

Ombudsman's Determination

Applicant	Dr Stephen White
Scheme	Thames Water Mirror Image Pension Scheme (the Scheme)
Respondent(s)	Thames Water Utilities Limited (Thames Water)

Complaint Summary

Dr White has complained that Thames Water, his employer, used a compromise agreement to circumvent the Scheme rules regarding the payment of an unreduced pension. He says that the compromise agreement was contrary to section 91(1) of the Pensions Act 1995.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld because Dr White has maintained his accrued (reduced) pension rights but waived any prospective entitlement to an unreduced pension through a valid compromise agreement.

Detailed Determination

Material facts

1. Thames Water placed a document headed, "Re-organisation Questions and Answers" on the company intranet. This said,

"Q. What is the difference between Compulsory and consequential voluntary redundancy?"

If your role is affected by organisational change and you are selected for redundancy this would be deemed as compulsory redundancy and you would receive a redundancy payment in line with the current redundancy policy.

Consequential voluntary redundancy is where an individual whose role was not affected by the organisational changes requests to go on voluntary redundancy in place of someone whose role was affected by the organisational changes and has been placed at risk of compulsory redundancy.

However, please be aware that if you choose to volunteer for consequential redundancy and your request is successful, while the redundancy pay calculator remains the same as for compulsory redundancy, you will not be entitled to receive your immediate, non-discounted pension as outlined in the redundancy pay policy...

Your termination letter would state that your reason for termination was "redundancy" but you need to be aware that, if questioned, the Company would be obliged to confirm that the redundancy had been voluntary."

2. Dr White applied for voluntary redundancy in April 2013. He says he received the compromise agreement on 28 May 2013 and discussed its content with his line manager, particularly the clause confirming that he had no further rights to an unreduced pension under the Scheme. He also took legal advice regarding the compromise agreement.
3. Dr White says that with the help of his solicitor that he proposed changes to the compromise agreement relating to the reason for his departure and his entitlement to an unreduced pension both of which were rejected by Thames Water.
4. Dr White says that he reluctantly signed the compromise agreement dated 3 July 2013 on 17 July 2013. The compromise agreement said,

"Background

The Employee wishes to terminate his employment with the Company. The Company and the Employee have agreed that the termination of his employment will be subject to the terms of this Agreement.

2. Termination

The employee's employment will terminate on the 10 September 2013...by mutual agreement between the Employer and the Company.

4 Compensation

...the sum of ...will be paid to the Employee as compensation in respect of the Settlement issues...

8. Company Pension

8.1 The Employee will receive a statement of the Employee's accrued pension benefits under the ...Scheme and the options available to the Employee for dealing with the accrued benefits...

8.2 The Employee agrees that his employment is terminating by mutual agreement between the Employee and the Company. The Employee agrees to choose one of the accrued benefit options and...irrevocably confirms that he has no right and will not seek to exercise any right to claim an early retirement pension under rule D2 (A) (i) (a)...

16 Full and Final Settlement

Without any admission of liability by the Company ...the Employee accepts the terms set out in this agreement in full and final settlement of any claims, complaints, ...or rights ..

16.2 Clause 16.1 above:

(a) does not apply :

(i) to any claim for pension entitlement which has accrued up to the Termination date;

(b) applies to:

(i) such matters are referred to in Clause 16.1 regardless of whether or not the Employee is aware, as at the date of the Agreement, of the facts giving rise to such claim or right of action; and

(ii) such matters are referred to in Clause 16.1 regardless of whether or not the as at the date of the Agreement, the law recognises the existence of such claims or rights of action.

16.3 By the Employees signature of this Agreement , the Employee agrees that he will not ...commence any claims,...against the Company ...in relation to the Settlement Issues before an Employment Tribunal or court whether in respect of the Specified claims or otherwise."

5. Dr White took actuarially reduced early retirement benefits from the Scheme on 11 September 2013.

6. Section 91(1) of the Pensions Act 1995 says,

“Assignment, forfeiture, bankruptcy etc.

91. Inalienability of occupational pension,

(1) ... where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme –

(a) the entitlement or right cannot be assigned, commuted or surrendered,

... and an agreement to effect any of those things is unenforceable...”

7. And Section 124(2) says,

(a) “the accrued rights of a member of an occupational pension scheme at any time are the rights which have accrued to or in respect of him at that time to future benefits under the scheme, and

(b) 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;

and references to accrued pension or accrued benefits are to be interpreted accordingly.”

8. The relevant provisions of the Scheme rules says,

“D2 Member’s Early Retirement

D2 (A) Application of Rule D2

Where a member ceases to be a member, and –

(i) He is aged 50 or more and either-

(a) The Employer certifies that he has ceased to be employed by the Employer by reason of redundancy or in the interests of the efficient exercise of the Employer’s functions,...

He is entitled to receive payment of an annual retirement pension which is payable immediately of an amount equal to his Formula Pension.”

Summary of Dr White’s position

9. The compromise agreement was contrary to section 91 (1) of the Pensions Act 1995 which says that entitlements or future rights to an occupational pension scheme cannot be commuted or surrendered. This makes parts of the compromise agreement

unenforceable. Clause 16.1 of the compromise agreement meant that he was not precluded from pursuing a claim for his accrued pension entitlement.

10. Thames Water should certify that he ceased to be employed because of redundancy. This would enable the payment of the unreduced pension to which he is entitled.
11. The Scheme booklet says if a member is over age 50 and is retired early because of redundancy or efficiency there will be no reduction for early payment. There is no mention of employer certification, discretion or consent to determine whether an unreduced pension would be paid.
12. His entitlement to an unreduced pension arises from the circumstances of his departure i.e. voluntary redundancy as part of a business efficiency initiative. It is not a matter of consent or discretion by Thames Water.
13. The Court of Appeal's decision in the IMG v German case was concerned with the application of section 91 (1) of the Pensions Act 1995 in a very specific circumstance, i.e. the use of compromise agreements to resolve a pre-existing dispute about pension right. This is not relevant to his case as there was no pre-existing dispute about his pension entitlement. He was invited to apply for voluntary (or consequential voluntary) redundancy and his application was accepted and confirmed in writing. He was replaced in his role by a person who had been identified as being at risk of compulsory redundancy – so Dr White did take consequential voluntary redundancy.
14. The compromise agreement has resulted in his Scheme benefits being significantly reduced.
15. He has suffered distress and inconvenience resulting from the process of contesting the legitimacy of the compromise agreement and should receive £2,000 from the Thames Water as compensation.
16. The compromise agreement was not offered by Thames Water because of a dispute.
17. The compromise agreement was part of a wider Thames Water initiative to make a number of employees redundant and thereby reducing operating costs, in particular the cost of paying immediate unreduced pensions.

Summary of Thames Water's position

18. The compromise agreement is not contrary to section 91(1) of the Pensions Act 1995 as it does not involve an unenforceable agreement to affect a "surrender" of inalienable pension rights by Dr White. In the case of International Management Group (UK) Ltd v German and another ...the Court of appeal accepted the appellant's case that if a compromise involves giving up an entitlement, that is not "surrender", of an entitlement. The Court of appeal decision in this case was that section 91(1) of the Pensions Act 1995 does not prevent a compromise agreement from having effect where it involves a bona fide settlement of disputed rights under a scheme.

19. Thames Water has no obligation to issue an employer certificate to Dr White. They made it clear to Dr White that if he chose to end his employment on the terms on offer by Thames Water; he would not be entitled to an unreduced pension but could apply for an immediate actuarially reduced pension.
20. Dr White, with the benefit of legal advice, voluntarily entered into the compromise agreement. Clause 8.2 of the compromise agreement says that he had no right and would not seek to claim any right to an unreduced pension under the Scheme rules.
21. Dr White was aware that his accrued pension rights would not include an option to claim an unreduced early retirement pension.
22. In clause 8.2 of the compromise agreement Dr White agreed that his employment was terminating by mutual consent between him and Thames Water.
23. His employment did not cease by reason of redundancy and it was made clear to him that if he chose not to end his employment on the terms offered his employment would continue normally. He voluntarily chose to take the settlement payment and terminate his employment by mutual consent.
24. There is nothing in the compromise agreement to suggest that he has commuted or surrendered his accrued rights. He continues to draw his early retirement pension.
25. Dr White knew well in advance of signing the compromise agreement that Thames Water was not going to provide him with an unreduced early retirement pension and so his claim for compensation for distress and inconvenience is not warranted.

Conclusions

26. At the time of his departure from Thames Water, Dr White had an accrued right to a pension but reduced actuarially for being taken early.
27. He also had a *prospective, or potential future right*, (a 'putative' right as LJ Mummery put it in the IMG case) to an unreduced pension but only if:
 - i) He was over 50 - which he was at that time; and
 - ii) He was to leave employment by reason of redundancy or in the interests of the efficient exercise of the employer's functions – which he says was the case but Thames Water (and the compromise agreement) says he was not; and
 - iii) Thames Water certified to the trustees of the pension scheme that he left employment for one of the two reasons in (ii) – which it has not done and made it clear to him that it would not do, at the time of leaving.
28. So, Dr White could not be said to have an accrued *right* to an unreduced pension at the time of service termination, as required by S124 (2) (b) of the Pensions Act 1995.

29. If he had gone to the Employment Tribunal at that time, he may have been able to succeed in showing that the wording in the compromise agreement to the effect that he left by 'mutual consent' should really be accepted in the circumstances to mean a voluntary redundancy – even though he would apparently have been able to carry on his own job if he had not signed the agreement and left the company. And a voluntary redundancy has been held in case law to equate to retirement with consent. For pension purposes, he would then have had to argue either:
- that Thames Water had in fact consented to his leaving on that basis and this should be taken as an effective certification (or there was no further need for one), or
 - that in the light of this, any decision to refuse to certify to the trustee would be perverse and thus invalid.
30. But all of this would be a matter of some dispute. As such, Dr White's claim amounts to a disputed right or entitlement which is capable of being compromised by agreement without falling foul of section 91 Pensions Act 1995 (as per *IMG v German* and the very recent decision in *IBM United Holdings Ltd & Another v Dagleish & Others [2015] EWHC 389 (Ch)*, in particular paragraphs 472-474 which indicate that a requirement for employer's consent meant there was no accrued right and compromise was available).
31. Dr White suggests that the certification required in his case should have been a simple administrative exercise but there was a fundamental disagreement between the parties on whether someone in his position who was not at risk of redundancy but nevertheless volunteered to go, was or should be entitled to an unreduced pension. So, certification was not going to happen. And Dr White would have needed to establish that this was a perverse decision through legal process to make an unreduced pension an undisputed right.
32. The case law does not define 'pre-existing' in holding that pre-existing disputes about pension rights and entitlements are capable of a bona fide compromise. However, the intranet notice made clear Thames Water's position that a volunteer would not receive an unreduced pension. Since Dr White considers that this was wrong or contrary to his entitlement, and continued to attempt to negotiate revisions to the subsequent compromise agreements after his application, the dispute was pre-existing at the time of compromise. The fact that Thames Water may have set out as part of the re-organisation to use compromise agreements does not mean they are invalid or not bona fide. I do not see any persuasive distinction with the waivers signed in the IBM case. The agreement was put forward, the choice was Dr White's and, despite some reluctance on his part, both sides ultimately accepted the terms in good faith.
33. The compromise agreement appears to comply with all legal requirements and clearly sets out the matters being compromised and those that are not. Any right to an unreduced pension is clearly said to be waived. And Dr White knew this because, with the assistance of a solicitor, he proposed changes to the agreement including one to

take this waiver out. This was not acceptable to Thames Water, leaving Dr White to then decide how to take matters forward. Having done so, he decided to sign the agreement. I note that he took legal advice and also contacted the Pensions Advisory Service. I appreciate that he faced a difficult decision but it was one that ultimately he had to make for himself. He did so, in full knowledge of the facts.

34. Dr White has validly waived any claim he may have had to an unreduced pension. I do not uphold his complaint.

Jane Irvine

Deputy Pensions Ombudsman
20 May 2015