

Ombudsman's Determination

Applicant	Mr N
Scheme	The Royal Bank of Scotland Group Pension Scheme (the Scheme)
Respondents	RBS Pension Trustee Limited (the Trustee) The Royal Bank of Scotland, (the Bank)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by the Respondents.

Complaint summary

2. Mr N has complained that the Respondents failed to offer him access to an unreduced pension when he was offered voluntary redundancy. Mr N believes he was entitled to be offered an unreduced pension in the event of voluntary redundancy as he had a protected pension age (**PPA**) and it was an entitlement under the Scheme Rules.
3. He says that if he had been offered it, he would have accepted it.

Background information, including submissions from the parties

4. Mr N was an active member of the Scheme and employed by the Bank. Because of the Scheme Rules and his length of service, when the minimum pension age increased from 50 to 55 in 2010, he retained the right to retire at age 50 through a PPA.
5. In 2006, the Bank closed the Scheme to new members.
6. In 2008, a union led "Redundancy Objectors Agreement" was put in place. I have not been provided with a copy of it. Mr N says he submitted an objection under that agreement, but neither Mr N or the Bank have a copy of it.
7. In June 2012, the Bank proposed further changes to the Scheme in relation to the Normal Pension Age and the availability of early retirement in the event of redundancy.

8. In relation to the Normal Pension Age, two options were proposed. A member could either keep the existing Normal Pension Age of 60 by paying additional contributions of 5% or make no extra contributions and the Normal Pension Age would increase to 65.
9. In the case of the proposed change to redundancy options, the proposal confirmed that the Bank intended to increase the earliest date a member could take early retirement in the case of voluntary redundancy from 50 to 55.
10. There followed a consultation period involving the union.
11. In August 2012, the Bank wrote to Mr N to confirm the changes to the Scheme. This included the decision to increase the Normal Pension Age from 60 to 65, and changes to redundancy options and early retirement. The letter said:

“We are also making some changes to redundancy options for early retirement, full details of which are set out in the accompanying pack.

...

We will delay implementation of the increase in Voluntary Early Retirement Age for an unreduced pension to 55, from June 2012 until October 2012.

Change to redundancy options for voluntary early retirement

This change affects members of the schemes who joined the Group before 3 June 2003 and who leave the Group via voluntary redundancy. From 1 October 2012, the earliest age you will be able to draw a pension in these circumstances will be 55, in which case you will have two options in the future...”

12. On 23 August 2012, the union wrote to members in a newsletter stating it had agreed changes to the Bank’s proposal on a number of points, including “The protection of the Unite Redundancy Objectors Agreement signed in 2008”.
13. On 19 September 2012, Mr N elected for Option 1 of three on an Election Form. In doing so he elected to “keep my current Normal Pension Age and pay the additional 5% charge.” The option went on to say:

“I understand that by electing this option:

- I will continue to accrue pension on the same basis as at present (including the restrictive pensionable salary – see below)
- I will pay the additional 5% charge and consent to the appropriate deduction from my ValueAccount.”

14. Alternatively, Mr N could have accepted the Normal Retirement Age increasing to 65, with no additional contributions being paid, or opt out of the Scheme with effect from 1 October 2012. If he became a deferred member, he would no longer be eligible for any special early retirement terms in the event he was made redundant.

15. Under the Election Form's Member Declaration it stated:

"I understand that it is my responsibility to read the information available to me, obtain satisfactory answers to any questions I have, and understand the implications of the option I choose.

...

I understand and agree that the above will vary my contract of employment and my benefits under the RBS pension scheme with effect from 1 October 2012 to the extent necessary to give effect to my option."

16. In November 2017, Mr N was offered voluntary redundancy. He has said that at the time he asked his line manager about the possibility of early retirement, but it was not made available to him.

17. On 20 November 2017, Mr N ticked and signed a Redundancy Choices Form, selecting the option which said:

"Consider me for voluntary redundancy on the basis that I understand and accept the terms set out in the "My Agreement" statement below."

18. The statement titled My Agreement (**the Agreement**) is set out in the Appendix and was signed by Mr N.

19. On 5 December 2017, Mr N reached age 50.

20. On 8 December 2017, Mr N emailed the Bank's HR Department, saying:

"I made an objection to the bank's revised severance terms in 2006 in which case the heritage severance terms of my RBS SERPA contract should still be honoured, with the additional option of Voluntary Early Retirement being made available to me now.

I would be grateful therefore if you could supply me with the relevant figures for taking VER as a matter of urgency.

In view of the above, I wish to withdraw my Voluntary Redundancy Application on the basis I do not have all the information required to be able to make an informed choice and be allowed to make my decision in the near future based on the 3 choices I believe I should have been given initially..."

21. On 20 December 2017, Mr N emailed the HR department again, saying:

"I write regarding my email of 8th December as below. I was contacted by someone from the Redundancy Choices Team by telephone on 13th December who confirmed receipt of the email and that someone on the team was looking into it.

Yesterday, my line manager advised me that my application for Voluntary Redundancy has been accepted, however, I am still awaiting a reply to my email from you.”

22. On 7 March 2018, the Bank served notice on Mr N that he would be made redundant, with his employment to end on 30 May 2018. At this meeting Mr N raised the possibility of early retirement but was informed it was not an option.
23. On 5 April 2018, Mr N submitted a complaint to the Trustee through the internal dispute resolution procedure (**IDRP**).
24. On 2 May 2018, the Bank confirmed that it had no record of Mr N's objection to the changes in redundancy rights.
25. On 10 May 2018, Mr N submitted a query about his redundancy terms to the Bank's HR department. He reiterated that he wished for either the voluntary redundancy to be withdrawn or for his exit date to be delayed whilst concerns about his pension were resolved.
26. On 16 May 2018, the Bank responded to Mr N's concerns. It declined his request to vary the timing of the voluntary redundancy or withdraw from it.
27. On the same day, the Trustee provided its IDRP stage one response. It took the view that up until 2012, Mr N had a PPA, but that following the 2012 changes to the Normal Pension Age and redundancy rights, this was lost. This contractual change overrode the Scheme's Rules and meant the earliest Mr N could receive an unreduced pension via voluntary redundancy was age 55. The Trustee was satisfied that Mr N did not have a right to an unreduced pension.
28. On 16 September 2018, Mr N submitted an appeal to stage two of the IDRP.
29. On 14 November 2018, the Trustee responded. In this, it reiterated the comments in the stage one response, and went on to highlight the terms of the Agreement. Considering those terms, the Trustee did not uphold Mr N's complaint and concluded that Mr N had no right to an unreduced pension at the point of redundancy.

Adjudicator's Opinion

30. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Respondents. The Adjudicator's findings are summarised below:-
 - The August 2012 contractual amendment altered Mr N's employment contract, but it did not alter the Scheme Rules. The intention was to override elements of the Rules by way of extrinsic contract.
 - Mr N accepts that he consented to an increase in the Normal Retirement Age in 2012, but he did not consent to the terms relating to voluntary redundancy.

- Following *South West Trains v Wightman* [1997] (**the SWT judgment**), it is accepted that an extrinsic contract can legitimately alter pension benefits, but there are limits to this. Subsequent case law suggests that for a change to be effective, it should not directly contradict the scheme rules, or if it does, consent should be specifically provided in relation to the change.
- This is supported by the judgment in *IMG Pension Plan HR Trustees Ltd v German and another* [2009] (**the IMG judgment**), which said:

“It is one thing to hold that an extrinsic contract may be enforced to supplement a trust deed where the deed does not contain any contrary provisions. It is quite another to say that an extrinsic contract may override contrary provisions in a trust deed unless the extrinsic contract amounts to consent on the part of the beneficiaries.”
- The Adjudicator took the view that the changes to the rights in the event of voluntary redundancy were contrary to the Scheme Rules, and therefore the change must have been consented to by Mr N in order to be effective, as stated in the IMG judgment.
- Having considered the correspondence relating to the 2012 change, the Adjudicator took the view that sufficient information was provided regarding the change to rights on voluntary redundancy, and that the information was clear. But the terms of the consent in relation to this 2012 change were not clear on this specific change, and it was not apparent that Mr N had any option to reject this change. Given the IMG judgment, the Adjudicator therefore doubted the effectiveness of the change.
- The Adjudicator noted Mr N’s reference to objections to the change, but Mr N later clarified that the objection he raised was in relation to the 2008 Redundancy Objectors Agreement. As neither Mr N or the Bank had a record of this objection, the Adjudicator was of the view that it could not be relied upon by Mr N.
- However, whilst the Adjudicator thought that the effectiveness of the 2012 change was unclear, he considered that the Agreement, from November 2017, at the point of being offered redundancy, was compelling in confirming that Mr N waived any right he may have retained to an unreduced pension. The Agreement was clear that “in return for my being considered (and if accepted, being accepted for) voluntary redundancy...” he was giving up any rights he may have had to an unreduced pension.
- The Adjudicator was aware that Mr N had, shortly after agreeing to the voluntary redundancy terms, submitted a request to withdraw his consent. However the Adjudicator took the view that the Agreement became effective at the point that Mr N submitted a request to be considered for voluntary redundancy, and so a request to withdraw would not reinstate any potential rights he may previously have had.
- Notwithstanding this, the Adjudicator took the view that it did not appear that the Bank had correctly handled the request to withdraw from the redundancy process. But that error in redundancy procedure was an employment matter and not something that The Pensions Ombudsman could reverse. If the request to withdraw was not handled

appropriately Mr N ought to have pursued a grievance or Employment Tribunal, but he did not do so.

- For the avoidance of doubt, the Adjudicator also considered the likely outcome had the withdrawal been handled appropriately. The Adjudicator concluded that it was not possible to conclude how this would have been resolved, and it turned on the arguable effectiveness of the 2012 changes. It seemed likely that if Mr N was not prepared to accept the terms of the voluntary redundancy as it was offered to him, including the Agreement, he would have had to reapply for his job, which Mr N says he was unlikely to have been successful in doing so. In that scenario he would likely have been made compulsorily redundant, in which case he would not have been entitled to an unreduced pension under the Scheme rules and his redundancy terms were likely to be less beneficial.
- The Adjudicator also considered whether Section 91 of the Pensions Act 1995, which prevents the surrender of pension entitlements, might invalidate the Agreement. However, case law indicates that Section 91 is not effective where the rights in question are unclear or legitimately in dispute, an issue discussed in PO-5304¹ and *Briggs v Gleeds* [2014]. As Mr N's pension entitlement would have been in dispute because of uncertainty over the effectiveness of the 2012 changes the Adjudicator took the view that Section 91 would not invalidate the Agreement.
- The Adjudicator questioned whether the Agreement was effective in relation to the complaint against the Trustee given that it was not directly a party to it. The Adjudicator noted that the case law, being the SWT judgment and *A F Blakemore and Son Ltd v Machin* [2007] (**the Machin judgment**), was inconsistent on this point.
- The Machin judgment indicated that as the Trustee was not specifically mentioned as a possible respondent to a claim, the compromise agreement did not waive the applicant's right against the Trustee. Alternatively, the SWT judgment indicated that the wording of such an Agreement can give rise to an implied compromise of rights against the Trustee.
- On considering the Agreement in light of those judgments, the Adjudicator concluded that it was clear that Mr N was giving up "any" rights he may have had. So although the Trustee was not specifically referred to, as set out in the SWT judgment, the Adjudicator took the view that the Agreement inferred that Mr N waived any rights of action he may have had against the Trustee.

31. Mr N submitted further arguments that the Adjudicator considered and commented upon.

- Although Mr N considered his right to a PPA should have been retained because it was protected, the Adjudicator highlighted that the right to a PPA was dependent on the wording of the Scheme Rules and the circumstances in which a member retired.

¹ <https://www.pensions-ombudsman.org.uk/wp-content/uploads/PO-5304.pdf>

- To benefit from the PPA, it was necessary for a right to retire before age 55 to be unqualified, and not reliant on consent of another party. The only way that this was possible under the Scheme Rules was in the event of voluntary redundancy. A request for early retirement required the consent of the Bank, and if Mr N had become a deferred member a request for benefits would be dependent on the consent of the Trustee. The requirement for consent in those scenarios meant that the PPA would not be effective.
32. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments 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 N for completeness.

Ombudsman's decision

33. There are two elements to Mr N's complaint, the effectiveness of the 2012 changes and the effectiveness of the Agreement.

The 2012 changes

34. Mr N has argued that the 2012 changes were a regulated modification under Section 67 of the Pensions Act 1995, and therefore had specific statutory consent requirements. I do not agree. In order for that to be the case the right being affected would need to be a "subsisting right". But the right to an unreduced pension in the event of redundancy was not a subsisting right because at the time of the change it had not accrued, and he was not entitled to it at that time.
35. The test as to whether it is a subsisting right is whether Mr N could have taken advantage of the right in the event that in 2012 he had opted to terminate his service. However Mr N was not offered voluntary redundancy in 2012 and he was not yet aged 50. On that basis, I do not consider the 2012 changes were subject to the requirements of Section 67.
36. As the Adjudicator has said, the case law on the topic of extrinsic contracts suggests that where the contract is directly contradicting or invalidating a right set out within the scheme rules, the change should be consented to by the member. The IMG judgment is clear on this point. I have considered the Election Form that Mr N was provided with when making a decision following the 2012 changes and I find it hard to conclude that he had any genuine choice on the loss of the right to an unreduced pension in the event of voluntary redundancy.
37. Mr N had the option of accepting higher contributions for retaining a Normal Pension Age of 60 or paying no additional contributions and having the Normal Pension Age pushed back to 65. Alternatively, he could have opted out of the Scheme.
38. However, all of these options extinguished the right to an unreduced pension in the event of voluntary redundancy. I cannot see that this provided positive, valid consent

on Mr N's part for the right to be removed. I therefore think it is possible that the 2012 changes were not effective in the way the Bank intended.

The Agreement

39. The Agreement formed part of the redundancy offer made to Mr N in December 2017. It is quite clear that the intention of the Agreement was to reinforce the Bank's stance that Mr N had lost any right to an unreduced pension following the 2012 changes and I consider it was strongly worded to strengthen its position on this. The question is whether the Agreement is effective.
40. Mr N has argued that his mental health and the short timeframe to respond compromised his ability to make an informed decision on whether he should accept the Agreement. He has outlined the mental health difficulties he was facing at the time, including the fact that he was under stress from work with the prospect of redundancy, and that he subsequently went on sick leave. He considers he should have been given extra time to make a decision due to his disability, of which the Bank was aware.
41. While I am sympathetic to Mr N's disability, I think it was reasonable, on the balance of probability, to take the view that he would have read the Agreement and understood its intention. I am not persuaded that the terms of the offer being put to him breached the Mental Capacity Act 2005, as he has suggested. I consider Mr N was provided with sufficient information on the options available and the implications. If he had needed additional time or clarification, he could have requested it, so, I do not find that his acceptance of the Agreement was invalid.
42. On reviewing the Agreement, of note is the first sentence:

"In return for my being considered (and if accepted, being accepted for) voluntary redundancy..."
43. The result of this is that the declaration that follows, and which disavows any right to an unreduced pension, is effective from the point at which Mr N requested to be considered for voluntary redundancy. As a result, even though Mr N requested his application to be withdrawn shortly afterwards, it is reasonable to take the view that he had already waived any rights he may have retained.
44. However, even had the Bank erred in not acting promptly on Mr N's request to withdraw, redundancy agreements are subject to employment law and are not generally within my legislative powers. Mr N did not challenge his redundancy at the time, by issuing a grievance or taking the matter before an employment tribunal, and I understand it is now likely to be too late for him to be able to do so.
45. Had Mr N successfully withdrawn his request to be considered and challenged the absence of the option to take an unreduced pension at the point of voluntary retirement, the question of the effectiveness of the 2012 changes would have needed to be resolved, but that would have needed to be challenged in the appropriate forum

at the time and the outcome is uncertain. The change appears to have been viewed as effective in other circumstances², and it may be that the changes were agreed by way of consent from the union, but I have not been provided with evidence of this.

46. In addition to the uncertainty of any challenge to the 2012 changes, it is possible in that following such a challenge, Mr N may not have been selected for voluntary redundancy. If that was the case, the possible outcomes would have been reapplying for his role or compulsory redundancy, and Mr N suggests compulsory redundancy would have been the most likely outcome. That being the case, the final redundancy terms are likely to have been less advantageous than the voluntary redundancy package that Mr N has taken.
47. I do not uphold Mr N's complaint.

Anthony Arter

Pensions Ombudsman
13 November 2019

² <https://www.employmentcasesupdate.co.uk/site.aspx?i=ed22559>

Appendix

“My Agreement: In return for my being considered (and if accepted, being accepted for) voluntary redundancy I confirm the following (as evidenced by my signature below):

I agree and accept that by choosing voluntary redundancy, I am agreeing to end my employment with the bank and that my redundancy payment will be full and final settlement for my redundancy.

I understand and agree that by accepting voluntary redundancy on the terms offered to me by the bank, I am giving up any right I have or may have had to an undiscounted pension from the RBS Group Pension Fund (the “Fund”) which, but for this agreement, may otherwise be payable on my redundancy.

In particular, in return for being provided with the voluntary redundancy package offered to me, I agree that I am only entitled to a discounted pension from the Fund payable from age 55 (the normal minimum pension age), reduced for early payment on a basis decided by the bank and the Trustees of the Fund after considering actuarial advice and that I waive all and any claims that I have or may have to an undiscounted pension.

For the avoidance of doubt, I acknowledge that I have no prior claim to any undiscounted pension in the absence of an offer of voluntary redundancy, that I have no prior right to be offered voluntary redundancy on any terms and that the bank does not accept that I would have such a right even in the absence of this waiver.

I understand and agree that, by giving up any right I have or may have to an undiscounted pension, the pension I receive from the Fund will be lower than that which I have or may have otherwise received if made redundant at the request of the bank.”