

Ombudsman's Determination

Applicant	Mr Miles Firth
Scheme	BOC Pension Scheme (the Scheme)
Respondent(s)	Edwards Ltd

Complaint Summary

Mr Firth has complained that Edwards Ltd, his previous employer, introduced a new method of calculating the enhanced pension on redundancy which prevented him from taking his deferred pension without actuarial reduction.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against Edwards Ltd. This is because their consent to the payment of an enhanced pension on redundancy was conditional on the deferred pension being taken at the same time as the additional annual pension (**AAP**).

Detailed determination

Material Facts

1. Mr Firth joined the Scheme, a defined benefit arrangement, on 28 November 1983.
2. Edwards Ltd was purchased from British Oxygen Company, (**BOC**), by CCMP Capital Advisers in 2007. Employees of BOC were transferred to Edwards Ltd under the Transfer of Undertaking's (Protection of Employment) Regulations 2006 (**TUPE**).
3. Following his TUPE transfer to Edwards Ltd, Mr Firth became a deferred member of the Scheme in July 2007.
4. Edwards Ltd wrote to Mr Firth on 17 January 2013 regarding their compulsory redundancy program. The writer of the letter said,

"I regret to inform you that the Company has decided ...to make your role...redundant. Since you have completed 10 years active continuous membership of the BOC Pension Scheme as at 31 May 2007, then you will be eligible to receive an additional annual payment when you start to draw your BOC Pension. Further details are enclosed with this letter....Your last day of employment with the Company will be 31st January 2013..."

5. Edwards Ltd provided Mr Firth with an explanatory leaflet headed, "Explanatory Document Covering additional Annual Amounts". It said,

"The redundancy pension ...receives special treatment in that it can be paid out unreduced from age 55. Let us say in this example that the calculated redundancy pension is £22,000 p.a. (call this A). This is the pension that Edwards will honour and it will do this taking into account various elements of benefit. Your pension will therefore be made up of:

1. Your benefit within the BOC Pension Scheme as a deferred member based on service to 31 May 2007 ...(element B)
2. Your benefit from your Edwards stakeholder scheme (element C)
3. An additional annual amount payable by Edwards.

...the deferred BOC pensionif it is paid before age 65 then an early retirement reduction is applied...

The calculation for the additional annual amount is therefore based on the principle that the target pension A will be met by combining the BOC deferred pension (B) and the Edwards stakeholder pension (C) and the difference is the additional annual amount. In this example we have £22,000 (A) - £10,600 (B) - £1,000 (c) so the additional amount is £10,400...

Please be aware that this additional annual amount only becomes available after the employee leaves the company due to redundancy and then draws their BOC pension."

6. Mr Firth was made redundant by Edwards Ltd on 31 January 2013.

Scheme Provisions

7. Deed of Variation adopting new Rules of BOC Pension Scheme, dated 18 April 2006.

"C5. Redundancy

C5.1 If a Member's Service is terminated by the Employer by reason of Redundancy and at that time:

- (1) The Member has at least 10 years' Active Membership, and
- (2) His age and Active Membership when added together ...is at least 55 years,

The Member shall on retirement when the Member leaves Service or, if later, attains age 55 be entitled to an immediate pension equal to the Scale Pension.

C5.2 A Member entitled to a pension under Rule C5.1 may in writing choose to receive the pension from such earlier or later date as he shall specify ...in which case the pension shall be reduced or increased by such amount as the Trustees shall think fit. The Company's consent shall be required if the reduction or increase is different from that which the Actuary advises would be appropriate to take account of earlier or later payment.

D1. Deferred Pension

D2. Early Payment

D2.1 A Member entitled to a deferred pension on retirement after Retirement Age may, with the consent of the Trustees, elect instead to receive a reduced pension from an earlier date...”

Summary of Mr Firth's position

8. Because the payment of the AAP is triggered by taking his deferred pension; by the time he reaches normal retirement date the reduction in his deferred pension would be so severe that it would not be worth him taking his AAP. He therefore, cannot now take early retirement on redundancy and must seek other sources of income.
9. Edwards Ltd should break the link between taking the AAP and drawing his deferred pension. The only reason for the link is to calculate the amount payable from the AAP scheme. Once this calculation is made, (crystallised), he should be allowed to defer taking the Scheme pension element of the payment until normal retirement age at which time it will be paid to him unreduced.
10. Edwards Ltd implies that it used to be possible under the old Scheme rules to defer taking his deferred pension on redundancy until normal retirement age. Since he has a contract benefit that has transferred under TUPE it should be possible for him to defer all or part of the enhanced redundancy pension once it was crystallised.

Summary of Edwards Ltd's position

11. Mr Firth's complaint relates to a decision it made in or about June 2008. Mr Firth, as a Senior Manager, would have been aware of that decision in or about early 2009. He complained more than 3 years later so his complaint should be ruled outside my jurisdiction under the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996.
12. They obtained legal and actuarial advice on how to protect employee benefits under TUPE in the event of redundancy. The advice led them to apply a legally compliant method for the calculation of an AAP to “top up” benefits to the level at which an enhanced redundancy pension would have been paid had the individuals remained as active members of the Scheme and the TUPE transfer to Edwards Ltd had never happened.
13. The starting point for the calculation is to determine the enhanced redundancy pension that the individual would have been entitled to had he remained in active service and as a member of the Scheme until the date of redundancy, under the

rules of the Scheme in place at the date of the TUPE transfer. This calculation allows for service all the way up to redundancy as well as full salary linkage up to that point. The benefit is then compared with the pension entitlements these individuals have as employees of Edwards Ltd whose service in the Scheme ceased on 31 May 2007. Their pension benefits are therefore a deferred entitlement held in the Scheme (which could be reduced for early payment) and a money purchase arrangement in respect of their Edwards Ltd employment since 1 June 2007. The AAP is then calculated to be the difference between these two amounts.

14. Mr Firth's right that transferred under TUPE is not a standalone contractual right to specifically receive a pension "top up" on redundancy , but the continuing right to request and receive an unreduced pension on redundancy . It is therefore clear that he must request to receive his deferred pension in order for the AAP to be triggered. The maintenance of this link is not a "policy decision" but is accurate in case law.
15. A person is deemed to have retired when they opt to put their deferred pension into payment and it triggers the calculation of the AAP.

Conclusions

16. Mr Firth was not made redundant until 2013. He entered into correspondence about his entitlement and received the decision about which he now complains to this office. It is possible, though difficult to establish conclusively, that his position in senior management gave him greater and earlier access to information than an ordinary member as to Edwards Ltd's policy/decisions; but not in a way that directly impacted his position at the time, particularly with the ongoing uncertainty over whether the P&G court case would affect matters. I am not persuaded, therefore, that the complaint is outside our time limits.
17. Mr Firth has subsequent to the preliminary decision being issued submitted that arbitrarily changing the overall AAP scheme by Edwards Ltd removing the post retirement payment, has significantly reduced his options pre-retirement. However, Mr Firth's complaint to this Service was not about the post retirement element of the AAP. I note that he further submits that he is not complaining about the fairness of removing it. I therefore, will not be considering it in this determination. The hub of

Mr Firth's complaint is that he says he should be entitled to receive AAP without having to take his deferred pension at the same time and before normal retirement age.

18. Mr Firth was entitled to receive an enhanced pension on redundancy under C5 of the Scheme rules. Following the TUPE transfer in 2007, Edwards Ltd made provision for an equivalent unreduced enhanced pension equating to his deferred pension, his stakeholder scheme pension and the AAP. I therefore do not think that Mr Firth has been caused any actual financial loss. In terms of his enhanced pension entitlement under rule C 5 he is in no worse a position following the TUPE transfer as he was still entitled to the same amount of enhanced pension on redundancy as long as all the elements including his deferred pension was taken at the same time as his AAP.
19. It was never the intention of Edwards Ltd to have the AAP paid to qualifying employees as a standalone pension benefit. Their communications to Mr Firth regarding AAPs and how his enhanced pension on redundancy would be calculated was clear and specifically referred to the fact that it was to be taken at the same time as drawing a deferred pension from the Scheme. The AAP is calculated as the shortfall between the enhanced unreduced pension on redundancy and the deferred pension and stakeholder pension. It was an integral part of the overall redundancy pension and it is clear that Edward Ltd's consent to payment of an early enhanced unreduced pension payment was conditional upon any deferred pension being taken at the same time as the AAP and as a consequence incurring an actuarial reduction if paid early.
20. It is not for me to decide upon Mr Firth's entitlement. My role is to decide whether Edwards Ltd applied the relevant Scheme rules correctly. Rule C5 states that on redundancy a member is entitled to an immediate pension equal to the scale pension. The enhanced pension that Mr Firth was offered was calculated in accordance with this provision. Further, according to D2.1 of the Scheme rules a deferred pension if taken before normal retirement date is subject to actuarial reduction. Mr Firth was a deferred Scheme member at the time his enhanced pension was calculated. I therefore find that Edwards Ltd acted correctly in insisting that Mr Firth's deferred pension, if taken early, is actuarially reduced.

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21. In view of the above, I do not uphold Mr Firth's complaint against Edwards Ltd.

Anthony Arter

Pensions Ombudsman
12 June 2015