

PENSION SCHEME ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr Hassett Auguste
Scheme	Local Government Pension Scheme
Respondent	Ascham Homes Limited

Complaint summary

Mr Auguste has complained that Ascham Homes Limited (**Ascham**) improperly rejected his application for early payment of his pension on the grounds of business efficiency.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against Ascham because its decision was perverse.

DETAILED DETERMINATION

Material Facts

1. The background, including the relevant Local Government Pension Scheme (**LGPS**) Regulations, is set out in detail in my Determination of Mr Auguste's previous complaint (number 86352/1 dated 27 March 2013). One of my conclusions was that Mr Auguste's application for early payment of an unreduced pension on the grounds of business efficiency had not been fully considered. I directed Ascham Homes Limited (**Ascham**) to reconsider Mr Auguste's applications for aggregation of service and an unreduced pension on the grounds of business efficiency. I also directed Ascham and Capita (the LGPS administrator) to pay compensation to Mr Auguste, for distress and inconvenience caused to him. Ascham is a company limited by guarantee and Waltham Forest Council (**the Council**) is its sole source of funding.
2. Ascham subsequently allowed aggregation of Mr Auguste's periods of LGPS service. Ascham again refused Mr Auguste's application for early payment of an unreduced pension, on business efficiency grounds. This refusal is the subject of Mr Auguste's present complaint.
3. The LGPS (Benefits, Membership and Contributions) Regulations 2007 said:

“Regulation 19 (Early leavers: inefficiency and redundancy).

 - (1) Where
 - (a) a member is dismissed by reason of redundancy; or
 - (b) his employing authority has decided that, on the grounds of business efficiency, it is in their interest that he should leave their employment; and
 - (c) in either case, the member has attained the age of 55, he is entitled to immediate payment of retirement pension without reduction.
 - (2) In the case of a person who is a member on 31 March 2008, and to whom paragraph (1) applies before 1 April 2010, that paragraph applies as if “the age of 50” were substituted for “the age of 55”.

4. Mr Auguste's employment by Ascham ended on 30 November 2009. He was 52. Mr Auguste says:

"I was dismissed/required to resign/forced to go... There was no performance issue with my employer. None was ever raised with me... There was no adverse discussion on performance, leadership or any other aspect of my stewardship from/with my employer... My employer was wholly satisfied with my performance."

5. Mr L, who joined Ascham's Board in the same month that Mr Auguste left and is now the chairman, says that he met with Mr Auguste on a number of occasions shortly before his departure. Mr L says that Mr Auguste's relationship with the Council was extremely strained, and on several occasions the Council had written to Mr Auguste expressing grave concern about his leadership of Ascham. Mr L was an observer at Ascham's Board meeting on 3 November 2009, at which the Council's Chief Executive stated that it not received acceptable responses from Mr Auguste to questions put to him. The Council's Chief Executive said that the Council had sufficient evidence to terminate its management agreement with Ascham.

6. Mr L says:

"The Council's Chief Executive indicated that it appeared to the Council that the financial position of Ascham Homes was precarious, yet this was not being made clear to the Company. He also indicated that he had grave concerns about the preparedness of the Company for the upcoming Audit Commission inspection... A very late report was also prepared for the Board meeting on 9 November by the Director of Resources and Legal which had the approval of Mr Auguste (he confirmed that to me). This set out for the Board for the first time that the Company was forecasting a loss of over £1m for the year and recognising that the Council would not be making an additional payment, it suggested that the Board agree a series of actions that would seriously affect the front line service to residents and preparation for the Audit Inspection.

There were clearly differences of view from individual Board members about how this perilous situation had arisen. They ranged from some clearly focusing at shortcomings in leadership and responsibility of Mr Auguste, to some who reviewed the problem as principally created by the Council not working in partnership with Ascham. However it was clear to the Board as a whole that Mr Auguste was no longer in a position to lead the organisation given that its income was based on the management agreement with the Council and [the Council] no longer had trust in him. Further the Board recognised that its financial position was extremely grave."

7. Mr L says that he subsequently attended a series of meetings with the Council and Mr O, the chairman of Ascham's Board, following which he agreed Mr Auguste's exit package with Mr O. Mr L signed the compromise agreement, as he had become chairman by then. Mr L says that he understood from Ascham's solicitors that during the negotiations Mr Auguste had sought early payment of an unreduced pension, but Ascham refused, because the Council would not fund it.
8. Ms W, who was a member of the Board at the time of Mr Auguste's departure, says that by 2008 she was one of at least five directors who were very concerned about Mr Auguste's performance. Ms W says that it was very difficult to get Mr Auguste to agree any performance objectives, and a number of directors were not prepared to challenge him. Ms W says that the Board was not aware of the company's dire financial position until the Board meeting on 3 November 2009. The Board then recognised that Mr Auguste "had been presiding over an absolute mess and had withheld information from the Board about the true state of affairs."
9. In a letter to Mr Auguste dated 23 May 2013 Ascham said:
 "[Ascham] confirmed its decision that you did not leave service for reasons of redundancy or business efficiency. The reason that you left service was because Ascham and the Council lost confidence in you as Chief Executive. You were replaced immediately and there were no cash efficiencies gained as a result of your

departure. In addition, had you been departing for reasons of business efficiency, the Board feels that this would have been reflected in your compromise agreement, but it was not.

[Ascham] reconsidered whether you should be allowed to take your pension early, subject to actuarial reduction and decided not to agree to this. This is a matter for the Board in its absolute discretion, and in making that decision the Board can have regard to the financial interest of Ascham. Also, the terms of your departure in 2009 were negotiated and agreed at the time and consent to early retirement did not form part of those terms. The Board is not minded to reverse that decision now."

10. So far as is relevant to this complaint, the compromise agreement between Ascham and Mr Auguste said:

"10. The employee will resign as company secretary of the employer and from any other office he may hold, such resignation to take effect on the termination date [30 November 2009]...

14.4 ... it is agreed that this waiver and settlement of claims shall not apply to any claims that the employee has or may have in relation to personal injury or accrued pension rights relating to his years of pensionable service with the employer (which commenced on 3 November 2003), on the understanding that the employee warrants that he is not aware of any circumstances which might give rise to any such claims."

11. Mr O, Ascham's chairman at the time of Mr Auguste's departure says:

"... The Board, Mr Auguste's employer, did not have any question regarding his performance... The departure was at the request of the Chief Executive (at the time) of the Council. In return for the Board dismissing Mr Auguste, the Council would provide extra funding for the company... At no point whatsoever did the Board express any concern over performance to Mr Auguste as Chief Executive..."

12. Mr B, who was a director at the time of Mr Auguste's departure, says that Ascham was always very satisfied with Mr Auguste's performance and there were never any complaints or other indications from his fellow directors about Mr Auguste's performance. Mr B says that during his time on the Board he had been vice chairman and chaired Ascham's audit committee, and with many years experience at senior management level he would have sensed if something was amiss with Mr Auguste's performance. Mr B says that Mr Auguste "served the company, tenants and residents superbly."

Summary of Mr Auguste's position

13. Mr Auguste has provided a detailed submission saying how he turned Ascham around, from a company with low morale to a highly successful one. In his submission Mr Auguste recounts some of his dealings with the Council on behalf of Ascham, which appear to have been a series of arguments with Council staff and councillors. Mr Auguste says that he always acted in accordance with the Board's directions.
14. Mr Auguste suggests that Ms W's recollections are prejudiced by an appointment panel's decision not to reappoint her to Ascham's Board. Mr Auguste considers that Mr L "has no basis for any opinion, good, bad or indifferent", as Mr L only joined Ascham's Board when Mr Auguste left.
15. Mr Auguste is certain that performance was never mentioned to him at the time of his departure from Ascham. He says:

"...There was/is never any mention whatsoever - in any place (Board, committee, and working group) that my performance is any cause of concern. Never is it raised, said, intimated anywhere. [Mr O] and [Mr B] have told you that there was no performance issue.

The single and compelling reason is that my performance was not an issue, was known not to be an issue, was not cited by my employer as an issue and cannot then be the reason for dismissing me/forcing me to resign/requiring me to resign. The reason was business efficiency using any and every common sense definition of the term and circumstances.

All of the actions and interactions of the Board of 2009 lead to a single and inescapable conclusion. That conclusion is the same irrespective of whether the actions and inactions were by design or default. The actions and inactions of the Board of 2009 provide clear, unequivocal demonstration that my leaving was on the basis of business efficiency in any construction of that term. It is the reason for my leaving. The evidence is overwhelming..."

16. Mr Auguste says that Ascham got rid of him in order to obtain funding from the Council, and so his departure was on the grounds of business efficiency.
17. Mr Auguste also says that:
 - in saying that it had lost confidence in him, Ascham is guilty of libel and slander;
 - the cost of providing him with an unreduced pension should be borne by individual Ascham Board members and staff, not the LGPS;
 - I should direct Ascham to pay him a full pension, backdated to his leaving service.

Summary of Ascham's position

18. Ascham says that it carefully reconsidered Mr Auguste's application for a pension on the grounds of business efficiency and decided that he did not qualify. "Business efficiency" is not defined in the LGPS Regulations and was thus a matter for Ascham to determine.
19. Ascham says that Mr Auguste resigned and received compensation for loss of office. He did not retire, or say that he wanted to retire. There was no suggestion that Mr Auguste to retire on an unreduced pension. The reference agreed with Mr Auguste said that he "resigned from Ascham Homes to consider taking his career in a different direction..." If early retirement had been chosen by the parties as the basis of the severance agreement, the cost of providing an unreduced early retirement pension would have inevitably resulted in a reduction in the compensation payment, so as to avoid double compensation for loss of office.

20. Ascham also says that Mr Auguste was immediately replaced, so no cash efficiencies were made by his departure. Ascham considers that having agreed a substantial exit package, it cannot be right for Mr Auguste to come back for a "second bite at the cherry" on the grounds that his departure made Ascham more efficient. A finding in favour of Mr Auguste would result in his unjust enrichment.

Conclusions

21. Ascham had a duty as Mr Auguste's employer to act in good faith towards him in the way that it exercised its functions under the LGPS Regulations, and it was also obliged, as a recipient of public funds, to act in a financially responsible manner. Ascham was entitled to take its financial interests into account when making the decision.
22. Mr Auguste considers that the reason given to him for his departure – that the Council had lost confidence in him – amounts to libel and slander. Those are matters for the Courts, not for me.
23. Mr Auguste's pension comes from the LGPS, not individual employees of Ascham. My jurisdiction includes Ascham's role as Mr Auguste's employer, insofar as the company's functions under or in relation to the LGPS are concerned. (*Engineering Training Authority v Pensions Ombudsman (1996) PLR 409*) Any financial liability is Ascham's, not individual employees or Board members.
24. The principal issue - whether Mr Auguste's departure was on the grounds of business efficiency – concerns Ascham's functions under or in relation to the LGPS, and so is a matter for me to decide.
25. The compromise agreement excluded claims related to Mr Auguste's accrued pension rights, "on the understanding that the employee warrants that he is not aware of any circumstances which might give rise to any such claims." Mr L thinks that early retirement was included in the negotiations between Ascham and Mr Auguste, but Ascham says "there was no suggestion that he wished to retire on an immediate pension." That being so, the terms of the compromise agreement are not an impediment to Mr Auguste's later application for early payment of an unreduced pension, and his subsequent complaint to me.

26. Ascham's directors disagreed about Mr Auguste's performance as Chief Executive, although it seems that those who had concerns did not raise them with Mr Auguste or the Board. However, the divergence of views amongst Board members did not cause Mr Auguste's resignation. Mr Auguste and Ascham agree that Mr Auguste had to go because the Council had no confidence in him, and was unlikely to continue Ascham's funding if Ascham continued to employ him. It might be said that ending someone's employment is usually linked to business efficiency, but there is a difference between termination due to redundancy and termination on business efficiency grounds. There is also a common sense difference between business efficiency and performance grounds. If it is to function effectively, Regulation 19 cannot be taken to include all cases in which greater efficiency is a consequence of dismissal. Regulation 19 applies where there is no other significant reason than objective efficiency, for example, redundancy or restructuring, where the characteristics of the post holder are irrelevant. It does not automatically apply where the reasons for the gain in efficiency are closely connected to the individual employee – when the dismissal is subjective.
27. Ascham terminated Mr Auguste's employment because the Council required it and Ascham could not survive without Council funding.. This was not redundancy or restructuring, as Mr Auguste was immediately replaced by a new Chief Executive. There was no cash saving, indeed Ascham incurred the additional cost of paying Mr Auguste substantial compensation for loss of office.
28. In the absence of a definition in the LGPS Regulations, it fell to Ascham to decide what constituted business efficiency. However, Ascham's decision making power was not absolute; it had to be tempered with common sense, and could not be one that no decision maker, properly directing itself, could reach.
29. I will not usually interfere with the weight given by a decision maker to different factors that it is entitled to take into account. (*Edge v Pensions Ombudsman* [1999] 4 All ER 456). The exception to this general rule is if the decision was perverse. The test for perversity was set out in *Harris v Shuttleworth* [1995] OPLR 79 which held that the decision maker must ask itself the correct questions, direct itself correctly in law and adopt a correct construction of the pension scheme's rules, and not arrive at a perverse decision, that is, one which no

reasonable body could reach, and must take into account all relevant but no irrelevant factors.

30. Ascham's principal concerns were the cost of providing an unreduced pension, and ensuring continued funding from the Council. These were of course important matters, but Ascham did not ask itself what the cause of Mr Auguste's departure really was, so far as the LGPS Regulations were concerned. Ascham's understandable desire to protect its finances led to Ascham being quite sure from the start that whatever the reason for Mr Auguste's departure might be, it was not going to be business efficiency.
31. The reasons for Mr Auguste's departure were selective in that they were closely connected to his individual characteristics. But the circumstances were unusual and there was an objective element as well – Ascham's survival was at stake. Mr Auguste's employer got rid of him because the company's sole shareholder demanded that it do so. The Board had not raised performance issues with Mr Auguste. This was not an employee being sacked for poor performance. Dispensing with Mr Auguste's services enabled Ascham to get the funding it needed and improve its relationship with the Council. I have no doubt that Ascham's business operated more efficiently as a result, and it follows that the provisions of Regulation 19 were satisfied.
32. I have therefore decided that Ascham's decision was so wholly against the weight of the evidence that it was perverse. Ascham's refusal to grant Mr Auguste an unreduced pension constituted maladministration, causing him injustice.
33. Section 151(2) of the Pensions Act 1993 provides that I can direct a respondent "to take, or refrain from taking, such steps as [I] may specify". Having found as a fact that Mr Auguste's employment ended on business efficiency grounds, Ascham's decision needs to be quashed as perverse. I have considered whether to remit the matter for further consideration by Ascham, but bearing in mind the history of this matter, I have decided that to do so is unlikely to result in a just decision being made.

Directions

34. Within 28 days of the date of this Determination, Ascham shall put Mr Auguste's LGPS early retirement benefits into payment on business efficiency grounds, backdated to his leaving service. Interest shall be added at the daily rate quoted

by the reference banks, calculated from the due dates of payment to the actual date of payment.

Jane Irvine
Deputy Pensions Ombudsman

30 December 2014