

Determination by the Pensions Ombudsman

Applicant	Mr Richard James Lee
Scheme	AEA Technology Pension Scheme (the Scheme)
Respondent	Robin A Technology Realisations Pension Trustee Limited (the trustee)

Complaint summary

Mr Lee complains that the trustee failed to act in the best interests of Scheme members, and colluded with AEA Technology plc (**AEAT**) in putting the company into administration and the Scheme into a Pension Protection Fund (**PPF**) assessment period.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld, as the trustee's negotiations with AEAT and its support of the company's approach were within its powers. Faced with AEAT's failure to pay contributions to the Scheme, the trustee's chosen course was not perverse.

DETAILED DETERMINATION

Material Facts

1. The Scheme was set up in 1996, following the privatisation of the UK Atomic Energy Authority (**UKAEA**). Mr Lee worked for the UKAEA and was a member of its pension scheme (**the UKAEA scheme**). He joined AEAT, the UKAEA's private sector successor, and transferred his preserved benefits in the UKAEA scheme to the Scheme. Mr Lee says that he did so on the strength of statutory protection in the Atomic Energy Act 1995 and assurances given to Scheme members by Government, the UKAEA and the Scheme that their pensions would be protected, and would be on no less favourable terms than those previously provided by the UKAEA scheme.
2. Schedule 4 to the Atomic Energy Act 1995 was in force when Mr Lee transferred his preserved benefits to the Scheme. Section 6(1)(b) required the UKAEA to satisfy itself that:

“...the provisions of [the Scheme] (taken as a whole) confer benefits which, taking into account other benefits which [the Scheme member] will obtain as a result of his employment with the transferee, are no less favourable than the benefits conferred by the provisions, as in force immediately before the coming into force of the transfer scheme, of the Authority pension scheme in which he is then, or as the case requires, would be entitled to become, a member.”

Section 7(1)(b) imposed a similar duty on AEAT. Section 3 empowered the Secretary of State to make directions to amend the UKAEA scheme, subject to Section 3(4) which said:

“No direction under this paragraph affecting employees of a successor company may be given after that company has ceased to be publicly owned.”

3. In November 1996 the Government Actuary's Department (**GAD**) issued a note outlining the choices available to members of the UKAEA scheme. These were to leave their preserved benefits in the UKAEA scheme, transfer them to the Scheme or purchase a personal pension. The note said that it was unlikely that the Scheme would fail, or that “the benefit promise made by either the UKAEA scheme or the AEAT scheme would ever be broken.”
4. The Energy Minister at the time said in Parliament that as part of the privatisation process there was a “statutory duty” and a “statutory reassurance” to provide a pension scheme that was “no less favourable” than the UKAEA scheme.

5. The Scheme went into deficit and in 2008 a recovery plan was agreed between AEAT and the trustee, whereby AEAT agreed to pay additional contributions to the Scheme. On 31 July 2009 the Scheme was closed to future accrual. Despite the recovery plan, the Scheme's deficit continued to grow and by the end of 2011 the funding deficit was approximately £315m, and £450m on a buyout basis. (If AEAT became insolvent, the Scheme's claim as an unsecured creditor would be calculated on the buyout basis.) The trustee was then called "The Trustee of the AEA Technology Pension Scheme".
6. On 16 November 2011 AEAT issued a trading statement saying that its financial position was deteriorating and it was discussing the situation with the company's bank. The trustee informed the Pensions Regulator (the Regulator). On 17 November 2011 AEAT, the trustee and their advisers discussed the situation. It was noted that AEAT's contributions to the Scheme in the following year were estimated at £6m, which the company said it could not afford. The trustee agreed to work closely with AEAT. On 23 November 2011 AEAT asked the trustee to defer the company's contributions under the recovery plan until 30 June 2012, which the trustee agreed to on 29 November 2011 after checking with the Regulator.
7. The trustees and AEAT kept in close contact thereafter, and both regularly took professional advice. A revised recovery plan and schedule of contributions were agreed on 8 December 2011. A "draft framework document" dated 8 December 2011 included details of a plan to separate the Scheme from AEAT as part of a restructuring of the company, with the Scheme then being taken over by the PPF.
8. During the months that followed, the trustee decided not to exercise its power to wind up the Scheme, pending AEAT's proposals about the future financing of the Scheme. Scheme Rule 21(a)(i) said that when exercising its power to wind up the Scheme the trustee had to be satisfied that the Scheme was insolvent and "there are no proposals acceptable to the trustee which in the opinion of the trustee would restore solvency".
9. After many meetings and more professional advice, the trustee and AEAT agreed that leaving AEAT to drift into insolvency was not in the best interests of the company or the Scheme. The trustee and AEAT both considered that the company and the Scheme would benefit financially if AEAT was restructured, separated from the Scheme, and then sold as a going concern, with the Scheme being taken over by the PPF. A trustee "draft briefing paper" dated 7 February 2012 reviewed the various options and concluded that "a pre-pack is likely to yield the greatest value to creditors." The trustee regularly discussed the Scheme's situation with the Regulator and the PPF, including meetings with the Regulator on 20 February 2012 and 29 March 2012.

10. The term "pre-pack" is used to describe the use of a pre-packaged sale of a company in administration. The company is put into administration and immediately sold under a sale arranged before the administrator is appointed.
11. On 4 April 2012 AEAT requested a further deferral of contributions to the Scheme. The trustee sought AEAT's proposals for a new recovery plan. AEAT's response was that it could not afford to pay contributions to the Scheme until the company was restructured. AEAT's latest forecast indicated that the company would be insolvent on a cash flow basis by 30 June 2012. The trustee told the PPF and the Regulator that it supported the separation of the Scheme from AEAT, with the company then being sold. On 24 April 2012 the trustee decided that it would have to wind up the Scheme.
12. On 7 June 2012, after taking advice from its solicitors and the Scheme's actuary, the trustee concluded that AEAT could not afford to pay the contributions needed to adequately fund the Scheme, and any recovery plan that AEAT might propose would be unacceptable to the Regulator. The trustee decided to delay winding up the Scheme until 5 July 2012, and work with AEAT and the Regulator in the meantime to agree a restructuring of the company.
13. The trustee did not initiate the winding up process, although it reviewed the situation every week. Instead, the trustee continued to postpone winding up while it worked with AEAT, the Regulator and the PPF to facilitate the restructuring plan. On 31 July 2012 the Regulator agreed to the plan, including provisions for the Scheme to receive part of the sale proceeds.
14. On 1 August 2012 the trustee issued an announcement to members, saying that AEAT had failed to pay a contribution to the Scheme and negotiations were taking place with the company. The announcement also said that it was likely that the Scheme would be wound up and be unable to pay members' benefits in full.
15. On 12 October 2012 the trustee issued a further announcement to members, saying that in the absence of an acceptable funding plan, it had endeavoured to obtain the maximum amount from AEAT, and the Scheme would be taken over by the PPF.
16. On 8 November 2012 AEAT went into administration, and was sold to Ricardo plc on the same day. On 12 November 2012 the trustee issued an announcement to members about the pre-pack sale, saying that the Scheme's share of the proceeds was insufficient to restore the Scheme's funding, so it had entered a first assessment period for the PPF with effect from 8 November 2012. The trustee was subsequently restructured and renamed Robin A Technology Realisations Pension Trustee Limited.

Summary of Mr Lee's position

17. Mr Lee says that he was misled by assurances that the Scheme would provide guaranteed benefits, with statutory protection. He considers that he is entitled to the benefits he would have received had the transfer never happened and he continued as an active member of the UKAEA scheme. Mr Lee asks why the Scheme was set up without the protection provisions included in the electricity and coal industry pension schemes.
18. Mr Lee says that the Regulator failed to adequately supervise the Scheme and ensure that the statutory funding objective was complied with, against a background of AEAT selling off parts of the company over the years and thereby increasing the deficit. Following the Pensions Ombudsman Service's request for final comments Mr Lee provided a lengthy submission, reiterating this complaint and a separate one that he has made to the PPF. In the submission he requests that I consider his complaints about the GAD, the Pensions Regulator, the Energy Minister, the Department of Trade and Industry, the UKAEA and the PPF.
19. Mr Lee says that the trustee provided insufficient information about the pre-pack and the events leading up to it, and ignored his questions.
20. Mr Lee considers that Parliament intended the relevant provisions of the Atomic Energy Act 1995 to apply to the Scheme in the years following privatisation.
21. Mr Lee says that deferred members of the Scheme were excluded from the member nominated trustees (MNT's) on the trustee board, although deferred members were in the majority.

Summary of the trustee's position

22. The trustee says that at all times, before and after its change of name, it acted in the best interests of the members. It decided that as AEAT could not afford to fund the Scheme, the best outcome would be the sale of the company, with the Scheme receiving a share of the proceeds. (Estimated at between £6m and £8m, as against £1m in a conventional insolvency and subsequent liquidation.) The trustee says that it told members what it could, but much of the negotiations with AEAT and the pre-pack sale were confidential.
23. The trustee denies that it ignored Mr Lee's questions, although it accepts that sometimes there were delays in responding.
24. The trustee says that MNT elections were open to all active and pensioner members. There are two pensioner MNT's on the trustee board, and one MNT who was an active member and is now a deferred member.

25. The trustee says that if AEAT had not got into financial difficulties, Mr Lee's Scheme benefits would have been the same as what the UKAEA scheme would have provided. The trustee cannot be held responsible for AEAT's financial problems.

Conclusions

26. Mr Lee's complaints about the Regulator's supervision of the Scheme and its consent to the pre-pack, the Energy Minister's statement, the Department for Trade and Industry and the UKAEA are not within my jurisdiction, so I am unable to consider them.
27. The GAD is not a respondent to Mr Lee's complaint, which was accepted for investigation against the trustee only. So I have not looked at the GAD's role in detail, or decided whether its actions in this case come within my jurisdiction. (No inference should be drawn about whether they do, or the likely success of such a complaint.)
28. The Atomic Energy Act 1995 required the Scheme to have a similar benefit structure to the UKAEA scheme, which it did. The differences in post privatisation pension schemes were primarily due to the legislation under which they were established, and are not matters for me to decide. The Scheme's post privatisation survival, and hence Mr Lee's benefits, were not guaranteed. AEAT was a private sector company and so there was a risk of the company getting into financial difficulties or failing altogether.
29. It was clear that AEAT was unable to pay its contributions to the Scheme. Early in the proceedings the trustee considered the available options and decided that its preferred solution was for AEAT to be restructured, with the Scheme being taken into the PPF. The trustee worked with AEAT, the Regulator and the PPF to achieve this outcome, and the Scheme received a higher amount as a result. The alternative was for the trustee to commence winding up the Scheme. Both solutions would lead to Mr Lee's benefits being reduced.
30. I cannot interfere with a decision reasonably reached. The trustee had wide discretion as to how to behave in difficult circumstances. The test is whether its decision in this case is perverse, that is, a decision which no reasonable body, properly directing itself, could have reached. I have concluded that the trustee's decision to support the pre-pack sale of AEAT in administration, on the basis that the Scheme would receive more money, was easily within the bounds of reasonableness.
31. AEAT shared information about the pre-pack with the trustee on a confidential basis, which restricted what the trustee could tell Scheme members. However, the trustee's announcements explained the Scheme's funding problems and the likely outcomes.

32. Section 241(2) of the Pensions Act 2004 provides for member nominated trustees to be active members and pensioners. There is no requirement for deferred members to be included.
33. Mr Lee's strongly held view is that his benefits should be guaranteed, presumably from public funds. But there is no statutory provision for this.
34. Whilst it is clear that Mr Lee feels very strongly that he has been let down by the combination of circumstances that have led to a reduction in the value of his pension, insofar as those circumstances are within my jurisdiction there has been no maladministration. So I do not uphold Mr Lee's complaint.

Tony King

Pensions Ombudsman

30 January 2015