

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mr Philip Moulton
Scheme	Home Retail Group Pension Scheme
Respondent(s)	Argos Limited, Home Retail Group Pension Scheme Nominees Limited

Subject

Mr Moulton complains that Argos Limited (**Argos**) did not grant him early retirement from active status in respect of his membership of the Scheme. Further, he is unhappy with Argos and Home Retail Group Pension Scheme Nominees Limited (**the Trustee**) about the way in which his application was administered.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against the Trustee because the administration was delegated to and carried out by Argos and, in the absence of consent from Argos, the pension Mr Moulton sought could not be paid.

The complaint should be upheld against Argos because:

- the matter of Mr Moulton's application was handled badly both in its capacity as an employer and as Scheme administrator;
- Argos did not act consistently with its obligations in not considering Mr Moulton's application, given the way the matter had been handled.

DETAILED DETERMINATION

Scheme Rules

1. Rule 3 of the Scheme says,
 - “3.4 **Early Retirement**
 - ...
 - (2) A Member ... who retires from Service with the consent of the Principal Employer after attaining age 50 (age 55 after 5 April 2010) but before Normal Retirement Date otherwise than on account of Ill-health shall be entitled to the Scale Pension reduced by such amount as shall be determined by the Trustees subject to a maximum reduction of such amount as may be certified by the Actuary as reasonable”.
2. There was also provision for pensions to be paid early to people who left without an immediate pension. However, the early retirement reduction was more severe than for pensions granted under rule 3.4.

Material Facts

3. Mr Moulton joined Argos and the Scheme on 19 September 1999. He worked at a Distribution Centre. His normal retirement age was his 65th birthday. At all relevant times in relation to his complaint Mr Moulton was aged below 60.
4. A retirement quotation as at 30 September 2011 was provided to Mr Moulton at the start of September 2011 but he did not proceed with retirement at that time. Both parties have differing views about the circumstances that led to this quotation.
5. From 18 September 2011 Mr Moulton undertook restricted duties (working 26 out of 39 hours per week) due to health reasons.
6. Mr Moulton says the warehouse where he worked closed in about October 2011 and he was then moved to the main warehouse.
7. Mr Moulton says his health condition worsened. By January 2012 he realised he could not cope at the main warehouse. He had a back problem and there was a lot of walking and lifting. Around that time he was referred to the occupational health department and they suggested that if he did not comply with the work requirements he could face a dismissal. He says he felt under considerable pressure to do tasks which were physically too difficult and therefore he decided to opt for early retirement.

8. Mr Moulton says he spoke to his line manager at approximately 9.30 am on 24 January 2012 and made it clear that he wanted to retire on 28 March 2012. He says he asked what needed to be done to take the pension on that date.
9. The local Human Resources Assistant emailed the HR team at Head Office (on 24 January 2012 at 5.44 pm) and said,

“[Mr Moulton] is 58 years old and has asked what he would need to do to look into retiring early and leaving the company, or, taking early retirement and taking his pension while he is still working for the company.

Please could you advise what steps he would need to take to start looking into this? Would he need to contact the Benefits team himself or is this something, I, HR would normally do for him?”
10. The HR team replied the next morning saying Mr Moulton needed to contact the in-house pensions department and ask for a forecast for early retirement at the date he planned to retire. They said if early retirement was possible they would send him out the information and an option form, which he needed to complete if he decided to go ahead.
11. The local HR Assistant forwarded the HR team’s email to Mr Moulton’s manager on 25 January 2012 (timed at 9:23 am) with a request that she passed on the information to Mr Moulton.
12. Argos says the Group’s senior management is at the level of the parent company, Home Retail Group plc (**HRG**). HRG made a decision to consult about the Scheme being closed to future accrual and Argos therefore made a decision, effective from 9 am on 25 January 2012, not to consent to requests for early retirement from active membership during the course of the consultation. No evidence (for example, board meeting minutes) has been supplied about this purported decision. Before that decision, Argos says the usual process was that the relevant HR Business Partner was asked whether or not they wanted to consent once the member had completed application forms for early retirement.
13. Mr Moulton says an announcement in relation to the Scheme was made on 25 January 2012 at about 1 pm. The announcement referred to the final salary scheme ending in January 2013, and that a consultation exercise would take place.

14. A 28-page document was issued to members at the time of the announcement entitled 'Proposed changes to your pension'. This document set out the reasons there was a need for change. The guide said the proposals were to be considered through collective consultation which would begin in the next two weeks and would last for at least 60 days.
15. On page 23 of that guidance (headed 'C. More about stopping the build up of pension in the Scheme'), it said in answer to the question 'Can I retire early?',
"All colleague applications for early retirement from the Scheme require the agreement of Home Retail Group and will be carefully considered. ..."
16. Later that day (at 3:33 pm) Mr Moulton emailed Argos' pensions department and said,
"I discussed early retirement with a member of my team management on the 24/01/2012, I have been advised by them to contact you to inform you that I intend to retire on 28/03/2012, and would request from you a forecast on my pension, one for full time retirement, and also a forecast to take early retirement but continue to work".
17. On 3 February the in-house pensions department acknowledged his request and said the estimated timescale was six to eight weeks. They told Mr Moulton that all early retirements from the contributing membership were subject to the consent of the company.
18. Mr Moulton recalls sending a handwritten letter to the company on 6 March 2012 but says he did not keep a copy. This letter was subsequently mentioned during the company's grievance procedure (at a 16 November 2012 meeting). Mr Moulton said his letter was sent to the company and stated he was retiring. Argos says it has no record of any such letter.
19. On 7 March 2012 the in-house pensions department sent Mr Moulton an early retirement illustration and an option form. They said,
"Please find an illustration of the benefits that may be payable to you at 28th March 2012 should you elect to take payment of your pension benefits. Please note this quotation is based on a number of assumptions and is not guaranteed. Please also note that there would be no difference in taking your pension benefits and to continu[e] working or for you to retire and not continue to work. ...

Should you wish to proceed, please complete and sign the enclosed pension option form. Please be aware however that all early retirements from active

membership of the Scheme are subject to the consent of [the] Company. On 25th January 2012 the Company announced that it was proposing to make changes to the Scheme and that it was entering into a period of collective consultation with representatives of impacted colleagues. During this period early retirement requests will not be considered until the end of the consultation period.

This decision does not affect your right to opt-out of the Scheme and to receive your retirement benefits as a deferred member. The figures illustrated do not reflect retiring on this basis and such a decision however and opting out of membership would result in a lower pension th[a]n illustrated.”

20. The benefits quoted included a pension commencement lump sum of £17,009.49 and a smaller pension of £2,551.54 per annum.
21. Mr Moulton says that when he got this letter he spoke to his trade union representative. He recalls that his union representative, in turn, went away to telephone the in-house pensions department. When his union representative returned Mr Moulton says he was told that his pension application could still proceed. Mr Moulton says he returned to work as normal believing that the position was not affected by this letter.
22. Argos says it has no record of any conversation with the union representative concerning Mr Moulton. The union representative has told the Pensions Ombudsman Service that he remembers Mr Moulton approaching him (and Mr Moulton had spoken to the Payroll Assistant). He also recalls that he did contact the pensions department by telephone on Mr Moulton’s behalf. However, he can neither recall the question that Mr Moulton raised with him nor the reply that the pensions department gave him.
23. On 12 March 2012 Mr Moulton completed the option form and sent birth and marriage certificates for him and his wife. He chose a pension commencement lump sum and smaller pension.
24. On 15 March, the in-house pension department wrote to Mr Moulton acknowledging receipt of his completed option form and returned his certificates.
25. Mr Moulton asserts he spoke to his local Payroll Assistant in his last working week. He says she checked the situation by telephone, and then told him that he would receive his monthly pension from 28 April 2012 and lump sum the week before. He believes she contacted the Trustee in order to answer his question.

26. The HR team from Head Office wrote to Mr Moulton (on Argos headed notepaper) on 27 March thanking him for his recent confirmation that he wished to retire on 29 March 2012. The letter gave certain information about his P45, final payslip, and holiday pay connected to his employment ceasing on his 'agreed retirement date'. Mr Moulton was told if he wanted to discuss his pension arrangements to contact the HR Query team. He was thanked for his service and wished well in his retirement.
27. Mr Moulton says that on his retirement he received the usual voucher from Argos and his wife received a bouquet of flowers.
28. The Trustee says that until 2 April 2012 the Scheme was administered on its behalf by the in-house pension department of Argos (though it seems that HRG's headed notepaper has been used in all correspondence with Mr Moulton). Thereafter, a new Scheme administrator (JLT Benefit Solutions Limited (**JLT**)) was appointed.
29. JLT sent a letter to Mr Moulton on 23 April 2012 saying they had all the information to progress his retirement from the Scheme. Nonetheless, they reminded him that early retirement requests were not being considered until the end of the consultation period and so they would be in touch with him at that time.
30. Emails within Argos show that Mr Moulton's early retirement was discussed internally between 26 April and 1 May 2012. After considering the circumstances, the Pensions Manager decided that the policy put in place to delay the acceptance of early retirement should still be applied to Mr Moulton, as it did to others.
31. On 16 May 2012 Mr Moulton met the Distribution Centre's HR Business Partner. Handwritten minutes of that meeting record that Mr Moulton was offered the opportunity to return to work via an agency until the consultation period was complete (or beyond) and the implications on early retirement requests became clear. Argos says this offer was open-ended. Further, had Mr Moulton not left on 29 March he would have formed part of the shift pattern change consultation process and would have been eligible for a gesture of goodwill payment (along with other colleagues that did not want to accept one of the new shift patterns). The minutes, however, record this gesture of goodwill payment was an

- alternative to returning to work and that Mr Moulton agreed to accept the goodwill payment of £6,411. Argos says this payment was made to Mr Moulton.
32. Argos says on or around 12 June 2012 the consultation period closed. Shortly afterwards it was announced that the decision not to consent to early retirement had been made permanent, pension closure of the Scheme to future accrual.
 33. When asked if Mr Moulton's early retirement application was considered after the consultation period had ended, Argos said the email of 1 May 2012 from the Pensions Manager shows Mr Moulton's request was considered at that time.
 34. Another letter was sent by JLT to Mr Moulton on 19 July 2012 setting out his preserved benefits in the Scheme, payable from his normal retirement date (**NRD**). His accrued deferred annual pension was stated to be £3,738.65.
 35. JLT subsequently wrote to Mr Moulton on 21 August 2012 about his estimated retirement benefits assuming he retired on 30 March 2012 from deferred status. The figures were stated as being provisional and not guaranteed. The benefits quoted were a pension of £2,569.67 per annum, or alternatively a pension commencement lump sum of £12,488.55 and a smaller pension of £1,873.28 per annum.
 36. In an email of 23 August to JLT, Mr Moulton asked why his pension benefits had fallen by 30% from the original (March 2012) quote. He said he had requested his early retirement before the consultation process began and if he had been given the August 2012 figures in March he would not have requested early retirement.
 37. JLT replied to him on 13 September 2012 saying from 25 January 2012 the Trustee had suspended consent to members taking early retirement from active status. In order for members to have taken early retirement from active status, all relevant retirement forms and documents needed to be received before the start of the consultation period. Mr Moulton's forms were received on 14 March 2012 and so early retirement from active status was no longer an option for him. Nevertheless, if he wished to take early retirement from deferred status Mr Moulton should return the forms sent to him on 21 August. Alternatively he could take his benefits at another future date.
 38. On 27 September 2012 Mr Moulton returned the pension forms to JLT that had accompanied their letter of 21 August. He said he did not believe he had been treated fairly and considered his benefits should be calculated on the basis

notified to him in March 2012. Mr Moulton reserved his right to pursue his claim and said his acceptance of the August offer was to mitigate his loss.

39. In response to Mr Moulton's letter of 27 September 2012 (and its contents), JLT confirmed that his retirement would be processed and said his comments had been forwarded to HRG.
40. On 23 October 2012 JLT confirmed to Mr Moulton that his pension commencement lump sum would be paid on or around 25 October and his first pension payment (with arrears) would be paid on or around 28 November 2012.
41. Mr Moulton's solicitors, EAD Solicitors LLP (**EAD**), wrote to JLT on 6 November 2012 noting their client had retired from employment and the reason for leaving was retirement. Mr Moulton's dispute concerned the level of retirement benefits (both lump sum and pension) he had received, which was lower than the level that would have applied had Mr Moulton been allowed to retire from the Scheme as an active member. His arguments are reflected in his position below.
42. JLT passed EAD's letter to the Trustee, which resulted in action being taken by both Argos under the company's grievance procedure and the Trustee under the Scheme's internal dispute resolution procedure (**IDRP**)
43. Argos noted Mr Moulton felt he had been treated unfairly and invited him to attend a meeting on 16 November 2012 with the Distribution Centre's Operations Manager (**the OM**) and HR Business Partner. The meeting was treated as a first appeal under the company's grievance procedure following the earlier meeting on 16 May.
44. After this meeting, the OM wrote to Mr Moulton on 6 December 2012. The OM considered that the correspondence from the company made it clear that any early retirement requests would be subject to company consent and early retirement from active status would not be considered during the consultation period. The OM reached a view that Mr Moulton had not be unfairly treated taking into account the quotations issued in September 2011 and March 2012 and Mr Moulton's meeting with the HR Business Partner of May 2012.
45. On 18 December Mr Moulton appealed against the OM's decision saying he had made it clear on 24 January 2012 that he intended taking early retirement. He noted the local HR Assistant's email of 25 January stated that he had to put his

- application in writing for a pension forecast and he did the same day. He disagreed about his retirement not being granted and referred to HR's letter of 27 March 2012.
46. On 20 December the Pensions Manager issued his decision under stage one of the Scheme's IDRPs. He did not uphold Mr Moulton's complaint. He said under the Scheme's rules the decision was one for the Principal Employer, Argos. Accordingly, the Trustee could not comment further upon that matter. In relation to the way his application had been administered, the information they provided to Mr Moulton was consistent with the correct position at that time, and they believed there was no maladministration. The company had advised the Trustee that they had not given their consent and, having taken professional advice, the Trustee had no reason not to administer the Scheme on that basis. The correct procedure to deal with his complaint was the company's grievance process, which he noted was underway.
 47. On 7 January 2013 Mr Moulton instigated the second stage of the Scheme's IDRPs.
 48. The Scheme closed to future accrual with effect from 31 January 2013. Closure was effected by all the then active members leaving pensionable employment on 31 January 2013 through consenting to changes to their employment contracts.
 49. The Trustee says the Scheme's rules were then amended to reflect the fact that after 31 January 2013 it no longer had active members.
 50. Mr Moulton attended a grievance appeal hearing with the General Manager (**GM**) of the Distribution Centre (and a HR Business Partner) on 14 February 2013. The GM wrote with his findings on 25 February 2013.
 51. The GM recognised that the Payroll Assistant did advise him his first pension payment would be received on 28 April 2012 and his lump sum the week before. However, the Payroll Assistant did not provide the Trustee with Mr Moulton's specific details and posed the question hypothetically resulting in him being given that information. He did not believe that that response detracted from the information supplied to Mr Moulton in their letters of 3 February and 7 March 2012. Neither did it imply that the company had given consent to him retiring early from active service.

52. The GM accepted their letter of 27 March 2012 did refer to Mr Moulton's retirement from the company; however, its purpose was to confirm the termination of his employment due to his retirement and did not provide consent of his retirement benefits on early retirement from active status.
53. Overall the GM agreed with the OM's decision. His comments as well as other comments from Argos are reflected below.
54. The decision under the second stage of the IDRPs was issued to EAD by letter on 28 March 2013. Briefly the Trustee said it had no power to change the decision of the Principal Employer and in the absence of the employer's consent the Trustee could only pay Mr Moulton a pension arising from the Trustee's consent under rule 4.2, i.e. the early payment of his deferred pension.

Summary of Mr Moulton's position

55. Mr Moulton considers the situation in September 2011 was different to that in 2012. He says a question was raised by management as to whether he wanted to take early retirement and the employer instigated enquires, including the preparation of figures. The origin of the request came from management because of the department closing and the difficulty perceived in relocating him due to his health problems. Nonetheless, he says he made it clear that he had no intention of retiring early at that time.
56. He spoke to his employer on 24 January and confirmed he wanted to retire. The email correspondence verifies his application was made then (i.e. before the consultation period started) and a request for benefits to be notified to him.
57. His initial contact should have been progressed promptly and the delay in addressing matters has caused him considerable prejudice. Had his initial contact been dealt with in a timely manner, the administration of that process would have led him to access his pension without the considerable loss incurred.
58. He understands that when pension benefits are taken before NRD it is common for an actuarial reduction to be applied. However, the level of actuarial reduction is higher than would have been the case prior to the announcement. He enquired as to his pension benefits in about September 2011, and he was informed at that time that there would be company consent.

59. It was only when he received the letter dated 7 March 2012 that he was told that during the consultation period early retirement requests would not be considered, in effect for active members.
60. He presented his request for access to pension benefits on the basis notified to all employees on 24 January 2012. That request was notified to the employer's HR team and acknowledged, leading him to confirm his desire to leave on the published basis to that point. Later the rules were in effect changed on a unilateral basis, altering the approach which had prevailed when the request was made.
61. The letter dated 27 March 2012 confirms there was in fact an agreed retirement date.
62. Had he been told that he would receive a lower level of lump sum and pension, then his decision to retire early may have been reviewed and it is very likely that he would have remained in employment.
63. Based on his solicitor's advice, he considers the process adopted by the employer was in breach of contract. The process for access to pension benefits was in effect concluded by the morning of 25 January 2012, and the only matter outstanding was the final quotation which should have involved the payment of benefits on a basis comparable to the sums notified to him in September 2011.
64. The exchange in January 2012 created a contractual bargain between the parties, reflecting not least the fact that no previous application had ever been refused. His expectations (through custom and practice) that an application of the kind pursued would have been accepted leading to the pension being received at the expected level. There is no form of written contract to send, and he relies upon the email exchanges between him and his employer and all past practice, noting that custom and practice can create a form of contractual bargain.
65. He has accepted the lower pension benefit to mitigate his loss. Nonetheless, his losses include a loss of annual pension in the region of £700 per annum with a loss of lump sum of £4,500. He seeks compensation for this loss, and as regards future loss this should be dealt with by agreeing for the higher level of pension to be paid.

66. Though his “contract of membership” has been breached, he also reflects upon the way in which his application was administered. He considers he was let down as regards the process adopted, and it should have been made clear to him in February and March 2012 that his decision to retire should be reviewed because of the substantial loss of pension benefit associated with the change in policy.
67. The offer to return to work was after his contract had terminated and was not as a direct employee of Argos. The offer was to return to work through an agency and agency workers have a basic contract providing for only 7 hours of guaranteed work. He was told that Argos would make up the difference to what he used to earn but as a new starter he would not have had any employment rights, and he would not have been reinstated by his original employer, the contractual relationship would have been with the agency and supplied to Argos. His employment position would have been vulnerable. Further, when the matter was raised again in November 2012 and February 2013 his back condition had worsened and it would have been difficult at that time to resume employment.

Summary of Argos Limited’s position

68. Argos says that the oral and written correspondence in January 2012 did not amount to an application. Argos points out Mr Moulton previously made enquiries about early retirement in 2011. However, they say such enquiries cannot be regarded as an application because despite the provision of retirement quotations in September 2011 for retirement as at 30 September 2011 Mr Moulton did not proceed with retirement at that time. On that basis, it believes he was aware that a quotation only becomes an application once the Pension Option Form is completed and submitted.
69. Though it is a separate legal entity to HRG plc, it would have implemented any decision made at plc board level (i.e. consult about Scheme closure). The then and now Finance Director as well as the then Chief Executive of HRG plc both sat on the Board of Argos and would have been making decisions in both capacities.
70. Under the Scheme’s rules, Mr Moulton could only have taken early retirement from active membership if he had left the service with Argos’ consent.

71. Mr Moulton requested a quotation on 24/25 January 2012 and this request was for a forecast. Argos does not accept that such an enquiry represented an application. A member cannot apply for consent to retirement from service simply by requesting a forecast – not least because (as happened in September 2011) a member can apply for forecasts and then decide not to retire after all.
72. It accepts Mr Moulton was first told by letter on 7 March 2012 about the decision of the employer not to consider consent for early retirement during the consultation. But before Mr Moulton both applied for early retirement and left service, it made very clear to him that (a) HRG would not consent to his early retirement from service whilst the consultation exercise was ongoing and had not consented to his leaving service and (b) the consequence of it not consenting to his leaving service is that he would not receive an ‘active member’ early retirement pension on leaving service. Instead, he could draw his pension from deferred status and his benefits would be lower than the amounts quoted. This is set out in the correspondence. At no point did the company give consent to Mr Moulton’s early retirement request.
73. Though it has no record of any discussion with a trade union representative about Mr Moulton, it might have been on a ‘no names’ basis. It obviously cannot comment on, and is not responsible for, anything that the trade union representative might have said to Mr Moulton.
74. The High Court and Court of Appeal have considered the meaning of the word ‘retires’ and the word ‘consent’ in this context. (Argos referred to particular cases that I do not need to set out in detail here.)
75. The decision to withdraw consent was not irrational or perverse. It was applied to all then active members to prevent a run of early retirement requests undermining the Scheme’s solvency and/or causing staffing issues during the closure consultation.
76. In May 2012 it offered Mr Moulton the opportunity to return to work and this offer was repeated during the company’s grievance procedure.

Summary of the Trustee’s position

77. Mr Moulton could only have taken early retirement from active membership had the Scheme’s Principal Employer, Argos, consented to his retirement from

Service. HRG has told them that Argos did not consent, and in the absence of this consent, the Trustee has no power to pay this benefit.

78. They are entitled to rely on HRG's statement as to whether or not Argos gave its consent, both as a matter of trust law, and under a specific provision in the Scheme's trust deed. Clause 2.5(4) of the trust deed dated 20 December 2010 says "Each Employer will give the Trustees such information as they may properly require for the operation of the Scheme, and the Trustees will be entitled to treat that information as correct. ...".

Conclusions

Consent to retirement

79. When raising his complaint with Argos Mr Moulton said he had not been treated fairly and considered his pension should be calculated on the basis notified to him in March 2012. However, the starting point for any consideration of Mr Moulton's entitlement is the Scheme's rules. According to rule 3.4 (2) a member retiring from service needs the consent of Argos before being entitled to his actuarially reduced pension.
80. From what Mr Moulton says, it seems that due to his back condition he was struggling with his job and by January 2012 this factor influenced his decision to retire from work towards the end of March 2012. His email of 25 January indicates his intention to retire and in his own mind he may have already decided that that was what he would do. The fact that Mr Moulton asked for two forecasts (one for 'full-time' retirement and the other if he retired but continued to work) perhaps indicates that he had not completely decided on the precise mechanics of retirement. However, the email was, at the most, a statement of intention and not an application for a pension.
81. As an aside, I do not consider the delay of about eight hours on 24 January 2012 had any impact on whether Mr Moulton could submit a proper application (i.e. the completion of the option forms) before 25 January.
82. Consent, in the context of rule 3.4 (2) was to retirement with a pension, not just to retirement. It does not follow from the fact that Mr Moulton was permitted to leave, nor that he was given a "send off" consistent with retirement that there had in fact been consent.

83. Although Mr Moulton argues that the exchange of correspondence in January 2012 created a contractual bargain between the parties, I do not consider all the essential elements for a contract exist.
84. Mr Moulton says no previous applications had ever been refused (presumably to his knowledge) and his expectations were, based on custom and practice, an application from him would be accepted with the pension being received at the expected level. If Argos may, in the past, have invariably given its consent did not mean it must always do so.
85. The illustration of benefits sent to Mr Moulton on 7 March 2012 was prepared on the more favourable early retirement factors applying to an active member retiring (as opposed to a deferred member). Taken by itself, the administrator's letter makes it clear that employer consent is required. So I do not consider that amounted to consent either.
86. I find, therefore, that Mr Moulton was not entitled to receive an early retirement pension under rule 3.4.

The process

87. The letter that Mr Moulton was sent on 7 March was extremely unclear. It did say that requests would not be considered during the consultation period (though without saying how long that would be). But at the same time it invited Mr Moulton to complete the option form if he wanted to proceed. And it said that "early retirement requests will not be considered until the end of the consultation period" with an implication that Mr Moulton's request would be considered then. Finally, what it said about opting out would not possibly have led Mr Moulton to understand that a pension eventually agreed to when the consultation period ended could be significantly lower than the estimated pension under rule 3.4.
88. It is not surprising that Mr Moulton continued with an application, given that the letter not only invited him to, but also asked for birth and marriage certificates and talked about when benefits would be paid. The implication was that there was at least a possibility of the application for a pension under Rule 3.4 as at 30 March being consented to when he retired, when in fact there was none. Mr Moulton recalls a conversation with his union representative and says that following the representative's conversation with the in-house pension department

he was reassured. That is not fully corroborated, but whether it happened or not I consider that on its own the 7 March letter was highly misleading.

89. There is no doubt in my mind that at that point Mr Moulton should have been told that if he left on 28 March the quoted pension would not be available. He also should not have been told that the application would be considered when the consultation period ended, since there could have been no certainty that it would have been.
90. On Mr Moulton completing the forms and supplying certificates in March, alarm bells should immediately have rung with the administration team. It was obvious then that Mr Moulton was on the point of retiring, based on benefits that had not been agreed to. And it should have been obvious that he had not clearly been told that was what was about to happen. Instead the forms were processed in a leisurely way, resulting in a letter sent on 23 April (this time from JLT) which once again implied that his request would be considered at the end of the consultation period.
91. And before JLT's letter the situation was made worse by Mr Moulton (as Argos appears to accept happened) being told in late March that his pension and lump sum could be expected in April.
92. When the consultation period ended, Mr Moulton's application was not considered. (Argos told us that it was considered on 1 May, but that was before the consultation had ended and was in fact a decision that the moratorium on applications should be applied to Mr Moulton.)
93. In deciding whether to consent to Mr Moulton's application, Argos was entitled to consider its own interests. However, as a matter of law, it had not to act in a way likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, without reasonable and proper cause.
94. Argos made a policy decision not to agree to applications during the consultation period. I agree with Argos' submissions on the legal position in relation to that and I do not find fault with the policy decision, nor, in principle, with a consequential decision not to consent to Mr Moulton's application in March.
95. However, as I have said, the way the matter was dealt with by the Scheme's administrators and by Argos was very much less than perfect. The effect of it

was an application due to be considered in June when the consultation period ended, but which never was.

96. It is likely that Argos would have said that a renewed blanket decision not to consent was in place if the application had been considered in June 2012. (Though it seems that there may have been a gap of a few days when the position was uncertain.) It is possible the existence of that renewed decision is the reason that they did not consider the application.
97. Rule 3.4 deals with individual cases, not policy decisions. And so strictly there was always a decision to be made in the case of an individual application (though ordinarily it might be expected to follow the policy). However, in my view, given what had happened, a consideration of Mr Moulton's application in June not only should have taken place, but ought to have taken into account the confused and confusing information that Mr Moulton had received in March, including that fact that he had retired having been told that his application would be considered when the consultation was ended and with no indication that the consideration would not be on a par with applications made before the consultation began.
98. I find that Argos, in its treatment of Mr Moulton, both in the part that it played as employer after his March application, and in its failure to consider the application in June, did not act consistently with its obligation to Mr Moulton. Argos acted in a way that was indeed likely to damage his trust and confidence in them.
99. I therefore uphold the complaint and am requiring Argos to reconsider Mr Moulton's application as if in June 2012 taking proper account of what had happened in March.
100. In doing so, Argos should also take account of the fact that Mr Moulton gave up his job with a reasonable expectation that his application would, at some point, be considered. (His rejection of agency employment should not count against him, in my view. That did not equate to offering him his job back, which would have put the matter right.)
101. Mr Moulton will undoubtedly have suffered distress as a result of what has happened. That distress has been caused by Argos in both its capacities – as Mr Moulton's employer and as the Scheme's administrator.

102. I do not uphold the complaint against the Trustee as it could not have paid the pension in the absence of consent. However I do include it in my directions below.

Directions

103. Within 28 days of this Determination, Argos is to reconsider Mr Moulton's application for an early retirement pension from active service, taking full account of the events up to April 2012 (with particular reference to the run-up to his leaving in March). In the event that it agrees to his receiving a pension under Rule 3.4 Argos is to so inform the Trustee.
104. If Argos consents to a pension under Rule 3.4 the Trustee is to pay back instalments of pension and any additional lump sum with simple interest at the rate for the time being payable by the reference banks from the due date of each instalment to the date of payment.
105. Whether or not it consents to the pension under Rule 3.4, Argos is to pay Mr Moulton £400.

Tony King
Pensions Ombudsman

25 February 2015