; hardly any choice in life is entirely free from pressures of some kind. An employee cannot refuse an out and out dismissal.

- The words “retirement” and “retire” in rule 13 naturally covered situations distinct from dismissal. In particular, the rule 13(c)(iii) context of retirement “at the request of the Employer” did not naturally embrace dismissal.

- Paragraph (iii) was intended to enable the employer to offer early retirement on preferential terms to employees over 50. It was not obvious why preferential terms should be available as a matter of entitlement where the employer dismissed an employee on the grounds of breach of contract. Nor where the employer was in breach. This was a pointer away from dismissals being generally within (iii). The law provides remedies where the employer is in breach of contract, there was no need for the pension scheme to do so. In view of this, there was less reason to think of (iii) as being aimed at in cases of compulsory redundancy.

- The question of where voluntary redundancy lay had to be answered by looking at the substance and reality of the situation. The realities of voluntary redundancy may differ, including the situation where employees are given no real option. Every case of statutory redundancy is in form a dismissal. The language of voluntary redundancy emphasises that it is a consensual process.

- Voluntary redundancy fitted better in the camp of a retirement at the request of the employer. The reality of the situation was that it was consensual dismissal. Where the member had volunteered and been accepted for redundancy at the invitation of the employer, paragraph (iii) could apply. Compulsory redundancy and all other cases of dismissal (other than some cases of constructive dismissal) were outside the scope of 13(c)(iii).

29. The wording of rule 59.1(3)(c) is, to all intents and purposes, the same as rule 13(c)(iii). The same principles of interpretation would, therefore, apply.

30. The Trustee determined that, on the basis of the wording of the settlement agreement, Mrs S was made compulsorily redundant. It determined, as per *AGCO*, that she did not retire at the request of the Company and was not entitled to an unreduced pension.

31. The Company is relying upon the wording of the settlement agreement which stated that Mrs S’ employment would terminate, on 30 April 2015, “by reason of Compulsory Redundancy”. It argues that Mrs S is now estopped from asserting that her employment was terminated on grounds other than compulsory redundancy.

32. I have given some thought to the application of Section 91(1) of the Pensions Act 1995. Section 91(1) states that, where a person is entitled to a pension, or has a right

to a future pension, under an occupational pension scheme, the entitlement or right cannot be assigned, commuted or surrendered. Nor can it be charged or a lien exercised in respect of it and no set-off can be exercised in respect of it. Any agreement to effect any of those things is unenforceable. A settlement agreement which amounted to the surrender of a right to an accrued or future pension could be void under Section 91(1).

33. However, the Court of Appeal[2] found that Section 91(1) does not prevent a settlement agreement from having effect when it relates to a bona fide settlement of disputed rights. At the time her employment ceased, Mrs S had the right to receive an actuarially reduced pension under rule 59.1(3)(b). Any right to receive a pension under rule 59.1(3)(c) was contingent upon her leaving employment "at the request of the employer". This is a matter of dispute. I cannot find that Section 91(1) applies in Mrs S' case such that it prevented her from waiving any potential right to a pension under 59.1(3)(c) by way of the settlement agreement. It remains for me to consider whether she did just that.

34. The Company argues that a contractual estoppel arises which prevents Mrs S from asserting that her employment was terminated for reasons other than compulsory redundancy. It bases its argument on the wording of settlement agreement.

35. A contractual estoppel can arise where the parties to a contract have agreed that a particular state of affairs will be the basis of their dealings with one another, even if they know the agreed state of affairs does not exist. The courts[3] will usually seek to uphold such agreements on the basis that contracting parties are entitled to agree whatever they like between them. Unlike some other estoppels, it is not necessary to consider unconscionability or require any specific detrimental reliance upon the representation. The representation is enforceable because it is a part of the contract between the parties.

36. Mrs S argues that, for estoppel to arise, there had to have been a clear and unambiguous statement on which it was intended that she would act. It may be that Mrs S has in mind the requirements for an estoppel by representation. One of the conditions for an estoppel by representation is a clear and unambiguous representation. Contractual estoppel holds the parties to a prior agreement in a contract that a particular state of affairs will be the basis of their dealings with one another, even if they know that the state of affairs is not the case. Unlike other forms of estoppel, it has evolved from the basic principle of freedom of contract and is essentially a form of enforcement of a contractual provision.

37. Mrs S argues that a simple representation in a contract, if known to be false, cannot create a contractual estoppel. She cites *Lowe v Lombank [1960]*. This is an early case in the evolution of contractual estoppel. It concerned the terms of a hire

---

[2] *IMG (UK) Ltd v German* [2010] EWCA Civ 1349

[3] *Peekay Intermark v Australia and New Zealand Banking Group* [2006] EWCA Civ 386, *JP Morgan Chase v Springwell Navigation* [2008] EWHC 1186 (Comm)

purchase agreement for a car, which turned out to be unroadworthy. In particular, it concerned certain clauses within the agreement under which the hirer agreed that she had examined the car and had not told the hire purchase company the purpose for which she required the car. Neither of these statements were, in fact, true. In his judgment, Diplock J said:

> "To call it an agreement as well as an acknowledgement by the [claimant] cannot convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the date of the promise or will exist in the future. To say that the hirer "agrees" that he has not done something in the past means no more than that the hirer, at the request of the owner, represents that he has not done that thing in the past. If intended by the hirer to be acted upon by the person to whom the representation is made, believed to be true by such person and acted upon by such person to his detriment, it can give rise to an estoppel: it cannot give rise to any positive contractual obligations. Although contained in the same document as the contract, it is not a contractual promise."

38. However, *Lowe v Lombank* is not now considered binding authority for the proposition that there can never be an agreement in a contract that the parties are conducting their dealings on the basis that a past event had not occurred or that a particular fact was the case, even if it was not the case and both the parties knew it was not the case[4]. A number of cases have been decided since which support the principle that parties can agree that a state of affairs will be the basis of their contractual dealings with one another, even if they know this not to be true. These cases are discussed in more detail in *Springwell*. Mrs S signed the settlement agreement which stated that her employment would terminate, on 30 April 2015, “by reason of Compulsory Redundancy”. She did so having received independent legal advice. It is now extremely difficult for Mrs S to make the case for her employment having terminated other than by compulsory redundancy; even though, on the facts, that may not have been the exact state of affairs. In effect, she and the Company entered into the settlement agreement on the basis that she was being made compulsorily redundant even though both parties may have known this was not the case. That was a decision that the parties were free to make and negotiate acceptable financial terms around. Since Mrs S was legally advised, I find that Mrs S is now precluded from enforcing her contingent right to retire early without actuarial reduction (contingent on circumstances and consent); and estopped from asserting that her employment terminated other than as a result of compulsory redundancy.

39. Mrs S has said that her legal adviser was not familiar with the Scheme’s trust deed and rules. She also points out that there was no clause in the settlement agreement under which she agreed she was not entitled to an unreduced pension. She

---

[4] *JP Morgan Chase v Springwell Navigation* [2008] EWHC 1186 (Comm)

questions how her adviser could advise on something which was not there. I am happy to accept Mrs S' assertion that her legal adviser was not familiar with the Scheme rules. However, the statement to the effect that Mrs S' employment was being terminated by reason of compulsory redundancy was clearly set out on the first page of the settlement agreement. Mrs S, herself, was fully aware of the implications of being made compulsorily redundant. She had been with the Company at the time of the 2003 court case and, moreover, in a position which afforded her particular knowledge of the impact of the *AGCO* judgment.

40. Previous settlement agreements may well have contained a specific clause to the effect that the individual would not be entitled to an unreduced pension. However, this does not help Mrs S' argument. She signed an agreement stating that her employment was being terminated on the grounds of compulsory redundancy. There was no need for a separate clause relating to her entitlement under rule 59.1(3)(c).

41. Having found that a contractual estoppel arises, I do not need to consider the Company's arguments for estoppel by convention. The Trustee was fully entitled not to award Mrs S an unreduced pension. Mrs S has raised other issues with the way in which the Trustee and the Company dealt with her case. She disagrees with the information provided to the Trustee by the Company. In particular, she is of the view that it was inappropriate for the Trustee to be provided with details of her financial package or the statement by Ms T. With regard to the details of the financial package, it may not have been strictly necessary for the Trustee to see these. However, it does not appear to have influenced its decision, since this was largely based on the wording of the settlement agreement. With regard to Ms T's statement, I find it was appropriate for the Trustee to seek evidence from the person who had been dealing with the termination of Mrs S' employment. I note that Mrs S had been afforded the opportunity also to submit her view to the Trustee. The matter of the sentence removed from one of the emails does not appear to have had any significant influence on the outcome.

42. Mrs S has also complained about delay. I have not identified any undue delay in dealing with her case given its complexity. Mrs S asserts that the Trustee failed to respond to her within the time limits set out in the IDR procedure. However, Mrs S' initial approach was to the Company and her case was not dealt with under the IDR procedure. The Trustee suggested the IDR procedure when Mrs S said she intended to approach TPO. She has complained that she was not made aware of the IDR procedure at an earlier date. I am a little surprised that someone with Mrs S' background and awareness of pension matters was unaware of the IDR procedure. However, be that as it may, there does not appear to have been undue delay in dealing with her appeal. The Trustee's stage two written response was issued outside its stated target but not excessively so. The response was provided within an acceptable timeframe given the complexities of the case and the need for legal advice.

43. I do not uphold Mrs S' complaint.

Anthony Arter

Pensions Ombudsman
18 September 2018