PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr Michael Heyes
Scheme	The ABB Plan (**the Plan**)
Respondent	(1) ABB Ltd (**ABB**) (2) Trustees of the ABB Pension Plan (**the Trustees**)

Subject

Mr Heyes was made redundant in December 2010. Mr Heyes complains that his entitlement to an unabated pension paid on redundancy, known as Benefit 4, was incorrectly taken from him. To put matters right Mr Heyes wants to be paid Benefit 4, backdated to 1 January 2011.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint is not upheld against ABB and the Trustees (together, **the Respondents**) because Mr Heyes was not entitled to Benefit 4 on his redundancy in December 2010. This was because the amendment to Benefit 4 in 2005 provided that Mr Heyes needed to be 50 or over in 2005 to be eligible to receive Benefit 4. He was not and therefore was not eligible to receive it. Further, the amendment of Benefit 4 was not in contravention of section 67 of the Pensions Act 1995 (**PA 1995**) or the amendment power in the Plan's governing documentation. In addition, Mr Heyes was not entitled to receive Benefit 4 by virtue of the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**).

DETAILED DETERMINATION

Material Facts

1. Mr Heyes was a member of the Former ICI Fund Section (**FIFS**) of the Plan. The FIFS was set up in 2001 to provide pension benefits for former ICI employees who had transferred to ABB as a result of the purchase of Eutech Engineering Solutions Limited (**Eutech**). The benefits provided were intended to mirror those benefits provided in the ICI Scheme.

2. Benefit 4 was first set out in the rules of the ICI Pension Fund 1967 (**the 1967 ICI Rules**). After the purchase of Eutech, Benefit 4 was incorporated into the Plan by a Supplemental Deed (adding a new section to the Plan) dated 20 June 2002 (**the 2002 Supplemental Deed (New Section)**).

3. Rule 15 of the 2002 Supplemental Deed (New Section) sets out a list of benefits that were provided under the 1967 ICI Rules. This provides that Benefit 4 is:

> "A pension on termination of employment for reasons beyond the control of the Member after reaching the age of fifty but before reaching the age falling 5 years prior to Normal Retirement Age except in cases where Benefit 3 or 3A is payable."

(Note: Benefits 3 and 3A relate to termination of employment by reason of "permanent incapacity" and "serious and permanent incapacity" respectively.)

4. Rule 19 of the 2002 Supplemental Deed (New Section) - entitled "Benefit 4" - says at 19(A):

> "A Benefit 4 pension will be payable to a Contributing Member to whom all the following qualifications apply:
>
> (i) The Contributing Member must have left the employment of a Contributing Company for reasons outside of his control but not owing to (a) circumstances in which a Benefit 3 pension or Benefit 3A pension becomes payable or (b) his own misconduct……
>
> (ii) He must, at the time he left the employment of the Contributing Company, have reached age 50 but not the age falling 5 years prior to Normal Retirement Age. [i.e. he must be between age 50 and age 57]
>
> (iii) …
>
> (b) In the case of a Contributing Member leaving such employment on or after the 1st August 1977, to ten or more years' Pensionable Service. [i.e. he must have completed at least 10 years' Pensionable Service (in respect of a member leaving such employment on or after 1 August 1977)]…. "

A "Contributing Member" is a member who is paying contributions to the ICI Pension Fund 1967.

5. The provision of Benefit 4 in the 2002 Supplemental Deed (New Section) essentially matched the provision in the 1967 ICI Rules.

6. Employees, such as Mr Heyes, who were transferring to ABB as a part of the acquisition of Eutech in 2001, were given three options as to what they would like to do about their pension benefits. Mr Heyes elected to join FIFS and transfer his benefits from the ICI Pension Fund 1967 to the Plan. Mr Heyes therefore became subject to the provisions of the 2002 Supplemental Deed (New Section) in respect of Benefit 4.

7. It was agreed, in the commercial agreement between ABB and ICI relating to the acquisition of Eutech dated 29 January 2001 (**the 2001 Acquisition Agreement**), that no amendments would be made to FIFS in the four years following the completion of the acquisition. It said - at clause 2(6) of schedule 5 - that:

> "The Purchaser [i.e. ABB] agrees that it will not… in the four year period beginning on the Completion Date, exercise any power to discontinue the Purchaser's Scheme or exercise any power of amendment with respect to the Purchaser's Scheme so as to adversely affect any Employee who becomes a member of the Purchaser's Scheme [i.e. the Plan]."

8. In 2005 ABB set out several proposals in respect of the future of FIFS. Amongst these proposals was that accrual of benefits under FIFS would cease with effect from 31 July 2005 and, instead, members of FIFS would be offered membership of another section within the Plan (although FIFS benefits accrued to the date of the change would still be linked to final pensionable pay). As part of this review, ABB proposed that Benefit 4 would be amended so that:

   - if a member of FIFS was, at the date the Plan was amended, over the age of 50 and had 10 years Pensionable Service he would retain Benefit 4;
   - but, Benefit 4 would be removed for FIFS members who had either not reached age 50 or not completed 10 years' Pensionable Service at the date of the amendment.

9. The above proposals were brought into effect in a Deed of Amendment dated 29 July 2005 (**the 2005 Deed of Amendment**). The date the amendments came into effect was 1 August 2005. Section 2(c) of the 2005 Deed of Amendment amended Benefit 4 in accordance with the proposals set out above. It says as follows:

> …
> "- (ICI Benefit 4) underpin

> 16. From the Amendment Date, if the provisions of this Rule 16 would provide a greater benefit than whichever provision of Rule 15 above would apply to the Member, the provisions of Rule 19 (Benefit 4) of the 1967 Rules ("Rule 19") will apply as follows:
>
> - age 50 and 10 years FIFS Pensionable Service on the Amendment Date
>
> (a) If a FIFS Member who has attained age 50 and completed 10 years of FIFS Pensionable Service as at the Amendment Date leaves the employment of a Participating Employer for reasons specified in Rule 19(A)(i) of the 1967 Rules between the ages of 50 and 62 the provisions of Rule 19 of the 1967 Rules will apply in respect of FIFS Pensionable Service by reference to FIFS Final Pensionable Pay and the State Pension Element as at the Election Date….
>
> - under age 50 or less than 10 years FIFS Pensionable Service on the Amendment Date
>
> (b) A FIFS Member who does not satisfy the age and pensionable service conditions of sub-Rule (a) as at the Amendment Date will not be entitled to benefits under Rule 19 of the 1967 Rules."
> …

10. Mr Heyes was 45 years of age as at 1 August 2005 and therefore, according to the Respondents, he was not eligible for Benefit 4 from that date. The Respondents subsequently refused to award Mr Heyes Benefit 4 on his redundancy in December 2010.

Summary of Mr Heyes' position

11. He became entitled to Benefit 4 after completing 10 years' pensionable service in 1987. Payment of Benefit 4 should therefore have been triggered by his redundancy when he was over 50. It follows that - because he was over 50 when he was made redundant in December 2010 - he should have been paid an unabated pension at that time.

12. He should not have been "excluded" from Benefit 4 by the 2005 Deed of Amendment; Benefit 4 was removed without his consent and that such removal was contrary to section 67 of the Pensions Act 1995 (**PA 1995**) and also to the Plan's power of amendment.

13. Section 67 PA 1995 says that the power to alter a scheme "cannot be exercised on any occasion in a manner which would, or might affect any entitlement, or accrued right, of any member…". He says that his entitlement to Benefit 4 was established "long before the FIFS was closed by ABB" (i.e. when he had completed 10 years Pensionable Service) and that, as such, in accordance with section 67 his

"entitlement" should have been transferred to the Plan (and, it follows, he should have been paid Benefit 4 when he was made redundant in December 2010).

14. Pension arrangements for ex-ICI employees should have been no less favourable than those provided by ICI. Clause 2(a) to schedule 5 of the Acquisition Agreement 2001 said:

> "The Purchaser will offer to each person who is a Relevant Employee on the Completion Date, in relation to all employment from and after the Completion Date, benefits which are of final salary type, are in accordance with the benefit structure summarised in Appendix A, and in the opinion of ICI's Actuary are as at the Completion Date for each Relevant Employee in respect of each such benefit no less valuable than those which would prospectively have been provided by ICI's DB Scheme for and in respect of him if he had continued in membership of ICI's DB Scheme. Without limiting the generality of the foregoing, the Purchaser's Scheme will include in the benefits offered, an equivalent benefit to that provided by Rule 13(A)(iii) and (iv) of the 1949 section of the Rules and Rules 17 and 19 of the 1967 section of the Rules."

This provides that Benefit 4 - provided under rule 19 referred to above - was protected. (Or, at least, provision of an equally-generous benefit in the Plan was protected.)

15. ABB planned to make changes to the FIFS at the end of the four year period (prescribed in the 2001 Acquisition Agreement) and as such the intent to make changes was related to the transfer, thus TUPE applied to the way his pension entitlement on redundancy was calculated. It follows that the principles established in the cases of Beckmann v Dynamco Whicheloe Macfarland Ltd [2002] IRLR 578 (**Beckmann**) and Martin v South Bank University [2004] IRLR 74 (**Martin**) should apply to his circumstances and, as such, his entitlement to Benefit 4 should have transferred with him to ABB (in accordance with the Acquired Rights Directive (Directive 77/187/EC, subsequently revised and consolidated in Directive 2001/23/EC)).

Summary of the Respondents' position

16. Rule 19 of the ICI Rules, as amended by the 2005 Deed of Amendment, provided that for Mr Heyes to be eligible to receive Benefit 4 he must have reached age 50 by 1 August 2005. Mr Heyes was 45 years of age as at 1 August 2005 and therefore he was not eligible to receive Benefit 4 on his redundancy in December 2010.

17. Mr Heyes did not have an accrued right to receive Benefit 4. Section 124(2)(b) of the PA 1995 provides that "at any time when the pensionable service of a member of an occupational pension scheme is continuing, his accrued rights are to be determined as if he had opted, immediately before that time, to terminate that service;". When determining whether (b) (above) applies, "the correct approach is to establish the right the member would have had had be opted out of the Plan". It follows that as a deferred member Mr Heyes does not have any recourse to Benefit 4 "since Benefit 4 is only available to members who are paying contributions to the Plan and therefore does not fall within the definition of an accrued right". Further, entitlement to Benefit 4 cannot also be an accrued right as it is a contingent right. This is because eligibility is contingent upon redundancy (i.e. which may or may not happen). So it follows that if pensionable service in FIFS ceases and the contingency (i.e. redundancy) has not occurred the benefit will cease.

18. The amendment power at rule 28 of clause III of the Supplemental Deed dated 20 June 2002 (being the Definitive Trust Deed and Rules incorporating all benefit changes up to 6 April 2000 (**the 2002 Supplemental Deed (Definitive TD&R)**)) says:

> "28
>
> (a) Subject to the provisions of sub-Clauses (b) and (c) the Principal Employer may at any time and from time to time with the consent of the Trustees alter modify or add to all or any of the provisions of the Trust Deed and Rules Provided always that:
>
> (i) Any such alteration modification or addition shall be made by deed executed by the Principal Employer and the Trustees;
>
> (ii) No alteration, modification or addition shall be made if it would reduce the benefits which have accrued for or in respect of any Member by reference to Pensionable Service prior to the date of the alteration, modification or addition unless the Member consents thereto in writing. For the purposes of this sub-Clause the benefits which have accrued for and in respect of a Member shall be calculated by reference to the provisions of the Plan in force on the date of such alteration, modification or addition and the salary and service which are pensionable under the Plan on that date;
>
> (b) No alteration or addition made to this Deed or the Rules which falls within the scope of Section 67(2) of the 1995 Act [i.e. Pensions Act 1995] shall take effect unless the requirements of Section 67(3) of the 1995 Act are satisfied;
>
> (c) No alteration or addition shall be made if it would contravene the provisions of Clause VIII4. [Note: not relevant]"

Rule 28 says that in order to effect the amendment, ABB must obtain the consent of the Trustees to enter into a deed of amendment to bring the change into effect. As Benefit 4 was *not* an accrued right (as set out above), the Respondents were not prohibited from making the amendment. In addition, the Respondents were not prohibited from making the amendment by virtue of the reference in rule 28 to section 67 since this had "been dealt with through attaining an actuarial certificate".

19. Section 67 of the Pensions Act 1995 , which limits the extent to which occupational pension schemes can be amended, said (i.e. on 1 August 2005) as follows:

> "67. Restriction on powers to alter schemes
>
> (1) This section applies to any power conferred on any person by an occupational pension scheme (other than a public service pension scheme) to modify the scheme.
>
> (2) The power cannot be exercised on any occasion in a manner which would or might affect any entitlement, accrued right or pension credit right of any member of the scheme acquired before the power is exercised unless the requirements under subsection (3) are satisfied.
>
> (3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion-
>
> (a) the trustees have satisfied themselves that-
> (i)the certification requirements, or
> (ii)the requirements for consent,
> are met in respect of that member, and
> (b) where the power is exercised by a person other than the trustees, the trustees have approved the exercise of the power in that manner on that occasion.
>
> (4) In subsection (3)-
> (a)"the certification requirements" means prescribed requirements for the purpose of securing that no power to which this section applies is exercised in any manner which, in the opinion of an actuary, would adversely affect any member of the scheme (without his consent) in respect of his entitlement, accrued rights or pension credit rights acquired before the power is exercised, and
> (b)"the consent requirements" means prescribed requirements for the purpose of obtaining the consent of members of a scheme to the exercise of a power to which this section applies.
>
> (5) Subsection (2) does not apply to the exercise of a power-
> (a) for a purpose connected with debits under section 29(1)(a) of the Welfare Reform and Pensions Act 1999, or
> (b) in a prescribed manner.
>
> (6) Where a power to which this section applies may not (apart from this section) be exercised without the consent of any person, regulations may

> make provision for treating such consent as given in prescribed circumstances."

Benefit 4 is not an entitlement or an accrued right. It follows that the Respondents were not prevented from making the amendment by section 67. Further, recital F to the 2005 Deed of Amendment says that the Scheme Actuary has provided a certificate confirming that the amendments brought into effect by the deed do not affect any entitlement or accrued right of the members. In addition the 2005 Deed of Amendment also says, at 1(c), that "This Deed is not intended to affect adversely any member in respect of his entitlement or accrued rights acquired between the date of this Deed within the meaning of section 67…of the 1995 Act".

20. The reason for the closure of the FIFS in 2005 was not as a result of, or related to, the transfer of undertaking (i.e. from ICI in 2001) and therefore issues of the transfer of pension rights under TUPE do not apply. It follows that Mr Heyes does not have an entitlement to Benefit 4 by virtue of the operation of TUPE and, as a consequence, the principles established in the cases of Beckmann and Martin will not apply to him.

Conclusions

Background

21. Benefit 4 becomes payable under the 2002 Supplemental Deed (New Section) if the relevant member satisfies all three conditions set out in rule 19(A). These are that their reason for leaving was outside of their control, that they were aged between 50 and 57 at the date of leaving and they had completed 10 years pensionable service.

22. Had rule 19(A) of the 2002 Supplemental Deed (New Section) remained in force at the time of Mr Heyes' redundancy in December 2010, he would have been eligible to receive Benefit 4. This is because he would have satisfied all three conditions set out in rule 19(A); he was made redundant (and thus his dismissal was out of his control), he was 50 at the time of his redundancy and had completed over 10 years pensionable service at the time of his redundancy.

23. The rules of the Plan were however amended in 2005. The amendments were recorded in the 2005 Deed of Amendment.

24. The amendments made in the 2005 Deed of Amendment provided that Benefit 4 could only be paid to members who, at the date of the *amendment* on 1 August 2005, had been made redundant, were between the ages of 50 and 62 and had completed 10 years pensionable service.

25. On 1 August 2005 Mr Heyes was 45 years of age. It therefore follows that Mr Heyes was - on a strict interpretation of the rules (and taking no other factors into account) - ineligible to receive Benefit 4 on his redundancy in December 2010.

26. However, Mr Heyes says that the amendment to Benefit 4 in the 2005 Deed of Amendment on should not have been made by the respondents. Mr Heyes offers various arguments as to why this is the case. I consider each below.

Did the amendment to Benefit 4 breach the terms of the 2001 Acquisition Agreement?

27. It is also necessary to consider whether the creation and execution of the 2005 Deed of Amendment was in any way in breach of the 2001 Acquisition Agreement.

28. Clause 2(a) of schedule 5 the 2001 Acquisition Agreement says that ABB agrees that it will not, in the four year period beginning on the date the share purchase is completed, exercise any power of amendment with respect to the Plan so as to adversely affect any employee who becomes a member of the Plan.

29. The amendments to the Plan in 2005 were made with effect from 1 August 2005. The acquisition was completed in late January 2001. It follows that in making the amendments over four years later the Respondents did not breach clause 2(a) of schedule 5 of the 2001 Acquisition Agreement.

30. Mr Heyes also says that clause 2(a) of schedule 5 also promises that employees who were transferred to ABB on the purchase of Eutech - such as himself - would enjoy benefits in the Plan that were no less generous than those they enjoyed under the ICI Scheme.

31. After the acquisition in 2001, Benefit 4 - as provided for in the 2002 Supplemental Deed (New Section) - was no less generous than Benefit 4 under the ICI Scheme. It was only in 2005 when, in accordance with the 2001 Acquisition Agreement, Benefit 4 was amended that it ceased to be as generous as it had been under the ICI Scheme. As I have said above, the terms of the 2001 Acquisition Agreement permitted the Respondents to amend Benefit 4 in the manner they did in 2005 and as such, I do not think that in amending Benefit 4 in 2005 the Respondents breached clause 2(a) of schedule 5 of the 2001 Acquisition Agreement.

Entitlement to/payment of Benefit 4

32. Mr Heyes said in his letter to my office dated 23 September 2014 that, as a general principle, "members become entitled to a benefit based on years' service and that the Benefit is paid at some later date, when the conditions prevail to trigger payment". As

such, he argued that "a member's "entitlement" to benefits is directly linked to the number of years' service and that the member's age is one of the conditions that trigger payment".

33. I do not concur with Mr Heyes' view. The rule that was relevant to Mr Heyes at the time of his redundancy is set out at section 2(c) of the 2005 Deed of Amendment. This rule says that if Mr Heyes was not between the ages of 50 and 62 *and* had completed 10 years of pensionable service as at 1 August 2005 (as provided for in rule 19 of the 1967 ICI Rules) he would not be entitled to receive Benefit 4 on redundancy. It follows that, contrary to Mr Heyes' view, entitlement to Benefit 4 is based on both age and service. Accordingly, both conditions must be met for Mr Heyes to become entitled to Benefit 4. As such, Mr Heyes is incorrect to suggest that he is entitled to Benefit 4 as he had the requisite service but that his failure to meet the age requirement simply meant that he had not triggered payment of it. Entitlement to - and the subsequent payment of - Benefit 4 is contingent on both conditions being met; as both conditions were not met on his redundancy, it follows that Mr Heyes was not entitled to receive Benefit 4 and thus it could not be paid to him.

34. Mr Heyes has produced - in his response dated 25 November 2014 - an extract from an ABB Q&A from a meeting on 21 August 2003 which he says provides that entitlement to Benefit 4 is based solely on pensionable service. The Respondents say that my office should not consider this document as it is not dated and so might not be dated as Mr Heyes suggests. Putting the Respondents' argument aside (i.e. so proceeding on the basis that the Q&A was dated 21 August 2003), the Q&A does not say that entitlement to Benefit 4 is only based on pensionable service. Indeed, the third question on the page starts by saying "If the member is over 50…". Mr Heyes was not "over 50" as at 1 August 2005, so an immediate pension was not payable.

35. To support his view Mr Heyes has also produced a letter from Lane & Partners (a firm of solicitors who, it appears, were at one time ABB's legal representatives) dated 8 August 2003. ABB have submitted that this letter should not be considered by my office as it is protected by legal professional privilege. I concur with ABB's view. It follows that I have not considered the content of the letter.

Accrued right

36. Mr Heyes has said that at the time the amendment was made in 2005 he had an accrued right (and entitlement) to Benefit 4.

37. I do not think that Mr Heyes had an accrued right to Benefit 4 at the time the amendment was made in 2005. This is because if his employment had ceased (for reasons outside of his control) on or immediately prior to 1 August 2005 he would not have qualified to receive Benefit 4 as he was, at that time, not between the ages of 50 and 62.

38. Further, I do not think that the operation of section 67 PA 1995 offers Mr Heyes any protection.

39. The version of section 67 PA 1995 in force at 1 August 2005 (set out previously) says that the power of amendment in a scheme's rules cannot be exercised in a manner which would affect any entitlement, or accrued right, acquired before the power is exercised unless consent has been obtained, or an actuary has certified that the changes would not adversely affect the member.

40. Accrued rights are calculated on the date of the amendment of the relevant scheme. In Mr Heyes' circumstances the date of amendment was 1 August 2005. As stated previously, Mr Heyes did not qualify to receive Benefit 4 on 1 August 2005 (as he did not meet the age requirement) and therefore it follows that he had no entitlement to Benefit 4 at that date. As Benefit 4 could not have been paid to Mr Heyes on 1 August 2005, or on any date prior to it, the amendments made in the 2005 Deed of Amendment did not contravene section 67 PA 1995. As such, there was no requirement that Mr Heyes must consent to the changes made in the 2005 Deed of Amendment, or that there was a requirement that (at least in Mr Heyes' circumstances) an actuary must have certified that they did not adversely affect him.

Amendment power

41. Mr Heyes has also said that in exercising the Plan's power of amendment to amend Benefit 4 in 2005 the Respondents breached the rules of the Plan.

42. The Plan's power of amendment is found at rule 28 of clause III of the 2002 Supplemental Deed (Definitive TD&R) (and has been set out previously). It says that ABB must obtain the consent of the Trustees to enter in to a deed of amendment to amend the provisions of the Plan. It also says that such amendment should not be made if it has the effect of reducing the benefits "that have accrued for or in respect of" the relevant member "by reference to Pensionable Service" prior to the date of the amendment unless the relevant member consents to the amendment in writing. The rule adds that benefits that have "accrued for and in respect of" the relevant

member should be calculated by reference to the "salary and service which are pensionable under the Plan" on the date of the amendment.

43. As I have said previously, Benefit 4 was not an accrued right for Mr Heyes at the time the Plan was amended on 1 August 2005. Therefore, so long as ABB obtained the consent of the Trustees to enter into a deed to amend the Plan in 2005, then the amendment of the Plan did not breach the amendment power. We have not received any information which suggests that the Trustees did not consent to the provisions of the 2005 Deed of Amendment and, as such, I find that the amendments made to Benefit 4 were not in breach of the Plan's power of amendment.

44. It follows that in 2005 the Respondents did not need to seek Mr Heyes' written consent to the proposed amendments of Benefit 4 before they could be made.

TUPE

45. I understand that Mr Heyes' employment was transferred from ICI to ABB in 2001 (as a consequence of the purchase of Eutech by ABB that year). (It was at this point that Mr Heyes elected to join FIFS.)

46. Mr Heyes has argued that in 2001/2002 ABB already planned to make changes to the FIFS at the end of the four year period (prescribed in the 2001 Acquisition Agreement) and as such the intent to make changes was related to the transfer of his employment to ABB, thus TUPE does apply to the way his pension entitlement on redundancy was calculated.

47. The Trustees have said, by contrast, that the reason for the closure of FIFS in 2005 was not as a result of, or related to, the transfer of undertaking (i.e. from ICI in 2001) and therefore the issues of the transfer of pension rights under TUPE do not apply to the amendments made to the Plan in 2005.

48. TUPE will apply where there is a transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity (also known as a "business transfer").

49. Such a transfer did take place in 2001, however, I concur with the Trustees' view that the closure of the FIFS in 2005 did not directly relate to the transfer in 2001. This is because no evidence has been provided which demonstrates that the closure of the FIFS was directly related to the transfer.

50. Mr Heyes has provided evidence which he says demonstrates that "ABB intended to amend the FIFS long before the 4 year period expired [i.e. long before 2005]". He has provided this evidence in his response to my preliminary decision and in response to a subsequent request for information from my office.

51. In both responses Mr Heyes refers to the minutes of a meeting held on 21 August 2003, attended by various representatives of ABB and a number of FIFS members. It is clear from the minutes that the intention of the meeting was to provide information to the FIFS members, many of whom were concerned "to know precisely their pension entitlements under a variety of different scenarios". It seems that the FIFS members present were concerned that the benefits under the FIFS did not mirror those under the ICI Pension Fund 1967. Although I appreciate that the minutes demonstrate that at least some FIFS members thought that there was some uncertainty about the benefits they were being provided in the FIFS, the fact that FIFS members wanted to know their precise entitlements was not an indication that the eventual closure of FIFS was in any way inevitable, nor did it point to the eventual closure being directly related to the transfer in 2001.

52. Mr Heyes has also provided a letter and an email from Max White, a former HR Director with ICI, that says that there was no "specific financial underpinning" of Benefit 4 when the acquisition of Eutech took place in 2001 and, as such, the payment of the benefit would have to be "born [sic] by the relevant businesses rather than the pension fund" (thus suggesting that ABB - and/or its group companies - would have to fund Benefit 4 going forward). Mr Heyes suggests that ABB knew that they were taking on the "business risk" associated with funding Benefit 4 when they purchased Eutech in 2001 but were aware that they could, in accordance with the terms of the 2001 Acquisition Agreement, "take steps to reduce or eliminate the liabilities after 2005". Mr Heyes therefore seems to argue that the funding situation in relation to Benefit 4 - and the negotiation of the four year period in the 2001 Acquisition Agreement - demonstrates that from 2001 ABB intended to change Benefit 4 in the manner that it was eventually changed in 2005. The views expressed by Max White and Mr Heyes have not been supported with any evidence to suggest that in the four years post-acquisition ABB had clear plans to amend Benefit 4 in 2005. In the absence of such evidence, I am unable to accept Mr Heyes' argument.

53. Mr Heyes has also provided an extract from a letter from ABB to the members of the FIFS and says, in his email to my office of 25 November 2014, that it demonstrates "that once the 4 year period expired; they [ABB] implemented changes that they had already planned some time ago". I do not concur with this view. In the letter ABB acknowledge that their commitment to provide the FIFS had expired, but such statement does not demonstrate that in the four years post-acquisition ABB had clear plans to amend Benefit 4 in 2005.

54. Further, from a practical perspective it seems unlikely that at the time of the transfer ABB opened the FIFS with a view to closing it just over four years later.

55. As such, the principles established in the cases of Beckmann and Martin will not apply to Mr Heyes and, as a consequence, he does not have an entitlement to Benefit 4 by virtue of the operation of TUPE.

56. It follows that Mr Heyes' complaint about the Respondents is not upheld.

Jane Irvine
Deputy Pensions Ombudsman

23 January 2015