

Ombudsman's Determination

Applicant	Mr K
Scheme	Carillion Public Sector Pension Scheme (CPSPS).
Respondent	Carillion plc (in Liquidation) (Carillion)

Outcome

1. I do not uphold Mr K's complaint and no further action is required by Carillion.

Complaint summary and background

2. Mr K complains that his former employer Carillion has failed to pay and previously underpaid his Annual Compensation Payment (**ACP**).
3. In July 1998, Mr K transferred from the Metropolitan Police Service (**MPS**) to Tarmac Services (which later became Carillion) under Transfer of Undertakings (Protection of Employment) (**TUPE**) Regulations. Mr K subsequently joined the pension scheme that is now known as the CPSPS. Tarmac Services entered a contractual agreement to honour Mr K's previous MPS terms and conditions as part of the TUPE transfer. Mr K retained rights to the same compensation payable had he received redundancy from the MPS. This comprised of an ACP between the date of redundancy and age 60, as well as a reduced ACP after his CPSPS entitlement became payable.
4. Contemporaneous guidance provided to Mr K by the Government Actuary's Department (**GAD**) to staff transferring to Tarmac Services (later Carillion) in relation to redundancy ACPs stated that:-

"You should note, that this entitlement is an obligation directly on Tarmac Services as your employer and is not part of the standard benefits provided by the Tarmac Scheme."
5. On 31 July 2000, Mr K received compulsory early retirement from Carillion. From age 60 Mr K's CPSPS pension was paid by the CPSPS Trustee. Carillion continued to pay the revised ACP to Mr K directly, by cheque, annually.
6. On 15 January 2018, A compulsory liquidation order was made against Carillion, and some of its subsidiaries, on the petition of the companies' directors. The Official

Receiver was appointed as liquidator by the court and subsequently a Special Manager was appointed.

7. On 12 April 2018, Carillion wrote to Mr K saying that his ACP was suspended, that he was now a creditor of Carillion and the liability would be considered as part of the liquidation.
8. On 20 December 2018, 10 February 2019 and 4 March 2019, Mr K wrote to the Special Manager stating that he did not understand why the liability of his ACP could not be passed to the Pension Protection Fund (**PPF**). Mr K also said that Carillion had a statutory obligation under TUPE Regulations to ensure that his entitlement was not altered after his transfer from the MPS.
9. No response was received from the Special Manager.

Adjudicator's Opinion

10. Mr K's complaint was considered by one of our Adjudicators who concluded that no further action was required by Carillion. The relevant legislation is summarised in the Appendix and the Adjudicator's findings are set out below:-
 - The ACP did not qualify for entry into the PPF because it did not meet the definition of an eligible scheme as set out in Section 126 of the Pension Act 2004.
 - The guidance that Mr K provided in support of his complaint from GAD states that the ACP was an obligation upon his employer directly. Consequently, it was not part of Mr K's CPSPS entitlement and was paid directly by Carillion.
 - The Adjudicator appreciated Mr K's view that Carillion should have secured the ACP in a suitable pension scheme much earlier. However, it did not do so and there was nothing to compel it to do so.
 - As Carillion is in liquidation, Mr K should be treated as a creditor in accordance with correspondence that he previously received from it.
 - Even if an Ombudsman were to find in Mr K's favour, any directions that an Ombudsman might now make against Carillion would have no practical effect due to its liquidation.
11. Mr K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr K provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will only respond to the points made by Mr K for completeness.

Ombudsman's Decision

12. Mr K's CPSPS entitlement continues to be paid while it is in the PPF assessment period.

13. Having reviewed the papers, I understand that there are in the region of 40 ex civil servants previously employed by Carillion Group Companies in similar circumstances to Mr K. A House of Commons briefing paper (**CBP-8316**) from July 2018 summarised the history of how the original TUPE transfers took place and stated that the contract entered into by Tarmac included an undertaking to secure the ACPs. A section of CBP-8316 entitled "Payments not covered by the PPF" states that:-

"When this group were first transferred out of the civil service, an undertaking was included in the contract that required their private sector employer to secure the ACPs (annual compensation payments) through a pension fund or insurance company at the point of redundancy to ensure the payments would not be threatened if the company subsequently ran into financial difficulties. Unfortunately, this did not happen and their ACPs have now stopped."
14. It is not disputed that Carillion did not set up a suitable pension scheme to secure Mr K's ACP. Based on the paucity of representations from Carillion, I cannot draw any conclusions as to why it failed to do so. Carillion's liquidation is subject to investigation by the Insolvency Service, the Financial Conduct Authority, the Financial Reporting Council and The Pensions Regulator (**TPR**).
15. I appreciate the reasons why Mr K feels that action should have been taken to secure his ACP in 2006. However, it is outside my jurisdiction to investigate the supervision of Carillion's redundancy benefits at that time and I am unable to comment further.
16. Mr K argues that his ACP entitlement should be transferred to the CPSPS in accordance with contemporaneous GAD guidance and Article 8 of the EU Insolvency Directive. Mr K also says that the ACP is a subsisting right in accordance with Section 67A of the Pensions Act 1995. Subsisting Rights provisions are defined in Section 67A of the Pensions Act 1995 and apply to any party exercising a power to modify the Rules of a Scheme. However, Carillion is not modifying the provisions of the ACP or re-structuring its business to avoid insolvency. It is in liquidation. Consequently, I do not agree that the provisions of the EU Insolvency Directive or the Pensions Act 1995 are applicable to Mr K's complaint.
17. I appreciate the reasons why Mr K believes that the ACP liability should transfer to the CPSPS and continue in payment. However, the dictionary definition of a pension cited by Mr K is not the definition specified in the relevant legislation. I agree with the Adjudicator's view that the ACP does not meet the definition of an eligible scheme set out in Section 126 of the Pensions Act 2004, to qualify for entry into the PPF.
18. It is not disputed that a pension scheme or arrangement was not set up by Tarmac/Carillion after Mr K's TUPE transfer to administer payment of the ACP. Having reviewed the papers, the ACP appears to have been paid by Carillion directly out of company assets. Consequently, I am of the view that the ACP liability is ineligible to transfer to the PPF, and that Mr K should be treated as a creditor in accordance with Carillion's April 2018 letter, because it is in liquidation.

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19. I have considerable sympathy with the position in which Mr K finds himself. However, any directions that I might make against Carillion would be of no practical effect.
20. In conclusion, I do not uphold Mr K's complaint.

Anthony Arter

Pensions Ombudsman

28 January 2020

Appendix

Pensions Act 2004

126 Eligible schemes

(1) Subject to the following provisions of this section, in this Part references to an “eligible scheme” are to an occupational pension scheme which—

(a) is not a money purchase scheme, and

(b) is not a prescribed scheme or a scheme of a prescribed description.

(2) A scheme is not an eligible scheme if it is being wound up immediately before the day appointed by the Secretary of State by order for the purposes of this subsection.

(3) Regulations may provide that where—

(a) an assessment period begins in relation to an eligible scheme (see section 132), and

(b) after the beginning of that period, the scheme ceases to be an eligible scheme, the scheme is, in such circumstances as may be prescribed, to be treated as remaining an eligible scheme for the purposes of such of the provisions mentioned in subsection (4) as may be prescribed.

(4) Those provisions are—

(a) any provision of this Part, and

(b) any other provision of this Act in which “eligible scheme” has the meaning given by this section.

(5) Regulations may also provide that a scheme which would be an eligible scheme in the absence of this subsection is not an eligible scheme in such circumstances as may be prescribed.