

## Ombudsman's Determination

Applicant	Mr B
Scheme	Atkins Pension Plan ( <b>the Plan</b> )
Respondents	Atkins Limited ( <b>Atkins</b> ), Atkins Pension Trustee Limited ( <b>the Trustee</b> )

## Outcome

1. I do not uphold Mr B's complaint and no further action is required by Atkins or the Trustee.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr B has complained that Atkins and the Trustee have not fully met his entitlement to augmented pension benefits under the Plan and which are due under the terms of his employment transfer from Essex County Council (**Essex CC**) in 1995.

## Background information, including submissions from the parties

4. Mr B was employed by Essex CC Highways Department, and on 1 June 1995 he transferred under TUPE to Atkins. On 11 October 2010 Mr B was made redundant.
5. On joining Atkins, Mr B joined the Plan, a defined benefit scheme closed to future accrual in 2008. Mr B then became a member of a defined contribution scheme for the remainder of his service with Atkins.
6. Mr B says that he believes he is entitled to additional pension benefits by virtue of the TUPE transfer terms that applied on his transfer from the Essex CC Local Government Pension Scheme (**LGPS**). In June 1995 the LGPS terms for those over age 50 and leaving service due to redundancy were:
  - a) immediate payment of an unreduced pension; and
  - b) added years pension enhancement limited to the lower of:
    - (i) a period of 10 years;
    - (ii) a period equal to the employee's total service in the LGPS;

- (iii) a period sufficient to bring the employee's reckonable service in that scheme to 40 years; or
  - (iv) a period sufficient to bring the employee's pensionable service in the scheme to what it would have been had he remained in service until aged 65.
- 7. Mr B has said that he is entitled to an immediate payment of an unreduced pension from the Plan for the period from the date of his redundancy and for an added years pension to match the pension that he should have received under the TUPE transfer terms. Mr B has also pointed to two legal cases to support his view, the first being *Beckmann v Dynamo Whicheloe Macfarlane Ltd*, and that this confirms that superannuation benefits arising from redundancy are a TUPE protected benefit. The second case, *Alemo-Herron*, confirmed that a static approach should be taken in respect of employment terms that derive from collective agreements. Mr B says that this means that his pension entitlements arising from redundancy should be the same as they were at the time of his TUPE transfer.
- 8. Mr B has referred to the statements given by Essex CC in relation to its policy on enhancement of pensionable service in the lead up to the transfer to Atkins in 1995. This included a copy of an extract of minutes of an Essex CC Personnel Committee meeting in June 1976. The meeting had referred to proposed legislation, and the ability for Essex CC to exercise discretions to award additional compensatory payments, including an annual pension where employees are made redundant. The minutes confirmed that any compensatory payments would be paid out of the County Fund and not the Superannuation Fund. The minutes also gave an example of possible savings if an employee were made redundant, either with or without an enhancement being granted. The Personnel Committee therefore resolved to allow employees made redundant to have the benefits payable to them from the LGPS enhanced to the maximum extent. Mr B says that the Essex CC policy that applied at the time that he transferred to Atkins should equally apply at the time of his termination of employment.
- 9. Atkins say that they accept that Mr B is entitled to a top up of his LGPS pension between age 55 to age 60 and have offered to pay a sum in settlement. But they cannot pay a pension for the period between the date Mr B was made redundant when he was aged 54, and below the minimum pension age of 55. Atkins do not consider that Mr B had a contractual right to added years on redundancy, as this was a discretionary benefit.
- 10. The Trustee says that as the nature of the complaint is to do with the contractual basis on which Mr B transferred to Atkins then it is for the company to decide if it agrees with him and to augment the benefits. The Trustee can only pay the benefits to which Mr B is entitled.

## **Adjudicator's Opinion**

11. Mr B's complaint was considered by one of our Adjudicators who concluded that no further action was required by Atkins or the Trustee. The Adjudicator's findings are summarised briefly below:
- It is not possible for Atkins and the Trustee to pay a pension before the minimum pension age of 55. The change in the minimum pension age was overriding legislation and the minimum pension age was automatically changed to 55. The Trustee is obliged to comply with the pension minimum age requirements.
  - The awarding of added years of pensionable service is a discretionary benefit.
  - Although the resolution passed by the Personnel Committee had stood since 1976 this did not mean that it was incapable of change and Essex CC had the ability to change the resolution at any time. The policy could not, therefore, be construed as a contractual term and all the transferring employees could expect would be for Atkins to consider whether additional service should be granted. It would be unreasonable to expect Atkins to simply comply with a resolution passed in 1976 by a (predecessor) Personnel Committee – as to how it proposed until, further notice, to operate part of the LGPS regulations - as opposed to exercising its own discretion.
  - It was within Atkins' discretion to decide whether additional pensionable service should be granted to employees transferred from Essex CC and being made redundant. It would be a fettering of that discretion if it were bound by discretionary policies made by other organisations.
12. Mr B did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr B provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will, therefore, only respond to the key points made by Mr B for completeness.

## **Ombudsman's decision**

13. Mr B says that Essex CC had an established policy to award the maximum benefits possible in cases of redundancy and this created a legitimate expectation amongst transferring staff. I accept that Essex CC appear to have had an established policy that applied in 1995 and Mr B may have, at that point, built up an expectation that an added years' enhancement would likely apply if he were made redundant. But the regulations that governed the LGPS still treated the awarding of added years as a discretionary benefit and allowed Essex CC the right to refuse an award of added years and also to change the policy. The same right would therefore devolve to Atkins. It is also more than 20 years since Mr B transferred to Atkins and I do not find that there was a duty on Atkins to continue the Essex CC policy indefinitely.

14. It is not usually the case that an employer such as Essex CC has a policy to always agree to provide a discretionary benefit such as the maximum enhancement possible. It was a discretion for Essex CC to consider anew each time and this should not have been fettered in any way (whether positively in favour of members or otherwise). However, assuming it was always exercised that way from 1976 to at least 1995, that does not mean that the same policy is or should be in place now. It would be unreasonable to expect Atkins to exercise its discretion in the same way for the next 20 years as circumstances change.
15. Mr B has argued that he should be entitled to an immediate pension from the time that he was made redundant in 2010, and aged 54. He says that the change in the tax law is irrelevant as the benefit to age 55 is payable by Atkins and not the Plan. Atkins could make the payment out of its own assets and so not give rise to an unauthorised tax charge.
16. Atkins' have previously responded to Mr B's argument saying that the contractual right to an unreduced pension at 50, which transferred on externalisation, was subject to an implied term which qualified that right to the extent that it was permitted by tax rules and that Mr B's case would amount to imposing an obligation on Atkins to do something which Essex CC could not have done.
17. Mr B says that the comparison between what Essex CC could do pre-transfer and what Atkins must do post-transfer is irrelevant. Essex CC would have been making the unauthorised payment in its capacity as the administering authority, whereas Atkins would be making the payment in its capacity as an employer. I do not agree with Mr B's argument and I accept the argument put forward by Atkins. The change to the minimum pension age also applied to the LGPS, and it would be illogical and unreasonable to expect Atkins to provide a benefit that would not have been provided by Essex CC.
18. Mr B has provided a number of documents in support of his case including the Essex CC Personnel Committee minutes of 8 September 1994. The minutes reported on Essex CC's response to the draft of the Local Government (Compensation for Redundancy) Regulations 1994, and its proposal that the awarding of added years on redundancy should be mandatory and not discretionary, as that reflected its current policy. It seems to me that Essex CC would not have been pushing for the mandatory awarding of added years if it thought there was already a contractual obligation to provide added years, or there was a legitimate expectation based on practice.
19. The question of the pension terms to be provided to the transferring staff was the subject of much discussion and debate, both at the tendering stage and in the lead up to the transfer. Mr B has referred to Section 4.2 the Contract for Highways and Transportation Consultancy Services, drawn up by Essex CC and dated May 1995, as proof that the successful applicant was required to provide added years in the event of redundancy. Section 4.2 says:

“...and in particular in the event of redundancy the award of compensatory added years for pension purposes on the basis of page 11 of the booklet Local Government Pension Scheme.”

20. The booklet does however include a disclaimer that it is intended only as a guide to the LGPS and nothing in its contents can be taken as overriding the Regulations under which it is established. Atkins have also pointed out that page 11 of the booklet says that “Compensation can be awarded by an employer if retirement is on the grounds of redundancy”. The use of the word “can” in the booklet does not in my view mean that there was a contractual right to added years at the time of the transfer. I therefore find that there was no explicit contractual entitlement to an added years enhancement. The circumstances of the transfer to Atkins do not demonstrate that an implied term has been incorporated overriding the Plan rules.
21. Atkins have agreed that during the course of the discussions regarding the pension provisions to be provided, a letter dated 20 March 1995, was sent to all staff saying that the awarding of added years would apply. However, the letter stated that this was only for the duration of the initial contract which was to run for 5 years until 31 May 2000. So, it is not the case that Atkins failed to consider the position of transferring members, or the discretionary right that existed within Essex CC. They formally offered a proposal to continue but only for 5 years, so any expectations that might have been formulated before then should not have extended beyond that period.
22. It was up to the members and their union/representatives to decide whether to accept the new terms which made no explicit promise to pay added years indefinitely. In the event it seems the terms were accepted including the limited scope for a mandatory awarding of added years in the first five years of the contract.
23. Mr B has also argued that membership of the Plan attracted a premium because of the particular liabilities for an immediate unreduced pension and added years if a member retired due to redundancy. The former Essex CC members paid a 6% pension contribution from 1995 to 2000 and thereafter. At no point did Atkins change the conditions of service in respect of the inherited redundancy terms, or offer a reduced rate for pension contributions in respect of the termination of added years. Therefore, Mr B believes he has shown, that he and other members had a legally protected legitimate expectation that they would transfer on their existing terms and conditions, and be granted an added years’ pension enhancement on redundancy. Support for this proposition comes from the Court’s decision in *R (PCS) v Minister for the Civil Service* [2010] EWHC 1027 (Admin). Mr B says that the Court held that the right to be considered for discretionary civil service redundancy benefits which were invariably granted, had arguably hardened into a legally protected legitimate expectation.
24. Reference has been made to *R (PCS) v Minister for the Civil Service* (paragraph 23 above) and Mr B’s claim, particularly the letter referred to at paragraph 21. However, this case was decided on another basis and no finding was made on the legitimate expectation argument.

25. For the reasons set out above I am not satisfied that any practice adopted by Essex CC in the period leading up to 1995, created a legitimate expectation that added years would continue either, while still under the control of Essex, or following the transfer to Atkins, and through to 2010 when Mr B was made redundant. Especially, in light of the 1995 letter limiting the granting of added years to the five year term of the initial contract.
26. Therefore, I do not uphold Mr B's complaint.
27. At an earlier stage of our involvement in this case, various jurisdictional issues were raised on behalf of Atkins. Jurisdiction is kept under review throughout our investigations. However, it has not been necessary to determine these issues (which were not pursued subsequently) as the complaint has not been upheld.

**Anthony Arter**

Pensions Ombudsman  
5 August 2016