

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

Applicant	Mrs E D F McQuade
Scheme	Faceo 2007 Pension Scheme
Respondents	Faceo FM UK Limited Trustees of the Faceo 2007 Pension Scheme

Subject

Mrs McQuade complains that her pension was reduced for early payment, and delays caused her financial loss.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld in part against Faceo FM UK Limited, because its delay in responding to Mrs McQuade's complaint caused her distress and inconvenience.

DETAILED DETERMINATION

Material Facts

1. Mrs McQuade joined the South of Scotland Electricity Board Pension Scheme on 1 September 1979. Following privatisation of the electricity supply industry, in 1990 her preserved benefits were transferred to the Scottish Power Pension Scheme. Mrs McQuade is a “protected person” under the Electricity (Protected Persons) (Scotland) Pensions Regulations 1990 (SI 1990 510) (**the Regulations**).
2. Protected persons are those who were members of the South of Scotland Electricity Board Pension Scheme on 31 March 1990. The Regulations extend to the last successor company to the South of Scotland Electricity Board to have been the employer. Protected persons are entitled to benefits that are no worse than those provided by the South of Scotland Electricity Board Pension Scheme on 31 March 1990. Successor schemes must provide for acceptance of a transfer of preserved benefits, at the request or with the consent of a protected person, and pension benefits at least equivalent in value, on the basis of good actuarial practice, to the rights transferred.
3. The Regulations provide for an indemnity to be provided by one employer to another, in the event of a breach of any duty imposed on an employer by the Regulations.
4. In March 2001 Mrs McQuade consented to the transfer of her preserved benefits to the Alstom Pension Scheme. The transfer did not take place until August 2007. Scottish Power and Alstom UK Limited issued a joint “protocol for contracting staff transfer to Alstom” dated June 2000 which said:

“The Alstom pension arrangements will provide all eligible transferring employees access to a pension scheme with broadly equivalent benefits and administrative rules to those enjoyed under the existing Scottish Power group schemes. Where applicable, the arrangements will meet the requirements of the Electricity Act in full.”

5. Mrs McQuade's preserved benefits in the Alstom Pension Scheme were supposed to be transferred again, to the Cegelec 2002 Pension Scheme, but although she signed a transfer request form this never happened. The trustees of the Cegelec 2002 Pension Scheme and Cegelec Limited issued a joint "announcement to protected members" dated 21 April 2004. It said (so far as is relevant to Mrs McQuade's complaint):

"As a protected member of the Alstom Scheme who joined the Cegelec Scheme you enjoy statutory protections under the Electricity (Protected Persons) Regulations...in other words to provide "mirror image" benefits in accordance with the statutory regulations...In view of the proposal to transfer benefits from the Alstom Scheme to the Cegelec Scheme, the Scheme Actuary has completed a review of the amounts which would be paid to the Cegelec Scheme in accordance with the terms of the Sale and Purchase agreement by Alstom if a transfer was to take place. That review clearly shows that the amount on offer is insufficient to provide the past service benefits linked to future salary in accordance with the Rules of the Cegelec Scheme. The transfer on offer is inadequate... We have received clear advice that it would not be in the best interests of all the members of the Cegelec Scheme, if a transfer of benefits with a high actuarial cost were to take place without a corresponding transfer of assets and/or additional contributions from the employer to cover that cost."

6. As the transfer of her preserved benefits did not take place, Mrs McQuade remained a deferred member of the Alstom Pension Scheme. Mrs McQuade accrued benefits in the Cegelec 2002 Pension Scheme from 1 July 2002 to 30 June 2004, which were transferred to the Cegelec 2004 Pension Scheme, following which the Cegelec 2002 Pension Scheme was wound up. Finally on 1 November 2007 Mrs McQuade's preserved benefits in the Cegelec 2004 Pension Scheme were transferred to the Faceo 2007 Pension Scheme (**the Scheme**). Mrs McQuade is a Scale B member of the Scheme. Scale B is the section of the Scheme for former members of the

Scottish Power Pension Scheme, who are “protected persons” under the Regulations. (Scale A members’ benefits are also protected, but under different statutory provisions.)

7. The minutes of a Cegelec “consultation meeting” on 28 May 2003 contain the following:

“Anyone can apply for their pension at 50, if you are protected you would receive your full pension, if unprotected your pension would be diluted. However, in both cases you must have consent from your company before payment is made.”
8. The Scheme commenced on 1 May 2007 and is administered under the terms of an interim trust deed. The Scheme Rules have not yet been finalised. Scheme Rule 4.2 says that pensions paid to “protected persons” on redundancy shall be reduced for early payment, unless Faceo FM UK Limited (**Faceo**) agrees otherwise. The Scheme booklet says that pensions paid early will be reduced if the trustees decide to do so.
9. None of the schemes mentioned above gave an absolute right to an unreduced early retirement pension on redundancy. Their rules all provided for reductions for early payment, unless consent was given for the reduction to be waived. However, the Cegelec 2002 booklet said that in the event of early retirement, no reduction would be applied to the benefits of a protected person.
10. During 2009 and 2010 the trustees and Faceo discussed the possibility of a bulk transfer from the Alstom Pension Scheme. Faceo was opposed to a bulk transfer, on the grounds that it would expose the company to an unacceptable level of financial risk. However, the minutes of a trustee meeting on 11 May 2010 record that:

“Mrs McQuade queried whether or not members would lose their protected status if this [*a bulk transfer from the Alstom Pension Scheme*] happened? Mrs S [*Faceo’s Human Resources Director*] confirmed that the last employer has an obligation to cover the salary increases and top up the members’ benefits regardless of whether a transfer occurs.

...

The potential transfer of benefits into the Faceo 2007 Pension Scheme in respect of past service in the Alstom and Scottish Power Schemes will be on hold awaiting the outcome of discussions regarding the potential transfer of TUPE members' benefits."

11. Faceo provides an overarching guarantee that if the combined total of the benefits from the Alstom Pension Scheme and the Scheme is less than the amount due in accordance with the Regulations, it will fund a "top up" of the affected member's benefits.
12. Mrs McQuade became a member nominated trustee of the Scheme on 7 October 2009.
13. Faceo made Mrs McQuade redundant on 23 February 2011. She applied for immediate payment of her benefits from the Faceo Scheme, without any reduction for early payment. Mrs McQuade said this was her entitlement as a protected person who had been made redundant. Faceo refused to agree to payment of unreduced benefits, and the trustees said that they could not pay unreduced benefits without consent and funding from Faceo, as the Faceo Scheme was in deficit.
14. Faceo and the trustees agreed to pay Mrs McQuade £6,821.81. Aon Trust Corporation Limited, the Scheme's independent trustee, told Mrs McQuade this payment was:

"...to cover the shortfall in the combined pension (taking into account your service from 1 September 1979) over the period from your redundancy until your 55th birthday (December 2011) when the benefits from the Alstom Pension Scheme could have become payable."
15. Mrs McQuade did not access her benefits from the Alstom Pension Scheme when she reached age 55, as that scheme's administrator said that doing so was conditional on her withdrawing her application to transfer her preserved benefits to the Cegelec 2002 Pension Scheme. Mrs McQuade was concerned that doing so might affect her "protected person" status, due to Regulation 4 which says:

“A person shall not cease to be a protected employee-

(a) if, after ceasing to participate in a relevant scheme as a protected employee, he subsequently participates in another relevant scheme as a protected employee and has not, during the period in which he did not participate, ceased to be in continuous employment:

Provided that he transfers to that scheme within a period of two years the pension rights which accrued to him under the relevant scheme in which he formerly participated.”

16. In a letter dated 14 January 2013, Scottish Power said that in the event of a member of the Scottish Power Pension Scheme aged 50 or above being made redundant, it funded the cost of an unreduced pension. In an email dated 17 January 2013, the administrator of the Alstom Pension Scheme said that it no longer had any active pre-privatisation members, but in the past Alstom had always funded unreduced pensions to such members if they were made redundant over age 50.
17. My investigator requested a response to Mrs McQuade’s complaint from Faceo on 2 July 2012. Despite repeated attempts to obtain this, including letters to various senior people at Faceo, a substantive response was not received from Faceo’s solicitors until 14 October 2013.
18. In an email dated 29 April 2013, Aon Hewitt, the Scheme’s pension consultants, confirmed to Mrs McQuade that drawing her benefits from the Faceo Scheme would not affect her complaint. On 7 July 2013 my investigator confirmed this in an email to Mrs McQuade. Mrs McQuade continued to press the trustees for an unreduced pension. On 30 December 2013 Mrs McQuade told Aon Hewitt that she wanted to draw her benefits from the Faceo Scheme, pending the outcome of her complaint.

Summary of Mrs McQuade’s position

19. Mrs McQuade says:
 - The Scheme should pay her a full pension as a protected person who was made redundant, based on her continuous service in the electricity supply industry from 1979;

- She was not told at the outset that she could draw her pension from the Faceo Scheme without it affecting her complaint to me, and apart from some short term contract work she has been unemployed since leaving Faceo. As a result she had to cash in an ISA and incur a loss of at least £3,000. She was also unable to clear her mortgage and so had to pay £1,000 interest, and lost tax relief she would otherwise have received;
- She did not qualify for jobseeker's allowance because she told the Jobcentre that she was entitled to a pension;
- Faceo and the trustees took too long to respond to her concerns.

Summary of Faceo's position

20. Faceo says:

- it accepts that Mrs McQuade is a "protected person" and that she must be provided with benefits in accordance with the Regulations;
- the Faceo Scheme provides benefits to protected persons that satisfy the Regulations;
- none of the pension schemes that Mrs McQuade belonged to provided an absolute right to an unreduced pension on redundancy;
- there could have been a historic expectation that discretion would be exercised in the member's favour, but there is no evidence to suggest that doing so amounted to a regular custom or practice;
- the company is not prepared to fund further benefits for Mrs McQuade.

Summary of the trustees' position

21. Aon says, on behalf of the trustees:

- Mrs McQuade is a "protected person";
- she is entitled to an actuarially reduced pension;

- Mrs McQuade's previous employers tended to consent to unreduced benefits for members who were made redundant, and meet the cost of doing so.

Conclusions

22. Mrs McQuade's benefits have been calculated in accordance with the interim Scheme Rules, which provide benefits in accordance with the Regulations. Mrs McQuade wants all her accumulated benefits to be paid by the Scheme, rather than having a separate pension from the Alstom Pension Scheme. However, because the transfer from the Alstom Pension Scheme to the Cegelec 2002 Pension Scheme did not take place, the Scheme has no liability for Mrs McQuade's Alstom pension. She is, though, protected by Faceo's "top up" guarantee.
23. It may be that there were shortcomings in the handling of Mrs McQuade's transfer request by the Alstom Pension Scheme and the refusal by Cegelec and the trustees of the Cegelec 2002 Pension Scheme to accept the bulk transfer from the Alstom Pension Scheme. I can understand Mrs McQuade's reluctance to take her benefits early from the Alstom Pension Scheme, given that scheme's requirement for her to withdraw her transfer request. However, Mrs McQuade's complaint to me is about the Faceo Scheme, and so I have not considered the actions of her previous employers and their pension schemes. And if Mrs McQuade decides to access her benefits in the Alstom Pension Scheme, Faceo's "top up" guarantee will ensure that her combined benefits will comply with the Regulations.
24. Mrs McQuade expected an unreduced pension as she was made redundant, and it seems that the Scottish Power and Alstom schemes routinely provided these. The trustees of the Scheme agree that unreduced pensions were often provided by Mrs McQuade's previous pension schemes. But it does not necessarily follow that because consent was more freely given in the past by other employers and pension schemes, that the Scheme is required to do so. Faceo and the trustees were entitled to take the Scheme's financial condition into account.

25. It follows from the above that Faceo and the trustees' decision to refuse Mrs McQuade an unreduced pension was not perverse, and so I am not prepared to interfere with it.
26. Mrs McQuade's mistaken belief that she could not draw her benefits without affecting her complaint was not caused by the trustees or Faceo. And as a former trustee of the Scheme, she would have known, at the very least, who to ask (although I realise that she says the HR adviser who helped with redundancy had left). When the correct position was confirmed to Mrs McQuade, she delayed taking what was on offer, although she was forgoing jobseeker's allowance on account of her pension. Given these circumstances, I have difficulty in accepting Mrs McQuade's argument that her changed financial situation was caused by maladministration on the respondents' part. It seems more likely than not that it was an inevitable consequence of losing her job.
27. Faceo took 15 months to provide a substantive response to Mrs McQuade's complaint, which delayed the investigation of her complaint. Mrs McQuade is entitled to appropriately modest compensation for the distress and inconvenience caused to her by Faceo's delay.

Directions

28. As redress for the injustice referred to in paragraph 27, Faceo shall pay Mrs McQuade £200 within 28 days.

Tony King
Pensions Ombudsman

5 August 2014