The Pensions Ombudsman

# Ombudsman's Determination

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| Applicant | Mr Y |
| Scheme | Serco Pension and Life Assurance Scheme Section F (**SPLAS**) |
| Respondents | Magnox Limited (**Magnox**), Amec Foster Wheeler Plc. (**AMEC**), Nuclear Decommissioning Authority (**NDA**), Serco Group PLC (**Serco**), the Trustees of the Serco Pension and Life Assurance Scheme (**the Trustees**) |

## Complaint Summary

1. Mr Y's complaint is that he has not received early payment in respect of his deferred pension benefits held under SPLAS following his redundancy from AMEC. He believes he would have received these pension payments had his employment not been transferred from Magnox. Mr Y believes that the Respondents have incorrectly interpreted and applied the relevant SPLAS Rules and are in breach of the statutory, common law and contractual obligations they owe him.

2. Mr Y is seeking:-

   2.1. Early payment of his deferred pension in SPLAS (whether from SPLAS or by payment outside SPLAS by any of the Respondents) from the date of his redundancy from AMEC which was 2 November 2015, until his normal pension age (**NPA**) of 60 in SPLAS.

   2.2. Immediate payment of lump sums (3 times annual scheme pension plus his additional voluntary contributions).

   2.3. Interest at the rate of 8% on the lump sum referred to in paragraph 2.2 above and monthly pension payments since 2 November 2015.

   2.4. Excess tax costs as a result of back payments in one financial year of income due in previous financial years.

   2.5. The net amount he receives, after tax, from his employer to be the same as he would have received had the monies been correctly paid in the first place if he finds new employment.

2.6. Compensation for time spent and the significant distress and inconvenience he has experienced trying to get this complaint resolved.

## Summary of the Ombudsman's Determination and reasons

3. The complaint is not upheld against the Respondents because:-

3.1. The Respondents have correctly interpreted and applied the relevant SPLAS Rules and legislative provisions. Mr Y has no entitlement, under the SPLAS Rules, or any of the legislative provisions, or any provision or agreement outside those provisions, to an unreduced early pension from SPLAS arising from either: the transfer of his employment from Serco Limited to Energy, Safety and Risk Consultants (UK) Limited (**ESRC**) and ESRC's subsequent sale to AMEC; or his later redundancy from ESRC.

3.2. The aim of the Electricity (Protected Persons) (England and Wales) Pension Regulations 1990 (SI 1990/346) (**the Protected Persons Regulations**), was to protect a protected person, such as Mr Y, from being worse off as a consequence of the transfer of their employment. That aim did not extend to ensuring that the protected person was, or could be, better off as a consequence of such a transfer.

3.3. In accordance with that aim, Mr Y could have maintained the same level and structure of benefits had he opted to transfer his accrued pension under SPLAS to the AMEC Staff Pension Scheme (**the ASPS**) within two years of his employment having transferred to ESRC. The right to do so, under Regulation 6(5) of the Protected Persons Regulations, is a central feature of those Regulations. Had Mr Y exercised that right, he would have been entitled, on his redundancy from ESRC, to an unreduced pension in respect of all of his pensionable service, spanning his employment by Magnox and all subsequent employers. However, he did not do so.

3.4. I have not found that any of the Respondents made assurances to Mr Y that he would be entitled to an unreduced pension on redundancy from ESRC.

## Detailed Determination

### Material facts

4. Mr Y was employed by Magnox until 31 October 2005. He was a member of the Magnox Section of the Electricity Supply Pension Scheme (**the ESPS**) during his employment with Magnox.

5. NDA was established in 2005, under the Energy Act 2004 (**the Energy Act**). It was responsible for the operation, decommissioning, and clean-up of 17 nuclear reactor and research sites in the UK. It contracted with Magnox in that regard.

6. It is not in dispute that Mr Y was a protected person, with rights under the Electricity Act 1989 (**the Electricity Act**), the Energy Act and the Protected Persons Regulations. A copy of the relevant parts of the Protected Persons Regulations is included in Appendix 1.

7. In summary, Rules 16(2) and 17(1A)(c) of the ESPS, which are set out in Appendix 3, made provision for benefits to be paid to a member:

   7.1. on the member's compulsory retirement by his employer on or after age 50; and

   7.2. if the member had previously left service due to reorganisation or redundancy, on reaching age 50.

8. Regulations 13 to 15 of the Protected Persons Regulations required, broadly, that on any transfer of Mr Y's employment under a business sale, from Magnox to another employer, Mr Y's new employer was obliged to either participate in the ESPS or to set up an alternative scheme. The Regulations also applied if there was any subsequent transfer of Mr Y's employment or change of ownership of his employer.

9. Under an alternative scheme, the 'future pension rights' of a protected person had to be either:

   9.1. no worse than those already provided to other protected persons under that scheme; or

   9.2. if there were no protected persons already participating in that scheme, no worse than the future pension rights under the ESPS immediately before 31 March 1990, as amended under any amendment action taken prior to that date. This included any such amendment action that came into effect after that date (Regulation 7 of the Protected Persons Regulations[1]).

10. Further, the new employer was required, under Regulation 6(5) of the Protected Persons Regulations, to enable any protected person to transfer their accrued pension rights under the ESPS or any subsequent alternative scheme into the new

[1] The term 'transfer date rights', which is used in Regulation 7 of the Protected Persons Regulations, is defined in section 65 of the Electricity Act 1989.

employer's alternative scheme. The protected employee had to notify the new employer of his desire to transfer no later than two years after the date on which his employment transferred to that new employer. Where such transfer was made, Regulation 6(4) required the new employer to procure that the rules of the receiving scheme secured "accrued pension rights which, on the basis of good actuarial practice, [were] at least equivalent in value to [the protected employee's] accrued pension rights so transferred from the former scheme."

11. Under Regulations 6(1) and (2) of the Protected Persons Regulations, where a protected person had accrued pension rights in a relevant scheme, his employer or former employer participating in that relevant scheme was required to ensure that the relevant scheme was sufficiently funded to at least cover the liability of those accrued pension rights, in the event that the relevant scheme was wound up. The relevant parts of the Protected Persons Regulations are set out in Appendix 1.

12. Under paragraph 11 of Part 4 of Schedule 8 to the Energy Act, NDA had responsibility for ensuring that certain persons, which included representatives of protected persons, were consulted with, prior to any transfer arrangements affecting protected persons. Broadly, it also had to ensure that the provisions of the pension scheme Serco offered were no less favourable than the provisions of the ESPS.

13. Pursuant to paragraph 11 of Part 4 of Schedule 8 to the Energy Act, NDA needed to be satisfied, in relation to such a transfer, that any protected persons affected by the transfer would be entitled "to exercise an option of becoming a participant in an appropriate pension scheme."[2] Under paragraph 11(6) of Part 4 of Schedule 8 to the Energy Act, a pension scheme is an "appropriate pension scheme" in relation to a person if NDA is satisfied that:

> "(a) taking into account the other benefits (if any) that are conferred on or made available to him as a result of the employment that he will hold after the relevant time, and
>
> (b) taking the benefits that are available under the provisions of that pension scheme as a whole,
>
> the benefits that are available under those provisions are no less favourable than the benefits available under the provisions (taken as a whole) of the nuclear pension scheme in respect of which he is entitled to protection under this Part of this Schedule."

14. In January 2002, a guide to the main provisions of the ESPS, entitled 'Your pension scheme', (**the ESPS Guide**) was issued to members of the ESPS by British Nuclear Fuels plc. The ESPS Guide contained the following statement in its introductory section:

[2] Paragraph 11(3)

"This booklet is intended to be an easy to read and non-technical guide to the main features of the [ESPS] as they apply to employees and pensioners of the Magnox Electric Group. It is not intended to cover all eventualities. The comprehensive details of the [ESPS] are contained in the Clauses and Rules of the [ESPS], a copy of which can be obtained from the Pensions Section at Berkeley.

If any statement made in this booklet conflicts with anything contained in the Clauses and Rules of the Scheme, those Clauses and Rules shall apply."

15. Under the heading 'Compulsory Early Retirement', the ESPS Guide set out the pension benefits that would be available on early retirement due to redundancy or reorganisation. It said:

"If the Company retires you early because of redundancy or reorganisation and you are 50 or over, you have the right to receive an immediate pension and lump sum. In the same way as voluntary early retirement the pension and lump sum will be calculated as for normal early retirement except that service will be to the date of compulsory early retirement and no discounting will be applied for early payment. If you are under 50, then you will have the same choices as if you had stopped work voluntarily except that any deferred benefits will be payable to you at age 50 instead of at normal retirement age. If you choose at the time of leaving to receive these benefits at normal retirement age, then in addition to your Scheme benefits, you may also receive a lump sum from the Company."

16. During the period from around late 2004 to October 2005, Magnox consulted with its staff (including Mr Y), regarding the possibility of a transfer of their employment pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 1981 (**TUPE**) to Serco.

17. In this Determination, references to 'Serco' are to be read as references to Serco Limited and / or Serco Group plc, as applicable.

18. In a letter to Mr Y dated 7 October 2005, the head of E&TS Ltd (**E&TS**), formally confirmed to Mr Y that his employment would transfer, under the terms of the TUPE, from Magnox to "a new subsidiary company, [E&TS], and that E&TS would be sold to Serco "[at] the same time." The letter also stated:

"You have been advised of the intended transfer and sale in team meetings, individual briefing, Company communications, briefing notes, and correspondence since December 2004. The transfer has also been the subject of detailed consultation with the Trade Unions. A draft version of the transfer booklet was previously issued to you as part of the ongoing communications process on 15 June 2005.

I confirm that neither your transfer to E&TS Ltd nor its sale to Serco will affect your terms and conditions of employment or pension entitlements…"

19. On 13 October 2005, Mr EY, of Magnox, sent an email to transferring employees, including Mr Y, in response to a query that one of the transferring employees had raised regarding pension scheme membership and benefits following the transfer. In the email, Mr EY clarified that, although the transferring employees' active membership of the ESPS would necessarily cease as a consequence of the transfer, it would be up to each transferring employee whether they: left their accrued benefits in the ESPS; or transferred them to the pension scheme provided by Serco Limited. Mr EY stated that 'the sessions on 20th/27th with Magnox pensions staff, Serco and Nelson as IFA, are designed to help you with that decision.'

20. Mr EY also said that 'the final salary basis of the scheme [provided by Serco for the transferring employees following the transfer] and the associated contribution rates and benefits are preserved, i.e. a mirror of the ESPS benefits. The obligations to preserve individuals' benefits are not only built into the contract with Serco Ltd. but are protected in law as described in the booklet.'

21. In order to assist Mr Y in deciding whether to exercise his option to transfer his pension benefits from ESPS to SPLAS, Magnox provided Mr Y with access to independent financial presentations and advice. A document, provided to The Pensions Ombudsman (**TPO**) by Mr Y, entitled 'Questions and Answers for the Serco Pensions IFA Seminar' sets out questions and answers in relation to the transferring employees' pension rights and the arrangements that were to be in place in that regard following the transfer.

22. The following questions and answers are of particular relevance to Mr Y's complaint:

    22.1. 'Q6. If the pension scheme into which we are transferring is no longer a true mirror-image scheme, then the transferees will not be happy. Please confirm that the appropriately qualified personnel from Magnox have been through the contract line by line and can confirm that the scheme is a mirror-scheme.

    22.2. A6. The pension scheme will be a mirror image. The pension arrangements have been the subject of detailed discussions involving the actuaries representing both ESPS and SPLAS.

    22.3. Q7. If we join the Serco pension scheme and then get made redundant, say just after 2010 at the end of the LPA would we get our pension at 50 or 55?

    22.4. A7. You have a reserved right to take a pension from 50…In practice the changing legislation may mean that the payments will be made from the company rather than the pension fund but that will not affect the monies that you receive.'

23. Mr Y received an explanatory booklet in October 2005, entitled "Your Transfer to E&TS Ltd. and its Acquisition by Serco on 31 October 2005" (**the 2005 Booklet**).[3] The 2005 Booklet outlined the various statutory provisions under which the

[3] The 2005 Booklet was signed by representatives of Magnox and the trade union Prospect.

transferring employees' employment and pension rights were protected and explained that:

23.1. Under the transfer and acquisition process, Magnox staff's employment would transfer to E&TS (a subsidiary of Magnox) under TUPE and, simultaneously, Serco would acquire E&TS.

23.2. All obligations transferring to E&TS regarding transferring employees' employment and pension rights would be "explicitly underwritten by Serco in the commercial agreements for the acquisition. These obligations therefore fall on Serco as well as E&TS, having the same effect as if the transfer had been direct to Serco. Serco is also prevented from selling E&TS without the consent of [Magnox]."

23.3. For protected persons, the Protected Persons Regulations provided "not only that the benefits that you have built up in the [ESPS] over your career (your accrued benefits) are protected, but that the new employer also has to provide you with individual benefits for future service which are no worse than those provided under the Magnox ESPS Group before you ceased to participate."

23.4. For transferring employees who had been employed by Magnox on 1 April 2005, the Energy Act meant that the new employer had to provide them "overall with "no less favourable" pension benefits."

23.5. Although this protection was "less prescriptive" than that provided under the Protected Persons Regulations, it was nonetheless a very powerful safeguard for individuals who were not protected persons. These protections had been designed with transfers such as that from Magnox to E&TS in mind, "anticipating the profound changes in the structure and priorities of the nuclear industry associated with the creation of the [NDA]."

24. The 2005 Booklet stated that Serco already recognised the Prospect trade union (**Prospect**), and would continue its recognition, for collective bargaining purposes in respect of the transferred staff.

25. Under the heading 'Pension Rights' the 2005 Booklet stated:

> "At the point of transfer and sale, the transferred staff will be deemed to have joined [SPLAS], which will be enabled to provide ESPS equivalent benefits for your future service from the transfer date…Providing ESPS equivalent benefits for transferred staff is a requirement of the commercial agreement between [Magnox] and Serco as well as complying with the requirements of the Protected Persons Regulations and the Energy Act."

26. Regarding "severance benefits", the 2005 Booklet said:

> "A key decision for you will be whether to leave your accrued pension benefits in the [ESPS] and join SPLAS for future service only, or whether to transfer

your accrued service to SPLAS, on a year for year basis. A feature of the commercial agreement between [Magnox and Serco] is that, regardless of your decision on this matter, the severance benefits which you would receive if you later took redundancy from Serco would be the same."

27. I shall refer to this wording as the **Severance Benefit Statement** throughout this Determination.

28. The 2005 Booklet went on to explain the situation in relation to early retirement benefits in situations other than on severance. It stated:

"By contrast, if you leave your accrued pension benefits in the [ESPS], rather than transferring them into SPLAS, early retirement benefits from Serco would be based on pensionable service since the transfer; undiscounted [ESPS] benefits would be payable from normal retirement age."

29. Prior to the transfer, SPLAS was amended to create a new section for the Magnox employees. Rule 4.2.1.3 of SPLAS provided that an early pension would be payable, on or after age 50, where the member had been compulsorily retired by the employer due to redundancy or reorganisation. Rule 6.2.3.1 entitled Magnox employees to a normal pension payable immediately or from age 50 if later, if, in the Trustees' opinion, the Magnox employee's 'Service' then ended 'due to redundancy or a reorganisation of the Employer's business' (see Appendix 2).

30. On 31 October 2005, Mr Y's employment with Magnox was transferred to E&TS by TUPE. Shortly thereafter, Serco acquired E&TS. On Mr Y's election, the entirety of his benefits in the ESPS were transferred to SPLAS, with effect from 1 November 2005. The provisions of SPLAS that are relevant to Mr Y's complaint are set out in Appendix 2.

31. On 21 March 2006, Mr EY emailed Ms S, a member of staff at Serco, who at that time was a 'lay' representative of Prospect with regard to the 'transfer arrangements'. Mr EY stated that he was aware that, since the 'pre-transfer briefing session', Ms S had had 'various discussions with Serco' and that Serco should now be the 'primary source of information.' However, Mr EY enclosed a memorandum with his email, which he said summarised the 'position.'

32. The stated purpose of the memorandum was 'to explain how the legal structure of the transfer ensures that those obligations to employees – put another way, the rights of employees – have indeed been preserved.' The memorandum explained that:

'As a result of [the TUPE transfer of the transferring employees from Magnox to E&TS and E&TS' subsequent sale to Serco], the transferring staff are performing essentially the same work for the same clients within Magnox as before the transfer, except that they are now employees of E&TS Ltd, part of the Serco Group. Serco is paid for this work through an amendment to a pre-existing contract for services between [Magnox] and Serco (and others), the

Alliance Agreement, whose scope was expanded slightly to include the work performed by [E&TS].

Within this arrangement, the rights of employees are maintained by a combination of the provisions of the TUPE regulations, and the additional protections written into the transfer contracts. These are at two levels: the obligations of [E&TS] to employees, and, perhaps more importantly, the obligations of Serco itself.

[E&TS]'s obligations are in part captured by the TUPE regulations: since an undertaking was transferred from [Magnox] to [E&TS] TUPE applies to all the transferring staff and means the contracts of employment transfer to [E&TS] as if they had been made with the new company in the first place. Continuity of service for statutory and contractual purposes is preserved and the terms of the contracts remain unchanged. Serco has made it clear that any subsequent changes will either be through collective agreement for generic terms, such as pay structures, or through individual agreement, in instances such as promotion. In addition, the transfer agreements specify that [E&TS] is obliged to maintain salaries, severance and pension rights.

Obligations solely on [E&TS] may, however, be insufficient if that left Serco with the theoretical option to sell, wind-up or otherwise dispose of [E&TS]. Such a manoeuvre would be outside the spirit of this arrangement, and Serco would be inherently unlikely to contemplate such an action, given Serco's principles and the importance to Serco of its reputation in both the nuclear and the general outsourcing markets. Nevertheless, it was considered important in these agreements to close this potential loophole. This was done in the following ways:

- A change in control of [E&TS] can only occur if [Magnox] agrees to it; this agreement would not be forthcoming if the rights of employees were being jeopardised.
- In addition to [E&TS]'s obligations, there is a direct obligation on Serco itself to honour the LPA[[4]] and meet the pension rights that employees enjoyed at the time of transfer. These obligations are contracted directly between [Magnox] and Serco, not via [E&TS]. That means that employees' rights in respect of both pensions and, importantly, severance payments are a direct obligation on Serco itself, not [E&TS]. So even if [E&TS] was disposed of, or wound up, or if Serco transferred the staff out of [E&TS] into another subsidiary (which would anyway require employees' consent if there was any change in their terms and conditions), Serco would still have the obligation to maintain employees' pension and severance rights.

[4] The LPA was a 'Lifetime Partnership Agreement', signed by representatives of Magnox and of various trade unions on 11 December 2001, the existence of which was of no consequence to Mr Y in respect of his redundancy benefits from AMEC.

> In summary, we believe that employees' rights have been preserved through the transfer agreements, through the protection offered by TUPE regulations, as reinforced by [Magnox]/Serco contracts putting obligations on both [E&TS] and more importantly on Serco itself. It is worth also reflecting that, in the negotiations with Serco, these provisions were not contentious: Serco accept them as fundamental to the principle of the transfer, and noted that the damage to Serco's reputation caused by being seen to try to circumvent them would be significant.'

33. Mr Y has provided TPO with a copy of a letter that was sent to him by Serco's HR and Change Director, dated January 2008, in which it was stated that his employment had subsequently transferred from E&TS to Serco Limited on 1 November 2005. This letter also stated that Prospect had asked Serco to confirm where liabilities sat regarding Mr Y's pension benefits. Serco confirmed that 'if you transferred your historic benefits into SPLAS, then the liability also transferred into this scheme, whereas if you decided not to transfer past service, you have become a deferred member of the Magnox group of the ESPS, with the liabilities relating to historic benefits remaining in this scheme.' E&TS was subsequently dissolved, in 2011.

34. On or shortly before 22 June 2012, Mr Y's employment with Serco was transferred by TUPE to ESRC, a subsidiary of Serco. On 29 June 2012, AMEC purchased ESRC's entire share capital. It seems that ESRC had been a participating employer in SPLAS from the date of Mr Y's TUPE transfer from Serco to ESRC until ESRC's acquisition by AMEC.[5] AMEC did not participate in SPLAS but had its own scheme, the ASPS. Mr Y's active membership of SPLAS was terminated on 30 June 2012.[6] Mr Y retained his accrued benefits in SPLAS and joined the ASPS for future accruals from 1 July 2012.

35. Prior to the transfer to AMEC, presentations were given to the prospective transferees, explaining AMEC's proposals regarding the provision of pension arrangements to the transferees after the transfer. A copy of the slides that were used in those presentations shows that the transferring employees were informed that protected persons would become members of a separate section of the ASPS. This was described in the slides as a "Mirror Image Defined Benefit Scheme providing the same benefits [as SPLAS]." Slide 8 stated, under the heading 'What happens to my Serco pension?':

> "For the SPLAS Section F members – you will have the option to transfer your past pension and past service liabilities to [the ASPS]. This would be on a like for like basis and you would therefore no longer have a Serco linked pension."

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[5] In a letter from Serco to Mr Y and others, dated 25 June 2012, transferees were informed that "from [the TUPE transfer from Serco to ESRC] until the onward point of transfer of [ESRC] to AMEC, there shall be no change to your pension arrangements or terms and conditions of employment."

[6] As stated in a deferred benefits statement, dated 28 September 2012.

36. Slide 9 stated that "Those protected ESPS members have 2 years to choose to transfer their past Serco pension to the [ASPS]." There was no mention in the slides of early retirement pensions on redundancy under either SPLAS or the ASPS.

37. Following completion of AMEC's purchase of ESRC, AMEC sent a letter to the transferees. The letter informed the transferees that they would have the right to transfer their "past service" into the ASPS "on a like for like basis." Transferees were advised to contact the 'Pensions Department' for information about that.

38. In September 2012, Mr Y was provided with a certificate of his deferred benefits in SPLAS, which set out the benefits that were preserved for him (**the Deferred Benefit Statement**).

39. On 11 February 2013, Mr Y wrote to Mercer, the administrators of SPLAS, to query his entitlement to receive his deferred benefits in SPLAS early, in the event of his redundancy. He explained that, under the terms of the ESPS, both active and deferred members would have received a pension on redundancy from age 50 or over.

40. On 23 May 2013, Mercer responded to Mr Y's query by letter and said:

> "…in the event of redundancy, the rules of the Magnox section of the [ESPS] state that a deferred member is only entitled to retire from age 50 if they left service prior to age 50 as a result of redundancy or reorganisation. As you left [SPLAS] after age 50 this does not apply to you and you would now be unable to draw your benefits until age 60, unless you qualify for ill-health retirement."

41. On 11 September 2013, Mr Y sent a subsequent letter to Mercer, querying its response. Mr Y stated that he considered that his entitlement under SPLAS mirrored his original entitlement under the ESPS, which he believed was that a pension would become payable on redundancy from age 50. As Mr Y was already over age 50, a pension would become payable under SPLAS from the date of his redundancy. Mr Y stated that this matter affected a number of people and was being taken up via Prospect and Magnox/NDA.

42. On 20 September 2013, Mercer replied to Mr Y. It referred to its letter of 23 May 2013 and enclosed the relevant parts of the ESPS Rules.[7]

43. Mr Y decided not to transfer his deferred benefits from SPLAS to the ASPS within the two-year window.

44. On 2 October 2015, in anticipation of being made redundant from his employment with ESRC, Mr Y wrote to Magnox. He requested formal confirmation that the provisions for early retirement on redundancy were contractual commitments on Magnox's part, applicable to him and the other individuals who had transferred from Magnox to E&TS. He also asked for confirmation that this remained the case,

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[7] The Rules of the ESPS that dealt with redundancy are detailed in Appendix 3.

irrespective of whether their pensions were transferred to any successor companies or frozen within the ESPS.

45. In response, Magnox informed Mr Y that it did not consider it appropriate for it to become involved. It suggested that Mr Y contact AMEC and Serco, as his current and former employers, in order to reach a resolution.

46. On 12 October 2015, Mr Y emailed Magnox, asking for confirmation of whether Magnox had an ongoing "legal or contractual responsibility to the transferred staff based upon the terms agreed with them at transfer and the Protected Person Regulations."

47. In response Magnox informed Mr Y that "all ongoing pension obligations as from the date of transfer, were clearly transferred to Serco. The Trustees of [the ESPS] paid a full past service reserve transfer value to ensure full compliance with the Protections." Magnox confirmed to Mr Y that it had provided no form of guarantee or warranty "as regards such ongoing pensions obligations which, as stated, from the transfer date in accordance with the agreement between Magnox and Serco, rest entirely with Serco."

48. On 2 November 2015, Mr Y was made redundant from his employment by ESRC. He was aged 56 at the time of the redundancy and he received an unreduced early pension in relation to the benefits he had accrued in the ASPS.

49. On 13 November 2015, Mr Y wrote to the Trustees requesting early payment of his deferred benefits in SPLAS as a result of his redundancy from ESRC. The Trustees refused Mr Y's application on the basis that the entitlement to a deferred early retirement pension from SPLAS prior to age 60, would only arise on a redundancy from Serco's employment. In light of that refusal, Mr Y wrote to AMEC in early 2016, to request that his accrued benefits under SPLAS were transferred to the ASPS. AMEC refused that request, as the request had been made outside the two-year window within which such a request could have been made, and Mr Y had already left ESRC's employment by the time he had made that request.

50. On 20 May 2016, Mr Y raised a complaint under SPLAS' Internal Dispute Resolution Procedure (**IDRP**). The Trustees did not uphold Mr Y's IDRP complaint, on the basis that:

    50.1. a deferred early retirement pension was only payable where the member left SPLAS due to being made redundant by Serco or an associated employer of Serco, and not where the deferred member left subsequent employment due to redundancy by an employer who was not an associated employer of Serco; and

    50.2. the relevant Rules under SPLAS reflected the provisions of Rules 16(2) and 17(1A) of the ESPS (see Appendix 2).

51. Following receipt of the IDRP response from the Trustees, Mr Y complained to NDA and Magnox, as he believed that the protected terms of the ESPS on his transfer to Serco were not being followed. Both Magnox and NDA responded to Mr Y and informed him that the early payment of his SPLAS benefits was a matter between him and Serco. So, they could not provide any further assistance.

52. Subsequently, Mr Y referred his complaint to TPO, as it remained unresolved after being considered under SPLAS' IDRP and by each of the Respondents. He also added AMEC as a Respondent to his complaint.

**Summary of Mr Y's position**

53. He is entitled to receive his deferred pension from SPLAS, prior to his NPA, following redundancy from ESRC because:-

    53.1. The ESPS Rules provided the right to an early pension in the event of redundancy. Irrespective of the employer that made him redundant, he is entitled to receive an early pension as a deferred member in SPLAS. He is entitled to this benefit despite SPLAS and the ASPS not being affiliated pension schemes.

    53.2. He has a statutory right to a deferred early pension in the event of redundancy, by virtue of the Electricity Act, the Protected Persons Regulations, and the Energy Act.

    53.3. NDA and Magnox assured him during the consultation period leading up to the TUPE transfer to Serco, and it was a term of the transfer contract between Magnox and Serco, that all the provisions of the ESPS would be preserved on transfer to Serco and subsequent employers. It was intended that his pension benefits would include the early payment of his deferred pension in the event of redundancy from a subsequent employer.

    53.4. As consideration for Magnox's provision of those assurances, he and the other transferees gave their collective agreement to the transfer. Without that agreement, Magnox's proposed business venture would not have been viable and Magnox's business would not have been viable on an ongoing basis. So, Magnox's assurances to the transferring employees became contractually binding obligations on Magnox.

    53.5. It would be contrary to the intent of contract law if Magnox had been able to make those promises to gain collective agreement to the transfer but had subsequently been able to renege on those promises. This contractual agreement between Magnox and the transferring employees had not been novated on subsequent transfers of employment. So, the transfer of early payment of pension on redundancy without loss of benefit was a contractual obligation of Magnox in favour of the transferring employees.

53.6. The pre-transfer arrangements made with the employees in respect of the transfer from Magnox to E&TS afforded ongoing redundancy benefits under the pension scheme without loss of benefit. It follows that such ongoing benefits must be equivalent to what they would have been, had the transferees remained as active members of the ESPS had they not transferred. So, the ongoing benefits must be the equivalent to the ESPS Rules for active contributing members, not equivalent to deferred member rules where those rules would differ from active member rules.

53.7. His case for early payment of pension "is dependent upon the agreements made between Magnox and the transferees and not on the wording of the pension rules as transferred between Magnox and Serco. [He] considers the latter to be contractual matters between those parties and should not impinge on the rights of the transferees under their agreement with Magnox."

53.8. He, as a deferred member in SPLAS, is entitled to the same benefits as an active member in SPLAS. This interpretation of the SPLAS Rules ensures: (i) compliance with the principles of continuity of service that underpin employment laws; (ii) the intentions of the electricity industry regulations; (iii) contractual employment rights; and (iv) the protection of pension benefit rights on transfer to subsequent companies, in accordance with the terms of the Magnox transfer agreement.

54. In further submissions, Mr Y said:-

54.1. He was aware of the consequences of not transferring his pension from SPLAS to the ASPS. There were a variety of considerations for why he did not transfer his pension, including some of those cited in Serco and AMEC's submissions. The balance lay in favour of freezing his pension within Serco. However, the accusation that the advantages of freezing were traded off against the loss of the benefit of early pension on redundancy for frozen accruals within SPLAS was abjectly wrong.

54.2. Serco's interpretation of the ESPS rules contradicted what Magnox represented to members of the ESPS in the 2005 Booklet. The relevant provision in the 2005 Booklet does not state that early payment of pension on redundancy is cut off after age 50. All members with whom he had discussed the matter agreed with his view.

54.3. The deferred pension rules are not relevant in this case. It is the ESPS active pension Rules that applied across subsequent transferee companies. The continuity of service for pension benefit purposes through subsequent transfers of employment, is afforded to him by the intent of the statutory electricity industry regulations and as per the terms of the "Magnox/transferee agreement."

54.4. For a routine transfer within the electricity supply industry (**ESI**), the ESPS rules provide for a member to be deemed not to have left the scheme if

employment is continued with another affiliated scheme within the ESI. So, there is no frozen pension, and pre-transfer accruals are treated as being subject to active pension rules. The same principle is also compulsory for the Serco to AMEC transfer, irrespective of SPLAS and the ASPS not being affiliated to the ESI.

54.5. He considers this to be the reason Magnox gave this matter particular attention and incorporated it into its contractual arrangements with Serco.

54.6. In its submissions, Serco ignored the provisions of the 2005 Booklet. It relied instead upon its interpretation of the SPLAS Rules, in the knowledge that transferees were not party to the agreement between Serco and Magnox.

54.7. Magnox failed to comply with the statutory and contractual obligations it owed to him to ensure that the pension benefits he received on redundancy from a subsequent employer, were equivalent to those he would have received had he remained employed with Magnox. Magnox was obliged to ensure his continuity of service, to protect his previous accruals and to ensure consistency of pension scheme rules between transferee companies, to prevent any fragmentation of pension benefits across TUPE transfers. Having failed to fulfil its obligations, Magnox should be liable to uphold his right to an early pension from SPLAS following his redundancy from AMEC.

54.8. Magnox was required to meet its obligations to him through a combination of commercial arrangements with Serco, by ensuring that transferee companies fell within the scope of the relevant industry statutes and through TUPE.

54.9. His entitlement to the early payment of his deferred pension is set out in the 2005 Booklet.

54.10. The terms of the 2005 Booklet are sacrosanct, a matter between Magnox and the transferees. The terms were the predominant elements that formed the transferees' decision on whether to freeze or transfer their accruals. The terms do not require the transferees to transfer their pension accruals in order to preserve their entitlement to an early pension on redundancy.

54.11. The Severance Benefit Statement (see paragraph 26 above) confirms his entitlement to an early deferred pension.

54.12. That provision reassured transferees that they had the choice to decide whether to freeze or transfer their benefits based on the merits of the scheme in which they were active members and the subsequent scheme. They did not have to worry about their severance benefits on redundancy because the benefits would be the same whether they decided to freeze or transfer their accruals. Transferees were entitled to an early pension on redundancy, irrespective of whether the accruals sat with the current company or whether some were held with any of the previous companies. Further, the entitlement to the same severance benefits on subsequent redundancy applied to all

future transfers of employment, not only to the transfer from Magnox to Serco.

54.13. He was aware that some other transferees chose to leave their accrued benefits in the ESPS, rather than transfer into SPLAS, having interpreted the 2005 Booklet in the same way that he did. However, he was aware of at least one of the transferees who was made redundant by AMEC and who had been refused early payment of pension against the frozen ESPS accruals. The 2005 Booklet differentiated between early retirement benefits and early pension on redundancy. Equating these two terms in the 2005 Booklet would create confusion and conflicts with the terms of this Booklet. So, early pension on redundancy and early retirement benefits needed to be differentiated.

54.14. Severance benefits are the benefits receivable on being severed from current employment, which means being made redundant. These benefits include lump sum payments based upon years of service and, most importantly, early pension based on accrued pension at the point of redundancy. This is consistent with the terminology used as standard throughout the ESI. Since the paragraph links severance benefits with accrued pension benefits, it was clear that the early payment of deferred pension on redundancy fell within the scope of the Severance Benefit Statement.

54.15. The 2005 Booklet outlines the steps taken to ensure that continuity of service for statutory and contractual purposes is preserved. The document states specifically, in relation to the Protected Persons Regulations, that the transferees' past accrued benefits will be protected. If such continuity of service and protection of past accrued benefits were conditional upon transfer of accruals into the pension schemes of future companies, it would have been incumbent on Magnox to specifically state so. There is no such statement in the 2005 Booklet.

54.16. The 2005 Booklet explains that, should the employee freeze their pension within the ESPS, the severance benefits received by that employee, on redundancy from Serco, would be the same as had the employee transferred their accruals to Serco. It is not specific about the source of the funding. This requirement is carried through to future transfers and the same provisions are applicable. That is, the total severance benefits that an employee would receive on redundancy from a future employer to whom his employment had been transferred would be the same. This is irrespective of whether all of his pension accruals sit with the current company or whether some were held with any of his previous employer companies. The source of the funding is not a concern of the transferring employee, whose only concern is that they do not lose future benefit by freezing their pension compared with transferring it.

54.17. The 2005 Booklet specifically states, in relation to the Protected Persons Regulations, that the transferees' past accrued benefits will be protected. The Severance Benefit Statement does not suggest that its provisions only apply to the transfer between Magnox and Serco. If that were the case, Magnox should have included an express statement to that effect. Further, "Attempting to write each clause to individually specify all potential permutations of onward transfers and deferrals would make the transfer agreement unreadable (if writeable)."

54.18. His interpretation of that paragraph was consistent with that of around 60 other transferees. It was a key element on which they made their decisions to transfer or freeze their pensions, since the original transfer of their employment from Magnox in 2005. A fundamental skill of their profession was, and is, detailed analysis of documentation.

54.19. Regulation 5 of the Protected Persons Regulations requires any change of employment between successor companies to be treated as continuous.

54.20. In addition to the 2005 Booklet, his entitlement to an early deferred pension is set out in Clause 11 of the sale of shares agreement relating to E&TS dated 31 October 2005, between Magnox and Serco (**the Sale Agreement**). Clause 11 confirms that early pension payments are due (where such payments would have arisen under the ESPS and within the employ of Magnox) consequent on redundancy or reorganisation, based upon total accruals irrespective of where the accruals are held. The clause includes the requirement for payment of such benefit (unreduced early pension based upon total accruals to the date of cessation) should Serco cease to directly employ ex-Magnox staff.

54.21. In the event that the obligations to pay his deferred pension early had been placed on Serco in accordance with the transfer agreement and those obligations had not been transferred to AMEC, then Serco was attempting to evade its obligation which must surely amount to attempted fraud. He was aware that, on the same day on which E&TS Limited was sold to Serco (31 October 2005), E&TS Limited's share capital was increased by £9,999,999. He considered this to be consistent with a rumoured "dowry", which Magnox paid to Serco. He noted the liquidator's statement of account at winding up, in respect of E&TS some years later, revealed funds of £8,200,000 reverting to Serco Holdings Limited.

54.22. Magnox could not have fulfilled its obligations under the Sale Agreement to maintain some degree of control over Serco's ongoing decisions in relation to E&TS. He believed that Serco absorbed this 'dowry' rather than using it to ensure that the transferred employees' pension rights were met following its sale of ESRC to AMEC. Magnox's awareness of this fact made it complicit.

54.23. Under Regulation 19(2) of the Protected Persons Regulations, there are "implications with regard to Serco being designated as the employer against my pension accruals when I was made redundant from AMEC."

54.24. If it were, in fact, the case that an early pension on redundancy only applied to transferred accruals, it would be contrary to:

54.24.1. the general intention of "no loss of benefit" of the 'ESI Regulations';

54.24.2. Regulation 19(2) of the Protected Persons Regulations;

54.24.3. the understanding of the transferees (while being a fact known to Magnox, Serco, and AMEC);

54.24.4. the implications of the ESPS handbook; and

54.24.5. what Magnox had led transferring employees to believe during negotiations before the initial transfer and as confirmed in the 2005 Booklet.

54.25. Magnox, Serco, and AMEC would have had a duty of care to inform all of the ex-Magnox transferring employees of the disadvantages of not transferring. The advice would have needed to, at least, have been ratified by all three companies.

54.26. Serco failed to meet its early pension obligation at onward transfer and Magnox failed to enforce it. "Serco is obligated to the employees under SPLAS rule 4.2.1.3 (relevant to the accruals within SPLAS) and to Magnox under Clause 11 [of the Sale Agreement]. Magnox is obligated to the transferees under the [2005 Booklet]…and Regulation 19(2) of the Protected Persons Regulations (for accruals remaining in ESPS). These obligations are consistent with the intent of the ESI Regulations and of TUPE ie [*sic*] retention of benefits."

54.27. Onward transfer from Serco was an acknowledged possibility; the 2005 Booklet acknowledged and provided ongoing protection in such an event.

54.28. The basis of the 2005 Booklet was to extend the tenure of the ESPS for the period of employment with Serco without triggering early pensions. This enabled Magnox to transfer its original obligation that would have been due on original transfer (under ESPS rule 16(2)) such that it became applicable to ensuring an early pension on compulsory exiting of SPLAS. Accordingly, it wrote the early pension provision into the Magnox/Serco commercial arrangements, and it is a requirement of SPLAS (Rule 4.2.1.3).

54.29. While the 2005 Booklet referred to redundancy, it did not mention reorganisation. Magnox was aware that the transferees did not know the implications of the term reorganisation, which was used in Rule 17(1A) of the

ESPS Rules. The fact that Magnox avoided clarifying this in the 2005 Booklet did not detract from the carry through of their obligation to ensure triggering of early pension benefits on closure of the pension scheme to the staff on Serco reorganisation. Indeed, it is the foundation upon which Magnox avoided meeting their otherwise due early pension obligation at transfer from Magnox to Serco, such obligation being the default position should Magnox renege on their intended arrangements.

54.30. Magnox and NDA have refused to provide any substantiation for their assertions that they are not responsible for his benefits under SPLAS and that this is a matter for Serco and/or AMEC. NDA and Magnox have refused to enter any discussion with him or entertain his submissions. What is required of Magnox/NDA is not an analysis of the Magnox/NDA contractual position with the transferee companies and the onward applicability of the Electricity and Energy Acts, but a remedy for the apparent failure to adequately build in the protections promised to the transferees.

54.31. He requested an oral hearing in the event that I did not uphold his complaint, on the basis that this would facilitate interrogation of the key issues and would require all parties to justify their positions.

55. I sent my Preliminary Decision on Mr Y’s complaint on 13 November 2023.

56. In response to my Preliminary Decision, Mr Y made further submissions. He sought to simplify his complaint, so that it covered only what he considered to be his right to an early pension on the transfer of his employment out of Serco. A summary of his response to the Preliminary Decision is set out in the sub-paragraphs below:-

56.1. Magnox acted disingenuously in transferring staff out of the ESI, being careful to mention only that an early pension would be payable on redundancy and not on a transfer of employment out of the ESI. Rule 17(1A) of the ESPS Rules provided for the latter, and he and other transferees were unaware of this benefit. Magnox refused to clarify, in response to staff queries, whether the protection of benefits against frozen accruals within the ESPS on redundancy from Serco would hold through any future transfers. It was clear that Magnox and Serco intended that transfer out of the employment of any employer participating in SPLAS would trigger payment of an early pension, having deferred Magnox’ responsibilities in that regard with the intention that payment of the early pension on exit from Serco would resolve the issue.

56.2. The ESPS included provision for an early pension to be paid, from age 50, on redundancy or on transfer to an employer whose pension scheme did not participate in the ESPS. This was not paid on initial transfer from Magnox to Serco; the ‘Magnox/Serco joint arrangements deferred payment to (if and when) compulsory exit from employment with Serco.’ He wished to claim payment of that early pension.

56.3. He again requested an oral hearing or, should an oral hearing not be granted, that 'the case documentation' (in particular, his submissions dated February 2024 (**the February 2024 Submissions**)) was opened to public access, in accordance with the principle of open justice.

56.4. Regarding E&TS' dissolution in 2011, he and other transferees were unaware of this and were not informed of it. 'Magnox had no known involvement.' He suggested that E&TS' dissolution 'would have enabled Serco to make an assessment of Magnox's engagement with their obligations to the transferees further to the original transfer. Such knowledge would have been useful to Serco, prior to transfer of the staff to AMEC the following year, in gauging the likelihood of Magnox enforcing the terms of the E&TS sale agreement.'

56.5. 'The conditions for triggering early pension on transfer out of the employ of SPLAS participating employers (30 June 2012) against all previous accruals irrespective of whether held within ESPS or SPLAS, were met but it was not paid. Transferees remained unaware.'

56.6. On transfer to the AMEC group, transferees who were not protected persons were not given any option to transfer previous pension accruals into the ASPS. Transferees' understanding, which was based on assurances received from Magnox on the initial transfer from Magnox to E&TS, had been that their pension benefits on redundancy would remain the same whether they transferred or not.

56.7. He acknowledged that the assurances in relation to the transfer of pension accruals were limited to the initial transfer, which he asserts was inconsistent with 'the stated protections on onward transfer.' He considered this to be explained by the 'intention to resolve the early pension at exit from Serco'.

56.8. 'The complexity of the contractual provisions of the respondents and their subsidiaries and potentially further transferee/transferor companies has become apparent in pursuit of this claim, as has a reluctance to pursue a fair resolution. Accordingly, the most appropriate solution is to return to the original intention of payment of early pension on exit of Serco. The transferee right in this respect is based on Magnox's obligations under the ESPS being deferred (assuming transferee agreement) from exit of ESI/ESPS to exit of Serco/SPLAS. In addition, Serco are obligated to the transferees under the rules of SPLAS (with respect to active accruals within SPLAS).'

56.9. Looking at the ESPS Rules, Rule 16(2) provides that, on leaving Service (that is, leaving the employment of an employer participating in the ESPS or being placed in 'Retirement') as a consequence of redundancy or reorganisation on or after age 50, an early pension becomes available. This is reflected in respect of active members in SPLAS Rule 4.2.1.3 and 6.2.3.1. Under Rule 17(1A), on leaving Service (and so ceasing to be a 'Contributor')

before benefits are payable, accrued benefits are frozen until the member reaches age 50, at which point a pension becomes payable from those 'previously frozen accruals.' On that basis, no situation could arise under the ESPS Rules in which an employee whose benefits were already frozen would leave Service on redundancy or reorganisation.

56.10. Under Clause 11 of the Sale Agreement between Magnox and Serco (**the Sale Agreement**), where an employee has been retired compulsorily or left Serco's employment on redundancy, or in cases of onward transfer from Serco (in which case the employee is defined as having left the employment of Serco on reorganisation), Serco was required to provide to that employee those benefits that would have been due had the employee remained as an employee of Magnox and an active member of the ESPS. So, 'all accruals would reside in the ESPS irrespective of whether in actuality the employee had frozen their past accruals within the ESPS or transferred them to Serco.' Depending on whether they had reached age 50 at the time of leaving Serco's employment, either Rule 16(2) or 17(1A) of the ESPS would apply to the employee.

56.11. The scenarios set out in paragraph 56.10 above are consistent with Magnox's obligations to the transferees and as set out in the Transfer Agreement; '[transferee] benefits on redundancy or reorganisation are protected irrespective of whether accruals are transferred to SPLAS or remain within the ESPS.' Magnox had intended that transferees would remain employed by Serco, but the scenarios outlined in paragraph 56.10 above would be the default if that intention were not borne out. While the 2005 Booklet does not expressly mention protection of benefits on reorganisation, it 'assures protection of benefits through future transfers', as 'the locking of accruals within ESPS taken together with assurances within the [2005 Booklet] of protection of benefits through future transfers, suggests locked funds are similarly protected.'

56.12. Transferees were misled, as the scope of Clause 11 of the Sale Agreement extended beyond that of the Transfer Agreement, as the latter referred only to redundancy and not reorganisation. Transferees made decisions whether to transfer their past accruals on the basis of this misleading representation. Magnox was aware that transferees did not know of the provisions in the ESPS Rules that related to their benefit entitlement on reorganisation, and that transferees' understanding of the intention of the 2005 Booklet was that, if they were transferred onwards from Serco, the 'pension equivalence' would apply.

56.13. Onward transfer 'was an acknowledged possibility and the [2005 Booklet] acknowledged and provided ongoing protection in this event.' 'The logical interpretation is that the early pension protections on redundancy as defined within the clause of the [2005 Booklet]…would also carry through onward transfers.' The terms of the commercial agreements between Magnox and

Serco provided evidence of how Magnox intended to meet its obligations to the transferees, that is, via securing Serco's compliance with Magnox's obligations in the case of any onward transfer.

56.14. The position 'as understood by the potential transferees was imparted by Magnox through presentations and meetings throughout the year preceding the transfer. Further, the [2005 Booklet] only appeared as a formal issue during the final month.' The apparent anomaly regarding redundancy benefits through future transfers that was then presented to the transferees was only in the unlikely scenario (also as represented by Magnox) of the onward transfer of staff by Serco.

56.15. As part of their many questions, the transferees requested clarification of this anomaly. When Magnox refused to respond, transferees now at the 11th hour, were left with little option but to assume the many assurances they had been given of preservation of all benefits were truthful and Magnox was acting in good faith. Prospect also did not offer any clarification on this point.

56.16. 'The fact that Magnox avoided informing transferees of [Magnox's] obligations under the ESPS Rules (and the ESI Regulations) does not detract from the carry through of those obligations through transfer.' The deferment of the triggering of early pension under the ESPS Rules was incorporated in the commercial agreements between Magnox and Serco. This incorporation was the foundation upon which Magnox avoided meeting its original obligation to pay early pensions to the transferees on the transfer of their employment from Magnox to Serco. 'The original obligation is the default position should Magnox renege on their intended arrangements.'

56.17. SPLAS Rules 4.2.1.3 and 6.2.3.1 required the payment of an early pension, in relation to accrued benefits under SPLAS, at onward transfer from Serco to AMEC. 'This benefit replicates the original ESPS benefit, its incorporation into SPLAS being consistent with ESI statutes. It is also consistent with Serco's obligations to Magnox under clause 11 of [the Sale Agreement].'

56.18. 'Where transferee accruals remain in ESPS, Serco are obligated to Magnox under clause 11 of their commercial arrangements to pay an early pension at onward transfer from Serco. Magnox are in turn obligated to the transferees to ensure that such an early pension is paid (at onward transfer from Serco) on the basis of deferral of their original obligation to pay an early pension at initial transfer out of ESI/ESPS.'

56.19. He considers that, in my Preliminary Decision, I had, at best, represented the issues that he had presented loosely and, at worst, misrepresented or omitted particular issues.

56.20. He asserted that Magnox's obligation to pay an early pension to transferees on transfer from Magnox to Serco could not have disappeared by virtue of a transferee's transfer of their accruals out of the ESPS.

56.21. He considered that I had conflated the position, as represented in the 2005 Booklet, regarding severance benefits with that regarding early retirement benefits arising from retirement other than on severance.

56.22. He asserted that my analysis of the relevant SPLAS Rules in my Preliminary Decision "is counter to their meaning as defined by the wording of those rules inclusive of the definitions", and that my interpretation "is counter to a mirror image of ESPS" and "conflicts with Serco's contractual obligations to Magnox":

56.22.1. He submitted that the word 'retired', as used in SPLAS Rule 4.2.1.3 should not be interpreted by reference to whether a member had actually ceased all employment; leaving 'Service' (as defined in the SPLAS Rules, as set out in paragraph 95 below) constitutes retirement in this context.

56.22.2. He made specific submissions concerning the interpretation of Rule 6.2.3.1, which I shall mention in detail in paragraphs 94 to 96 below.

56.23. He asserted that I constructed a case in favour of the Respondents that the Respondents had not made themselves. I represented the material facts 'in a way that would deceive the reader and have refused [him] the opportunity to challenge me and the Respondents in a two-way dialogue.'

56.24. He made representations concerning procedural matters, which I shall explain in more detail below, in paragraphs 64 to 88.

56.25. Mr Y submitted that the 2005 Booklet has legal standing because:

56.25.1. the 2005 Booklet was signed by Magnox and Prospect on behalf of the transferring employees;

56.25.2. multiple statements made by Magnox in meetings, presentations and correspondence throughout the year prior to the transfer affirmed 'the details and veracity of the assurances as defined in the document';

56.25.3. the Magnox communication from Mr EY, submitted by Mr Y early on during the course of this investigation, 'specifically confirmed the contents of the transfer agreement as obligations on Magnox';

56.25.4. the 'Magnox correspondence ([Mr R and Mr T] discussing the redundancy protections stated within the [2005 Booklet])' should be taken into account;

56.25.5. to find that the 2005 Booklet had no legal standing and that Magnox could legitimately ignore its provisions would result in 'the de-facto basis that it enables Magnox to transfer the tenure of the

ESPS provisions into SPLAS thereby avoiding the otherwise requirement in the ESPS rules to trigger early pension rights on closure of the ESPS scheme to the transferees' becoming 'null and void.' This would mean that the situation would revert to the provisions of the ESPS rules triggering early pension rights under Rules 16(2) and 17(1A)(c) on transfer of the transferred employees out of the ESPS group of companies and out of the ESPS.

**Summary of AMEC's position**

57. AMEC said in summary:-

57.1. It had fully discharged the obligations it owed Mr Y. As required by the Protected Persons Regulations, on transfer from Serco, it offered Mr Y membership of the ASPS. The Rules of the ASPS allowed Mr Y to accrue future benefits on the same basis as accruals in SPLAS. Mr Y was also given the opportunity to transfer his accrued benefits from SPLAS to the ASPS within two years of commencing employment with AMEC, but he elected not to do so. AMEC has paid Mr Y an early pension on redundancy in respect of the benefits he accrued under the ASPS.

57.2. It did not owe Mr Y a duty of care, either under TUPE or in common law, to inform him of the consequences of not transferring his benefits in SPLAS to the ASPS. The obligation under TUPE was for the transferring employer (Serco) to consult with an appropriate representative such as a union and for ESRC, as the transferee, to provide information to Serco on the measures it intended to put in place in relation to the transferring employees.

57.3. That consultation took place while ESRC was still a subsidiary of Serco, before it had been purchased by AMEC, so AMEC was not directly involved in the consultation regarding the TUPE transfer. Nevertheless, AMEC does not accept that ESRC failed to meet the TUPE requirement to consult with employees. Given Prospect's active involvement in the transfer, AMEC believes it to be highly unlikely that Mr Y would not have been aware of the consequences of not transferring his benefits from SPLAS to the ASPS in the event of a subsequent redundancy. In any event, any claim based on failure to properly consult under TUPE is out of time under Regulation 16(3) TUPE, which provides that any claim must be brought within three months of the transfer. So, any such claim should be rejected.

57.4. The Courts have previously held that there is no general duty of care on employers to give their employees financial advice or to safeguard the employees' economic wellbeing. Having complied with their obligations under TUPE, AMEC and ESRC were under no further obligation to provide Mr Y with any additional information, or to ensure that he acted in a way which was in his best financial interest.

57.5. Following his TUPE transfer from Serco, Mr Y addressed his question about his pension arrangements to the Trustees and not to ESRC. Neither AMEC nor ESRC were aware of the details of Mr Y's accrued benefits in SPLAS. So, they cannot be held liable for any insufficiency in the information Mr Y was provided about those benefits. AMEC and ESRC also cannot be held liable for any statements made at the time of the TUPE transfer from Magnox to Serco, as AMEC was not a party to that TUPE transfer.

57.6. It was not clear, on the balance of probabilities, that Mr Y would have transferred his deferred benefits from SPLAS to the ASPS if he had received more information about the consequences of redundancy. There would have been a number of factors relevant to Mr Y's decision, which would have made it reasonable for him to conclude that he was likely better off deferring his benefits. These factors included: the respective covenant strength and reputation of Serco and AMEC; the risk of redundancy, which may have appeared low at the time; and the rate of revaluation of deferred benefits appearing higher than the prospect of future salary increases in AMEC. Any decision that Mr Y took needed to be seen in light of his position at that time, rather than retrospectively in light of his later redundancy.

57.7. Regarding the economic position between AMEC and Serco, the transfer agreement between Serco and AMEC included provisions allowing Serco to reimburse ESRC for the cost of providing any past service benefits transferred from SPLAS to the ASPS, on a specified actuarial basis. This was in recognition of the possibility of employees wishing to transfer their benefits from SPLAS to the ASPS. The intention of those provisions was that there would be no financial detriment to ESRC if the relevant employees chose to transfer their benefits. It would not have been in AMEC's or ESRC's interest to withhold information from employees about the redundancy benefits payable if a member transferred their benefits to the ASPS, and they did not withhold such information.

**Summary of Serco's position**

58. Serco said in summary:-

58.1. Mr Y made a conscious decision not to transfer his deferred benefits, for his own pecuniary advantage. He made a calculated decision to take advantage of, amongst other things, the rate of revaluation being higher than anticipated future salary growth in AMEC. He would also have had access to his full SPLAS pension at age 60 while continuing to enjoy employment and pension accrual in the ASPS. It presumed that, at the time when Mr Y decided not to transfer his benefits from SPLAS to the ASPS, the risk of redundancy was considered by Mr Y to be low. Further, SPLAS offered a "secure, well run and well funded pension scheme in which to retain the bulk of the benefit accrued which could then be accessed at age 60."

58.2. It had fulfilled all its statutory obligations to Mr Y. There was no duty under the Protected Persons Regulations for a new or former employer to inform members of their rights and/or the advantages and disadvantages of transferring or deferring their benefits. Rather, the Protected Persons Regulations require employers to: ensure the relevant scheme is properly funded; permit the transfer of accrued rights within two years of a member commencing employment; and ensure that equivalent accrued rights are granted in the new scheme.

58.3. There is a danger of conflating awareness with advising. In Mr Y's case, he was aware of both the ability to transfer and the implications of a transfer. He was not advised, and it is not the place of the employer to advise, as shown in the case of *University of Nottingham v Eyett and another* [1999] OPLR 55 (**Eyett**). There was no breach of the obligation to act in good faith, which is limited in nature as shown by Eyett. Where a breach has been established, it has been through deliberate conduct by the employer in a situation where that conduct has been sufficiently serious to justify the employment contract as being repudiated. The facts in this case did not meet this high threshold. There was no deliberate attempt to manipulate an outcome.

58.4. There was also no common law duty on employers to warn employees of the consequences of not transferring their pension benefits and, in any event, Mr Y was aware of the consequences of not transferring his benefits. The key case is *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 (**Scally**). The duty arising in Scally is limited to specific circumstances, requiring a lack of awareness of the contractual right in question and a demonstration that, had the complainant known at the time, they would have exercised the option.

58.5. The case law is clear that the Courts would only imply a contractual obligation where the situation was known to the employer but not to the employee. In the case of Eyett, it was found that there was "no positive obligation on an employer to warn an employee who is proposing to exercise important rights in connection with his contract of employment that the way in which he is proposing to exercise them may not be financially the most advantageous way in the particular circumstances."

58.6. Mr Y's case did not satisfy the limited conditions set out in Scally and considered in Eyett, because he had knowledge of the impact of deferring, as opposed to transferring, his benefits. Mr Y was aware of the impact since the original move from Magnox[8] and this issue was reinforced subsequently. During the two-year period from the date that his employment was transferred from Serco to AMEC, Mr Y specifically raised the question of

[8] Serco has referred to the paragraph of the Severance Benefit Statement that is set out in paragraph 26 above, in support of this submission.

accessing his deferred benefits on redundancy. He was informed that the benefits in SPLAS were inaccessible until his NPA.

58.7. Mr Y has demonstrated his grasp of the matter through the articulation of his arguments. It was clear, from Mr Y's submissions, that "pensions was a topic that was very much in the forefront of his thoughts upon his move from Magnox and that members had a good understanding of the protections in place and nature of the transfer decision." It seemed implausible that Mr Y subsequently forgot all of this when his employment was transferred to ESRC, and that being informed that no early retirement benefit would be available as a deferred member of SPLAS did not cause him concern or prompt him to consider the matter further, in light of previous events.

58.8. While Mr Y was not a pension expert, he had sufficient experience and understanding of the matters to have asked the right questions and to have made suitable enquiries in response to what he was being told. His contention that he had no knowledge of either the option to transfer or of its consequences was untenable.

58.9. Mr Y had known, since his transfer from Magnox, that leaving deferred benefits in a scheme as opposed to transferring them to the receiving employer's pension scheme would impact his early retirement benefits. This was made clear to Mr Y in the 2005 Booklet.

58.10. Any disputes in respect of Mr Y's rights as a protected person and the interpretation of those rights are to be resolved through the dispute mechanism prescribed under Regulation 21 of the Protected Persons Regulations.

58.11. Any allegation of negligent misrepresentation was against Magnox, whom Mr Y frequently mentioned in his claim.

58.12. Mr Y asserted that there had been a commercial term, between Magnox and Serco, which created additional protection for his accrued pension benefits outside of the SPLAS rules and which was paid for by a "dowry" and should have been passed on under TUPE on each subsequent transfer. Serco does not understand what is meant by the term dowry.

58.13. The contract between Magnox and Serco contained provisions to deal with any shortfall in the bulk transfer value transferred from the transferring scheme. Such a provision is expected in a transaction such as the nature of that between Magnox and Serco, involving the potential transfer of past service pension liabilities. It believes that Mr Y was confusing a standard bulk transfer shortfall provision with an employee contractual promise.

58.14. This was neither a dowry nor an employment contractual right. It was a means of protecting SPLAS to ensure that it received an agreed value level in circumstances where the actuarial value placed on the liability by the

transferring scheme was deemed insufficient by the receiving scheme. It was not aware of any contractual rights, under Mr Y's employment contract with Serco, that have not been honoured.

58.15. While it was confident that it satisfied its obligations under the Sale Agreement, it should be noted that none of the provisions in the Sale Agreement created rights for Mr Y. The Sale Agreement excluded the possibility of a third party such as Mr Y from having any rights under the agreement. Mr Y was not a party to the Sale Agreement and cannot claim any rights through it.

**Summary of the Trustees' position**

59. The Trustee cited Sub Rule 6.2.3.1 of the SPLAS Rules[9] and said in summary:-

59.1. Mr Y's service with Serco ended as a result of a transfer of employment to AMEC and not due to redundancy. Mr Y was subsequently made redundant by AMEC but AMEC is not an employer or associated employer within SPLAS. So, there was no obligation on the Trustees to pay him an early pension from SPLAS on redundancy from AMEC.

59.2. Mercer who was the administrator of SPLAS was not an independent financial advisory body. So, it would have been inappropriate for it to advise Mr Y of the disadvantages of not transferring his benefits in SPLAS to the ASPS.

59.3. The Trustees had informed Mr Y on two occasions (23 May 2013 and 20 September 2013) that his deferred benefits in SPLAS would not be paid early on redundancy from AMEC. This information was provided before expiry of the two-year window within which Mr Y could have transferred his deferred benefits.

59.4. The two-year window to transfer the benefits is an overriding statutory requirement under the Protected Persons Regulations. However, the two-year window did not apply to ordinary transfers, which are permitted at any time.

60. With regard to whether Mr Y's Service had ended "due to a reorganisation of the Employers' business", the Trustees made the following submissions:-

60.1. There was no record of whether that point was considered at the time when Mr Y's employment transferred to ESRC/AMEC.

60.2. The Trustees' view was that no entitlement arose under Sub Rule 6.2.3.1 of the SPLAS Rules in respect of Mr Y, for the following reasons:-

[9] This Rule is set out in Appendix 2.

60.2.1. Sub Rule 6.2.3.1, which was introduced in order to meet the requirements of the Protected Persons Regulations, was intended to provide protection to a member in circumstances where a member's service ended by reason of termination of employment.

60.2.2. The transfer of employment from Serco to ESRC and ESRC's subsequent sale to AMEC were covered by TUPE. A key feature of the TUPE transfer was to provide continuous employment, and pension rights on early retirement or redundancy transfer from the old employer to the new one under TUPE. In Mr Y's case, this was reinforced by the Protected Persons Regulations. Sub Rule 6.2.3.1 was not engaged, as Mr Y's employment was not terminated by Serco, but was transferred, under TUPE, to ESRC and, ultimately, to AMEC.

60.2.3. The word 'reorganisation' is not defined in the SPLAS Rules, or in pensions or employment legislation, so it falls on the Trustees to interpret it. 'Reorganisation' is normally used in connection with termination of employment where individual job roles are no longer required, which is similar to the definition of 'redundancy' under section 139 of the Employment Rights Act. 'Redundancy' and 'reorganisation' are interlinked as they each require termination of employment due to the role or function ceasing to be required. If this were not the case then, under many UK pension schemes with similar rule provisions, every member who was transferred from one employer to another under TUPE would potentially be, or become, entitled to unreduced early retirement benefits.

60.3. They consider that the normal meaning of 'reorganisation', applies to Sub Rule 6.2.3.1 of the SPLAS Rules. This is in line with many other defined benefit pension schemes that use similar language, such as regulation 30(7) of the Local Government Pension Scheme Regulations 2013.

**Summary of Magnox's position**

61. Magnox said in summary:-

61.1. All contractual obligations to Mr Y were discharged at the point his employment was transferred to Serco. Magnox had no further ongoing obligations to Mr Y with regard to the early payment of his deferred benefits.

61.2. Transferring members would have made decisions concerning whether to transfer their benefits from the ESPS to SPLAS on the basis of the information set out in the 2005 Booklet. The 2005 Booklet explains that past service benefits did not have to be transferred from Magnox to Serco, but in that case only future service benefits would be undiscounted in the event of redundancy. It expected the same to apply for any subsequent transfers.

61.3. The ESPS rules provide for an unreduced pension to be provided in the event of redundancy to active members only, not those who have chosen to leave deferred pensions in the ESPS.

61.4. Many of the employees who transferred had protection under the Electricity Act, which in particular protects future service pension benefits. It had written to those employers to whom it had transferred employees, including Serco, to remind them of their obligations, in early 2014.

**Summary of NDA's position**

62. This complaint was not a matter for NDA as it discharged its statutory obligations to Mr Y when his employment transferred from Magnox to Serco. NDA's obligations under the Energy Act were limited to ensuring that, where there was a relevant staff transfer, the receiving employer provided an appropriate pension scheme, and the pension benefits were no less favourable than the benefits under the original scheme. Further, redundancy-triggered rights were contingent benefits that were usually only payable when a member was made redundant in active membership.

**Conclusions**

63. I will consider Mr Y's complaint under the following headings:-

63.1. Procedural matters.

63.2. NDA's obligations under the Energy Act.

63.3. The Trustee's obligations under the SPLAS Rules.

63.4. Statutory obligations.

63.5. Contractual obligations between Mr Y and Magnox.

63.6. The effect of the transfer from Magnox to Serco on Mr Y's entitlement under the ESPS.

63.7. The extent of the assurances given to Mr Y by Magnox.

63.8. E&TS' dissolution

63.9. The Sale Agreement

63.10. Communications from Serco and AMEC.

63.11. Duty to provide information.

63.12. Beckmann rights

**Procedural matters**

*Request for oral hearing/publication of submissions*

64. Mr Y has, on three occasions during the course of the investigation into his complaint by TPO, requested an oral hearing. The first request was considered by the Deputy Pensions Ombudsman who was in office at that time (**the DPO**). The DPO responded in writing to Mr Y's request, explaining that she did not consider that an oral hearing was necessary. I expressed my support for, and agreement with, the DPO's view that an oral hearing was not necessary, in my Preliminary Decision issued on 13 November 2023. My Preliminary Decision followed the DPO's Preliminary Decision, which had been issued previously. In my Preliminary Decision, I explained that I did not consider an oral hearing to be necessary, given the detailed submissions, with supporting documentation, received from Mr Y and the Respondents, which were sufficient for me to determine this matter.

65. Since I issued my Preliminary Decision, Mr Y has made two further requests for an oral hearing; in December 2023 (in a letter addressed to the current Pensions Ombudsman) and as part of the February 2024 Submissions. Mr Y's statements in support of his oral hearing request include that: it is necessary to hold a hearing to ensure that the case is fully understood by all parties and that 'a fair and honest determination emerges based on inexorable and unchallenged logic.'; and 'to present the Final Decision as a fait accompli finding against my claim without having addressed the core issues in open session to which I am party would be to perpetrate a deliberate miscarriage of justice; the epitome of tyranny.'

66. I considered Mr Y's December 2023 oral hearing request and decided that it would not be necessary to hold an oral hearing in relation to Mr Y's complaint. TPO's Deputy Chief Operating Officer responded to that request on my behalf, in a letter to Mr Y dated 22 January 2024. Having considered Mr Y's further request, my decision remains that no oral hearing is necessary. My reasons for this are set out in paragraphs 67 and 68 below, and reflect the reasons already given to Mr Y in respect of his previous requests.

67. The purpose of holding an oral hearing during the investigation of a case is to assist the Pensions Ombudsman, or the Deputy Pensions Ombudsman (as the case may be), in reaching a Determination in respect of that case. An oral hearing would only be held in the following circumstances, and/or when the Pensions Ombudsman or the Deputy Pensions Ombudsman decides that it is right and proper to do so:

    67.1. there are differing accounts of a particular material event and the credibility of the witness needs to be tested;

    67.2. the honesty and integrity of a party has been questioned and the party concerned has requested a hearing; or

    67.3. there are disputed material and primary facts which cannot be properly determined from the papers.

68. I consider that all of the relevant information is contained in the many documents and extensive submissions that Mr Y and the other parties to this complaint have provided.

69. Mr Y does not consider that I have recognised or addressed the content of his submissions, 'including the hard evidence presented', or that I intend to reach a 'fair and honest determination.' However, the many points that Mr Y has raised, and any evidence that he has provided, have been considered and have been addressed in correspondence and/or in this Determination.

70. Further, Mr Y has requested that, in the absence of an oral hearing, all of his submissions in respect of his complaint should be made publicly available and that he should be allowed the opportunity "either orally or via correspondence, to present [his] case to the Respondents and interact with their response." Mr Y has cited the legal principle of open justice in support of these views. I shall consider Mr Y's claim, that concluding this case without holding an oral hearing or publishing his submissions in full would be contrary to the principle of open justice, below in paragraphs 71 to 73.

71. As stated by Lady Hale in the case of *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims' Support Groups Forum UK)*[10] (**Dring**), the principle of open justice applies to "all courts and tribunals exercising the judicial power of the state", and it is within a court or tribunal's inherent jurisdiction to determine what is required of it by that principle, in terms of allowing access to documents and information placed before it.[11] The two principal purposes of the open justice principle, as identified by Lady Hale in Dring, are: to enable public scrutiny of the way in which courts decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly"; and "to enable the public to understand how the justice system works and why decisions are taken", acknowledging that access to written material that has not been read out during public hearings is often necessary in order to achieve this.[12]

72. However, applying the principle of open justice does not present a default position that all written material considered in a case before the court or tribunal must be either read aloud in public or published in writing: "although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle."[13] When deciding whether to grant access, the potential value of the information in question in advancing the open justice principle must be balanced against "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or

[10] [2019] UKSC 38

[11] *Dring*, at paragraph 41.

[12] Dring, paragraphs 42 to 43.

[13] Dring, paragraph 45.

to the legitimate interests of others"[14]. The practicalities and proportionality of granting the request are also relevant.

73. To date, no non-party has sought access to the materials that I have considered in relation to this complaint, so I need not consider granting such access. Mr Y, as the Applicant in relation to this complaint, is fully aware of his own submissions and has been provided with copies of the Respondents' submissions. My publishing of any of the documents or correspondence received during the course of this investigation would not assist Mr Y in scrutinising my decision-making or in understanding how TPO's processes work. Should Mr Y disagree with my findings in this Determination, it will be open to him to apply to the High Court for permission to appeal on any point of law.[15]

74. Finally, I note that Mr Y has stated, in the February 2024 Submissions, that I must address every matter raised in that document and that he is to be given further opportunity to respond to my decision. To do as Mr Y has asked would lead to a very lengthy Determination, given that the February 2024 Submissions cover 40 pages. I assure Mr Y that I have considered all of his submissions, and those of the Respondents, which TPO has received during the course of this investigation, thoroughly.

75. The position of the Court of Appeal on the matter of my duty to give reasons for reaching any decision, as expressed by Gibson LJ in the case of *Duckitt v Farrand*[16], at paragraphs 20 to 21:

> "The position in law seems to me abundantly clear. The duty to state reasons is a duty to tell the parties whether they have won or lost. The decision-maker must have regard to every material consideration; but he does not have to state every material consideration to which he has had regard. The classic statement on a statutory duty to give reasons is that given by Megaw J in *Re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 478, where he said this:
>
> Parliament provided that reasons shall be given and in my view that must be read as meaning that proper adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantive points that have been raised.
>
> In an employment case, *Meek v City of Birmingham District Council* [1987] IRLR 250 at page 251, Bingham J said:
>
> The parties are entitled to be told why they have won or lost. There should be a sufficient account of the facts and the reasoning to enable the EAT or on further appeal this court to see whether any question of law arises."

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[14] Dring, paragraph 46.

[15] Section 151(3) of the Pension Schemes Act 1993.

[16] [2001] 18 PBLR – [2001] PLR 155 – [2001] OPLR 113

*Transparency*

76. Mr Y has stated that 'the Respondents (or their representatives)' and I 'have been, contrary to the normal standards of openness/honesty/integrity, engaging in communications from which [Mr Y] has been excluded.' That is not the case. I understand that Mr Y is referring to correspondence, during March and April 2023, between TPO and the Trustees' legal advisor, in which TPO had questioned the Trustee with regard to its consideration of the application of Rule 6.2.3.1 of the SPLAS Rules to Mr Y.

77. Regrettably, due to a genuine error on the part of the sender, when my Preliminary Decision was sent to Mr Y, that correspondence (which had not been sent to Mr Y previously) was not included. When Mr Y made TPO aware that he had not had sight of the correspondence, TPO provided him with a copy expediently. TPO also granted him a significant extension of the deadline for him to respond to my Preliminary Decision, so that he might take the correspondence into account in preparing his further submissions.

78. Any procedural error that arose from TPO's initial omission has been corrected by the subsequent provision of the correspondence and the generous extension to the timeframe, which was granted to Mr Y in order for him to prepare his response to my Preliminary Decision.

79. I also note that Mr Y has raised concerns that the response to TPO's letter to the Trustees came from the Trustees' legal advisor, not from the Trustees themselves. I do not agree that this is any cause for concern; whether any party to a complaint brought to TPO seeks professional representation is a matter for that party and it is not uncommon practice for a respondent to a TPO complaint to do so.

80. Mr Y has further expressed concerns that Serco's and the Trustees', handling of their responses to TPO's investigation of his complaint has given rise to conflicts of interest for the individual who has been TPO's point of contact for both Serco and the Trustees at various points throughout this investigation. Provided that I am satisfied that any submissions received from any party to a complaint that I investigate have genuinely been made by that party or by a representative appointed by that party, it is not my concern whether two respondents to a complaint are represented by the same person.

81. Mr Y has submitted that I have 'constructed a case in favour of the Respondents' that has not been made by the Respondents, and that I have advanced arguments in my Preliminary Decision, which have not been made by the Respondents.' Mr Y has not elaborated this submission. However, in response to Mr Y's submission, I will point out that, in considering a complaint made to me, I am required to take into account the applicable law, whether or not the Respondent has raised it.

82. Mr Y has stated that, throughout the course of this investigation, he has made robust counter-arguments in response to the Respondents' arguments, which I have failed to reflect in my Preliminary Decision, or to put to the Respondents and require them to

clarify their position with regard to his counter-arguments. Again, Mr Y has not elaborated. So, as a general point, I will draw to Mr Y's attention the Court of Appeal case of *Seifert v Pensions Ombudsman* [1997] 4 All ER 947 CA. In that case, the Court of Appeal declined to make any finding as to when the then Pensions Ombudsman could call a halt on his referral of letters between the Applicant and the Respondent to the complaint concerned. The Court explained that the Ombudsman was required to adopt a procedure that was fair to both parties in all the circumstances of that case.

83. I have considered all of Mr Y's submissions, including his 'counter-arguments' to the Respondents' arguments, during the course of this investigation, and specific questions have been asked of the Respondents where I (or the previous DPO) have deemed it necessary. I consider that the approach taken has been fair to Mr Y and to the Respondents. Contrary to Mr Y's assertion that the parties should be given the opportunity to challenge each and every one of each other's arguments and responses, continuing 'until the only remaining arguments are unchallenged and there are no new arguments being made', it is my role as the Deputy Pensions Ombudsman, not that of the parties, to decide the outcome of Mr Y's complaint.

*Mr Y's request to simplify his complaint*

84. In his February 2024 submissions, Mr Y said that his complaint is to be simplified 'to revert to resolution on the originally intended basis, namely (as is now known to be the case) early pension at exit of Serco.' On that basis, he has chosen to limit his submissions made in response to my Preliminary Decision so that they were 'predominantly relevant to the simplified claim whilst providing sufficient details for an understanding of its genesis from the original claim.'

85. It is to be noted that the purpose of sharing my Preliminary Decision with the parties to a complaint is to inform the parties of my point of view at that point in time, and to allow them to make further submissions that they have not made previously, which they consider might change my position. This is explained in TPO's standard wording, which is set out at the top of the first page of any Preliminary Decision and states:

> "Subject to any further submissions made by the parties the Ombudsman presently intends to issue a Determination along the following lines. This Preliminary Decision also contains details of the directions (if any) which the Ombudsman is considering.
>
> If you wish to make any further submissions you should do so within the time scale set out in the accompanying letter. The Ombudsman may change the decision or the directions having considered those submissions."

86. Sharing a Preliminary Decision with the parties does not amount to an invitation to change the focus of the complaint, as Mr Y is seeking to do in this case.

87. To the extent that Mr Y's request to limit his complaint as described in paragraph 84 above, might amount to being an application, in accordance with Rule 4(b) of TPO's

Procedure Rules[17] for leave to withdraw any part of his complaint that I have considered in my Preliminary Decision, I do not grant him such leave. It is important that the Respondents to this complaint, which has taken some years to investigate, receive clarity with regard to the matters raised in it, so I do not consider it appropriate to allow the complaint to be narrowed at this late stage.

88. Mr Y's complaint requires me to consider whether the Respondents correctly interpreted and applied the relevant scheme rules. I also need to consider whether they acted in accordance with any other obligations that were imposed on them under: the Protected Persons Regulations; the Energy Act; TUPE; and/or under any other duty of care or contractual duty owed to Mr Y, in order to determine Mr Y's eligibility, or any of the Respondent's liability, for the early payment of his deferred SPLAS benefits. I shall deal with these issues in turn below.

**NDA's obligations under the Energy Act**

89. Schedule 8 to the Energy Act imposes obligations specifically on NDA. In summary, NDA's obligations were limited to ensuring that Mr Y was consulted with prior to the TUPE transfer to E&TS and its sale to Serco, and that the provisions of SPLAS were no less favourable to the provisions of the ESPS. I have not seen any evidence that NDA breached this statutory duty.

**The Trustees' obligations under the SPLAS Rules**

90. I shall consider first whether Mr Y became eligible, under the SPLAS Rules, for an unreduced early retirement pension from SPLAS, on leaving active membership of SPLAS, and/or on being made redundant by ESRC.

91. Rule 1.2 of Section F of the SPLAS Rules states that, in relation to protected persons, Section F of the SPLAS Rules is 'intended to meet the requirements for an alternative scheme for the purposes of the Protected Persons Regulations and are subject to those Regulations.'

92. Rule 1.3 of Section F of the SPLAS Rules requires that, in the event that any individual benefit under Section F of the SPLAS Rules provided to a protected person is less than the equivalent benefit that would have been provided to that protected person under the ESPS Rules as at 31 March 1990, the Trustees shall take any necessary steps to deal with the discrepancy.

*Rule 4.2*

93. Rule 4.2 of the SPLAS Rules (see Appendix 2) sets out the circumstances in which an early retirement pension is payable where an Active Member retires.

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[17] That is, Rule 4(b) of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Rules 1995, which provides that "The complainant may withdraw his complaint or dispute – (a) at any time before the end of fourteen days from the date he receives a copy of the [respondent's reply]…; or (b) thereafter with the leave of the Pensions Ombudsman which shall not be unreasonably refused.".

94. Sub Rule 4.2.1.3 of the SPLAS Rules, read in conjunction with Rule 4.2.2, provides that an unreduced early retirement pension is payable where an active member aged 50 or over 'is compulsorily retired from Service by his Employer due to redundancy or a reorganisation of the Employer's business.'

95. "Service" is defined, in the General Rules of SPLAS, as "permanent employment with any of the Employers and Service shall be deemed continuous although…performed partly with one Employer and partly with another Employer." "Employer" is defined as "such of the Employers as shall employ the Member for the time being" and "Employers" is defined as "the Principal Company and any Associated Employers which are participating in the Scheme."

96. "Associated Employer" is defined as a company "associated with" the Principal Employer (Serco Limited), which includes a company controlled by the Principal Employer.

97. Mr Y's active membership of SPLAS did not end until several days after the transfer of his employment to ESRC, so ESRC must have been an Employer for the period between that transfer and the sale of ESRC's share capital to AMEC.

98. However, I consider the crucial part of Rule 4.2.1.3 is the requirement for Mr Y to have been 'compulsorily retired.' The word 'retired' is not defined in the SPLAS Rules. The starting point for interpreting pension scheme rules is that a word will have the meaning that a reasonable person, with the background knowledge that would have been available to the parties, would have understood the parties to mean when they used it. I see no reason to attribute any different meaning to the word 'retires' from that of its normal use; that is, to leave one's job or stop working.

99. Additionally, the context within which the reference to retirement is made must be considered.[18] In Mr Y's case, the events that led to him leaving active membership of SPLAS were the transfer of his employment from Serco to ESRC, under TUPE, followed shortly by the sale of his new employer, ESRC, from Serco to AMEC, at which point his active membership of SPLAS ended.

100. Under Regulation 4(1) of TUPE (which is set out in Appendix 4), Mr Y's contract of employment with Serco was not terminated because of the TUPE transfer, his employment contract continued after the transfer as though it had originally been made between Mr Y and ESRC. The subsequent purchase of ESRC by AMEC did not affect Mr Y's contract of employment with ESRC. So, I do not conclude that Mr Y retired, or was retired, on the termination of his active membership of SPLAS. On that basis, I find that Mr Y has no entitlement, under SPLAS Rule 4.2.1.3, to an early pension.

101. Considering the requirement under Rule 1.2 (see paragraph 91 above), I shall now consider the provisions of Rules 16(2) and 17(1A)(c) of the ESPS and whether they

[18] IBM United Kingdom Holdings Ltd v Dalgleish [2015] EWHC 389 (Ch), (2015) Pens LR 99 (Warren J)

would have provided benefits to Mr Y in excess of those to which he is entitled under Rule 4.2.1.3 of SPLAS.

102. Mr Y's submissions focus in particular on the ESPS' Rule 17(1A)(c) (see Appendix 3), which states explicitly that a member 'shall be treated as having retired:…on his reaching age 50 where he has ceased to be a Contributor on leaving Service prior to that age consequent on reorganisation or redundancy.'

103. However, it is to be noted that ESPS Rule 17(1A)(c) applied only where active membership of the ESPS ceased prior to the member's 50th birthday. Comparing Rule 17(1A)(c) with SPLAS Rule 4.2.1.3, does not assist Mr Y, as he was aged over 50 years when his active membership of SPLAS ended. So, I find that Mr Y has no entitlement to benefits under Rule 4.2 of SPLAS.

*Rule 6.2*

104. Under Sub Rule 6.2.3.1, a normal pension and a retirement lump sum is payable 'where the Magnox Member's Service ended, in the Trustees' opinion, due to redundancy or a reorganisation of the Employers' business.'

105. I have considered whether, as a consequence of ESRC's having ceased to be an Employer under SPLAS or of Mr Y's later redundancy from ESRC when it was owned by AMEC, Mr Y became entitled to benefits under Rule 6.2.3.1. I have considered: the requirement in Rule 6.2.3.1 to have left 'Service'; the interaction with the Protected Persons Regulations; Rule 6.2.3.1 as a sub-Rule within the context of Rule 6.2; and any requirement to consider the wider context within which Rule 6.2.3.1 was drafted (see paragraph 113.1 and 113.2 below).

106. For the reasons that I have set out below in paragraphs 107 to 117, I have concluded that Mr Y has no entitlement to benefits under Rule 6.2.3.1.

*Requirement to have left 'Service'*

107. In order for Mr Y's Service to have ended, he must have ceased to be in 'permanent employment' with a company that was an 'Employer' (that is, controlled by Serco).

108. ESRC ceased to be an Employer when it was sold to AMEC, and therefore Mr Y's Service (as well as his Pensionable Service) ended at that time.

*Interaction with Protected Persons Regulations*

109. Regulation 6(5) of the Protected Persons Regulations requires a new employer to allow a protected person to transfer their accrued pension benefits into the new employer's [compliant] scheme by giving notice within two years of joining the new employer.

110. So, there is a conflict between:

    110.1. Rule 6.2.3.1, which purports to automatically put a pension into payment on a member leaving Service due to redundancy or a reorganisation; and

110.2. Regulation 6(5), which gives a protected person a right to transfer their accrued benefits to a new employer's scheme within two years.

111. If a protected person were to become entitled to an immediate pension under SPLAS as a consequence of their employment being transferred to another employer outside SPLAS, there would be no opportunity for Regulation 6(5) to operate.

112. The fundamental aim of the Protected Persons Regulations was to protect a protected person from being worse off as a consequence of the transfer of their employment. Part of this protection was to ensure that protected persons whose employment was transferred had the opportunity to transfer their benefits to a Protected Persons Regulations compliant pension scheme in which their new employer participated. This would have enabled the protected person to retain the same rights for their total accrued pension as if they had remained in the ESPS.

113. As noted in paragraphs 91 and 92 above:

113.1. Rule 1.2 of Section F of the SPLAS Rules states that, in relation to protected persons, Section F of the SPLAS Rules is 'intended to meet the requirements for an alternative scheme for the purposes of the Protected Persons Regulations and are subject to those Regulations.'

113.2. Rule 1.3 of Section F of the SPLAS Rules requires that, in the event that any individual benefit under Section F of the SPLAS Rules provided to a protected person is less than the equivalent benefit that would have been provided to that protected person under the ESPS Rules as at 31 March 1990, the Trustee shall take any necessary steps to deal with the discrepancy.

114. I consider that the SPLAS Rules were intended to be consistent with, and not conflict with or undermine, a member's rights under the Protected Persons Regulations.

115. So, I consider that for Rule 6.2.3.1 to comply with the requirements of the Protected Persons Regulations, benefits cannot be immediately payable under that rule where the protected person continues in employment with an employer who is subject to the Protected Person Regulations.[19]

116. Applying this to Mr Y, his accrued pension under SPLAS was not payable under Rule 6.2.3.1 as, although he left Service for the purposes of the SPLAS Rules, he remained in continuous employment with ESRC. So, he retained the ability to transfer his accrued pension under SPLAS to the ASPS within two years, in accordance with Regulation 6(5).

117. Had Mr Y exercised his right to transfer under Regulation 6(5), he would have been entitled, on his redundancy from ESRC, to an unreduced pension in respect of all of his pensionable service, spanning his employment by Magnox and all subsequent employers. The option for a Magnox Member to leave their accrued pension in

[19] Continuity of employment is defined in Regulation 5 of the Protected Person Regulations.

SPLAS was an option under which benefits would be treated differently (being deferred benefits) from how they would have been treated under the ASPS during Mr Y's active membership of the ASPS, and there were clearly potential advantages to that. For example, the deferred pension under SPLAS would be revalued, potentially at a rate exceeding any future salary increase; and Mr Y could foreseeably have chosen to continue working for ESRC beyond his NPA under SPLAS while receiving his SPLAS pension.

118. I have also considered in paragraphs 119 to 133 below the other issues that have been raised in relation to this point.

*Rule 6.2.3.1 and Rule 6.2: Pensionable Service and Service*

119. Rule 6.2 of Section F of the SPLAS Rules sets out the benefits to which a Magnox Member is entitled where that member becomes a deferred member of SPLAS, having left 'Pensionable Service[[20]] other than on death or retirement having completed more than one years' [*sic*] Qualifying Service.'

120. It is to be noted that, while the various sub-Rules under Rule 6.2 all require Pensionable Service to have ended[21], in order for Rule 6.2.3.1 to apply, Mr Y's 'Service', in addition to merely his 'Pensionable Service', would have had to have ended.

121. Mr Y's Pensionable Service of SPLAS clearly ceased when ESRC was sold to AMEC. However, if it had been intended that a member would become entitled to an immediate pension under Sub Rule 6.2.3.1 simply by virtue of his employer's ceasing to participate in SPLAS (as ESRC did when it was sold to AMEC), I consider that the defined term 'Pensionable Service', as opposed to 'Service', would have been used within Sub Rule 6.2.3.1.

122. Mr Y did not leave permanent employment as a consequence of either: the TUPE transfer from Serco to ESRC (under which his employment was deemed to be continuous); or AMEC's subsequent acquisition of ESRC (which did not affect his employment status).

123. I have considered Mr Y's submission that the use of the term 'Pensionable Service' in the header to Rule 6.2 is significant. I consider, the use of the term 'Service' in Rule 6.2.3.1, in contrast to 'Pensionable Service' in the header to Rule 6.2 and in Rule 6.2 itself, is deliberate. Having left Pensionable Service and become a deferred pensioner, the further requirement of having left 'Service' must have been met in order to become eligible for a pension on redundancy or reorganisation under Rule 6.2.3.1. For a pension to be payable under Rule 6.2.3.1 in Mr Y's situation, it would

[20] 'Pensionable Service' is defined, in Section F, Rule 1.4.15 of the SPLAS Rules, as '(a) any period of continuous Service during which the person pays contributions to the Scheme or during which the person is listed as an active Protected Magnox Member; plus [any further pensionable service credited to the member, for example under a transfer in from another pension scheme].

[21] For example, in order for a member to receive a normal retirement pension under Rule 6.2.1, that member need only have ceased Pensionable Service.

have been sufficient for the rule to have referred to 'Pensionable Service'. So, I consider that the use of 'Service' suggests that the rule was intended to apply where employment had ceased, rather than where the member continued to be employed but outside the corporate group.

124. This is consistent with the principle that the Protected Persons Regulations allow protected persons to transfer their accrued pensions with them to their new employer while they remain in employment, but they are entitled to early payment of benefits from age 50 if they cease employment due to redundancy or reorganisation.

*Further considerations*

125. Mr Y has made extensive submissions in relation to SPLAS Rule 6.2.3.1, some of which he made in response to my Preliminary Decision. I have addressed Mr Y's submissions in paragraphs 126 to 130 below.

*Relevant provisions of the ESPS Rules*

126. Given the requirements of SPLAS Rules 1.2 and 1.3 and those of the Protected Persons Regulations, and taking into account Mr Y's submissions concerning the relevance of Rules 16 and 17(1A)(c) of the ESPS Rules, I have considered the ESPS Rules 16(2) and 17(1A)(c) in relation to the construction of SPLAS Rule 6.2.3.1.

127. The ESPS Rule 16(2) provided an early pension for a member who was 'retired compulsorily by the Employer employing him'. As I have explained in paragraphs 98 to 100 above, Mr Y cannot be found to have been 'retired' by any of the SPLAS Employers, so my analysis of Rule 6.2.3.1 is not affected by the ESPS Rule 16(2). Regarding the ESPS Rule 17(1A)(c), that Rule would only have applied to Mr Y had he been aged under 50 years when he left active membership of SPLAS. Mr Y's age was more than 50 years when his active membership of SPLAS ceased, so I do not consider Rule 17(1A)(c) to be relevant to my analysis of SPLAS Rule 6.2.3.1 in relation to the transfer of Mr Y's employment under TUPE to ESRC or to ESRC's sale to AMEC.

*Mr Y's further submissions regarding the Protected Persons Regulations*

128. Mr Y has submitted that a transfer of employment that required the transferring employees to participate in a non-ESI pension scheme 'does not negate benefits enshrined within the transferor employer's scheme.' I do not consider that interpreting the SPLAS Rules in the way in which I have would negate Mr Y's benefits under SPLAS accrued prior to the transfer of his employment.

129. Mr Y has submitted that attempting to align the SPLAS Rules with the Protected Person Regulations is incorrect and 'indicative of a desperation to support Respondent interests', as the latter was 'designed around the ESI/ESPS and transfers within the industry (i.e. scheme participants) and not necessarily consistent with transfers outside the ESI.'

130. I disagree; the Protected Person Regulations contain provisions that are specific to a scenario in which an employee within the ESI is transferred to an employer that is unable or uninclined to participate in the ESPS and that must therefore comply with the protections that are in place under those provisions. I shall consider those provisions in detail under the heading: '*Statutory* obligations' below, but as I have explained in paragraphs 113 to 114 above, the requirements of the Protected Persons Regulations were clearly in the contemplation of the SPLAS Rules draftsman.

*Relevance of the Sales Agreement to the interpretation of Rule 6.2.3.1*

131. Mr Y has also submitted that Clause 11 of the Sales Agreement (**Clause 11**) must be considered when interpreting Rule 6.2.3.1. I have already made a finding concerning the construction of Rule 6.2.3.1 based upon textual analysis and taking into account the requirements of the Protected Persons Regulations. Further, as I shall explain below, in the section headed: '*The Sale Agreement*', Mr Y is not a party to the Sale Agreement so has no right to enforce any provision under it. However, I shall address Mr Y's submission and shall consider Clause 11 in relation to Rule 6.2.3.1.

132. Clause 11 provides as follows:

> 'In the event that after Completion any of the [transferred employees] is retired compulsorily by [Serco] on or after age 50 or leaves the employment of [Serco] prior to on or after age 50, in each case consequent on reorganisation or redundancy, [Serco] will provide, or procure that [SPLAS] provides, such benefits to each of those [transferred employees] as [ESPS] would have provided in those circumstances under rules 16(2) and 17(1A)(c) of the [ESPS Rules] as at the date of transfer, as the case may be, had those [transferred employees] remained active members of [ESPS] employed by [Magnox].'

133. Clause 11 essentially requires that, on leaving Serco's employment in the circumstances in which he did, Mr Y should be provided with benefits equivalent to those to which he would have been entitled under ESPS Rule 16(2) or 17(1A)(c) on the date of leaving Serco's employment had he remained an active member of the ESPS. Rule 17(1A)(c) would not have applied to Mr Y on leaving Serco's employment, as he was already over 50 years of age and he would not have become entitled to benefits under Rule 16(2), owing to the requirement under that Rule for him to have been 'retired'. So, I do not find that failing to provide Mr Y with an early pension on the transfer of his employment from Serco to ESRC, or on ESRC's sale to AMEC, is contrary to the requirement imposed on Serco by Clause 11.

**Statutory obligations**

<u>The Electricity Act</u>

134. Mr Y has submitted that, in failing to pay him an early retirement pension on his redundancy from AMEC, Serco and the Trustees are in breach of the obligations they owe him under the Electricity Act, the Energy Act and the Protected Persons

Regulations. Further, that AMEC, NDA, and Magnox have breached their respective duties under that legislation in failing to ensure that he receives an early pension from SPLAS. In further submissions, Mr Y clarified that he considered that, on redundancy from AMEC, he was entitled to receive the same benefits he would have received if he were still employed by Magnox and in pensionable service under the ESPS. He believes the onus to ensure his continuity of service and protection of his past accruals rests with Magnox.

135. The Electricity Act is the primary legislation that enabled the Secretary of State to make regulations, when the electricity industry was privatised, in order to amend the ESPS and to give "special protection to certain persons who have or may acquire rights under [the ESPS]." The Protected Persons Regulations were made under Section 104 and under Schedule 14 to the Electricity Act. The intention behind making the Protected Persons Regulations is set out in paragraph 2 of Schedule 14 to the Electricity Act, which includes the following:

"(1) The Secretary of State may make regulations for the purpose of securing that—

…

(c) no person to whom paragraph 3(1) below applies[[22]] is placed in any worse position by reason of any change of employer which does not affect his continuity of employment but prevents him from continuing to participate in or acquire pension rights under a relevant scheme;

and the references in paragraphs (a) and (c) above to any worse position shall be construed, in relation to a person to whom paragraph 3(1) below applies who, after the transfer date, ceases to participate in or acquire pension rights under the scheme, as references to a position which is any worse than his position immediately before he so ceases.

(2) Regulations under this paragraph may impose duties (whether as to the amendment of the scheme, the provision or amendment of other schemes, the purchase of annuities, the making of payments or otherwise) on persons who are or have been employers of persons to whom paragraph 3(1) or (2) below applies; and duties so imposed on any person may include duties owed to persons of whom he is not and has not been an employer."

136. The terms "pension" and "pension rights", used in Schedule 14, are defined in paragraph 5 of Schedule 14 which states:

"(1) In this Schedule—

[22] Paragraph 3(1) applies to employees who participated in the ESPS immediately prior to the "transfer date", so included Mr Y.

"pension", in relation to any person, means a pension of any kind payable to or in respect of him, and includes a lump sum, allowance or gratuity so payable and a return of contributions, with or without interest or any other addition;

"pension rights", in relation to any person, includes—

(a) all forms of right to or eligibility for the present or future payment of a pension to or in respect of him; and

(b) any expectation of the accruer of a pension to or in respect of him;

and includes a right of allocation in respect of the present or future payment of a pension."

The Protected Persons Regulations

*Aim of the Protected Persons Regulations*

137. The broad intention of allowing the Secretary of State to make the Protected Persons Regulations, included that the pension rights of the ESPS members who had to cease active membership of the ESPS as a consequence of a transfer of their employment, were to be no worse than the pension rights that they would have benefited from had they been able to remain in active membership of the ESPS. I shall explain in paragraphs 138 to 148 below, how the Protected Persons Regulations achieve the aims of Section 104 and Schedule 14 to the Electricity Act.

*Use of an 'alternative scheme'*

138. Under Regulation 7(3) of the Protected Persons Regulations, where a protected person's employment transfers to a new employer who participates in an "alternative scheme" (as opposed to participating in the ESPS), the future pension right of that protected person under that alternative scheme is "to accrue pension rights which are no worse than transfer date rights."[23] "Transfer date rights" is defined, by Regulation 2, as (broadly) the future pension rights provided under the ESPS. In other words, the alternative scheme must allow the protected person to accrue benefits on a basis at least as good as that provided by the ESPS.

139. Regulation 6(1) of the Protected Persons Regulations placed certain obligations on an employer of a protected person (see paragraph 11 above). Additionally, under Regulation 6(4) and (5), the employer must procure that:

[23] Alternatively, under Regulation 7(2), where the alternative scheme already has protected persons participating in it, the transferring protected person has a right to accrue pension rights on the same basis as that applicable to those other protected persons. This is not applicable in Mr Y's case.

139.1. a protected person in its employment is able to transfer their “accrued pension rights” to the relevant scheme provided by the employer within two years of transferring to that employer; and

139.2. on receipt of the transfer payment from the protected employee’s former scheme, the relevant scheme’s rules will secure accrued pension rights that are at least equivalent in value to the accrued pension rights that were transferred from the protected employee’s former scheme.

140. Reading Regulations 6 and 7 in conjunction with one another, protected persons whose employments are transferred to an employer who does not participate in the ESPS can maintain pension rights that are “no worse” than they would have been had they remained as active members of the ESPS. This is on the basis that they transfer their accrued benefits from the ESPS (or any subsequent scheme) into the relevant scheme provided by that employer.

141. It is not a requirement of Schedule 14 to the Electricity Act that its aims are to be achieved without requiring any particular action to be taken by the protected persons. So, I do not consider that, by requiring protected persons to transfer their accrued pension rights from their former employer’s pension scheme into that of their new employer, the Protected Persons Regulations are failing to achieve the intention of Schedule 14 to the Electricity Act.

*Continuity of employment*

142. Mr Y has referred to Regulation 5 and Regulation 19(2) of the Protected Persons Regulations, in support of his submissions that he should continue to be treated as an active member of SPLAS in order to give effect to the protection afforded him by the Protected Persons Regulations. I do not agree.

143. Regulation 5 defines “continuous employment”, for the purposes of the Protected Persons Regulations, by reference to paragraph 4 of Schedule 14 to the Electricity Act (**Paragraph 4**). Essentially, the effect of Paragraph 4 is to ensure that the term “continuous employment” used in Schedule 14 is defined in a manner consistent with the interpretation of that term under Chapter I of Part XIV of the Employment Rights Act 1996.

144. Throughout the Protected Persons Regulations, other than in Regulation 5 in which it is defined, the term “continuous employment” is used only in Regulation 3, which sets out the circumstances in which a person qualifies as a ‘protected employee’[24] under the Protected Persons Regulations. Regulation 5 serves only to supplement Regulation 3 in defining ‘protected employee.’ So, Regulation 5 cannot be interpreted or applied to mean that a protected person should continue to be treated as an active member of a relevant scheme after ceasing to be in actual pensionable service under that relevant scheme.

[24] ‘protected employee’ is one of the two categories of ‘protected person’, the other being a ‘protected beneficiary’ (which does not apply to Mr Y) as defined by Regulation 4.

145. Regulation 19(2) (Persons owing a duty) of the Protected Persons Regulations states:

> "If a protected employee changes his employer and does not require the accrued pension rights to which he is entitled immediately before the change to be transferred to the relevant scheme provided by his new employer in accordance with these Regulations, any former employer of whose relevant scheme those rights remain a liability shall be treated as the employer of that person for the purposes of these Regulations in respect of those rights until they are transferred to another relevant scheme."

146. On Mr Y's interpretation of Regulation 19(2), despite Serco having become his former employer when his employment transferred to ESRC, Serco should be regarded as his current employer when considering his entitlement under the SPLAS Rules for early payment of his pension on his redundancy from his employment with ESRC. I do not agree with that interpretation.

147. Regulation 19(2) provides that the former employer shall be treated as the employer "for the purposes of the [Protected Persons] Regulations", not for the purposes of applying the relevant scheme's rules more generally. The explanatory notes to the Protected Persons Regulations set out their purpose and states:

> "The [Protected Persons] Regulations lay a duty on employers to ensure the protection of the pension rights of protected persons in the event of:
>
> - the partial or total winding up of the [ESPS] or any alternative scheme;
> - the restructuring or change of ownership of the participating employers; or
> - the transfer of employees (whether at the requirement of the employer or on a voluntary basis) from one employer to another within the electricity supply industry.
>
> The [Protected Persons] Regulations provide that, as far as possible, a protected employee shall be enabled to remain a member of the Pension Scheme. If this is not possible (for example in the case of a partial or total winding up of the Pension Scheme), the employer is required to provide his protected employees with an alternative scheme which offers future pension rights which are no worse than those they enjoyed immediately before ceasing to participate in the Pension Scheme. The protection extends to circumstances where an alternative scheme is wound up. There is also a duty on employers to protect the accrued pension rights of protected persons, including benefits in payment to pensioners and dependants.
>
> The protection continues to apply when a protected employee moves within the industry and the Regulations set out the level of pension rights to be provided on transfers between companies in different circumstances. The

protection will cease to apply if continuity of employment in the industry is broken."

148. Regulation 19(2) places an obligation on a former employer of a Protected Person who has not transferred his accrued pension rights to the relevant scheme provided by his current employer, under Regulation 6, to ensure that the former employer's scheme remains sufficiently funded to protect the protected person's accrued rights that remain within that scheme. In other words, where the protected person's accrued rights remain with a former employer's relevant scheme, for the purpose of Regulation 6, the former employer is treated as the employer and, on that basis, is required to maintain their pension scheme's funding level accordingly. It does not follow that Mr Y is to be regarded as remaining in active membership of any former employer's relevant scheme for the purpose of determining the extent, if any, to which he is entitled to redundancy benefits under that relevant scheme if he is later made redundant by his current employer.

*Conclusions in relation to compliance with the Protected Persons Regulations*

149. I am satisfied, on the basis of the evidence that I have seen:

149.1. that the Respondents have fulfilled their obligations under the Protected Persons Regulations;

149.2. that the Protected Persons Regulations ceased to apply to Magnox in respect of Mr Y when his accrued benefits were transferred from the ESPS to SPLAS;

149.3. that there is nothing to suggest that the future benefits provided under SPLAS did not accord with the requirements of Regulation 7(2) or (3) (as applicable), or that Serco has failed to maintain SPLAS' funding level in respect of Mr Y's accrued pension rights as required by Regulation 6; and

149.4. that AMEC provided Mr Y with the option to transfer his accrued pension rights from SPLAS to the ASPS within two years from the date of the applicable transfer of employment, in accordance with Regulation 6(4) and (5). Mr Y's decision, following his transfer to ESRC and its acquisition by AMEC, to leave his benefits deferred in SPLAS rather than exercising his entitlement to transfer them to the ASPS under Regulation 6(5), does not constitute any breach of Regulation 6(4) or (5) on Serco's or AMEC's part.

**Contractual obligations between Mr Y and Magnox**

150. Mr Y has submitted that he and the other transferees gave their collective agreement to the transfer of their employment from Magnox to E&TS. This was done as consideration for Magnox's provision of its assurances, given during the consultation period prior to that transfer, that all of the provisions of the ESPS would be preserved on transfer to Serco and subsequent employers. Mr Y has stated that Magnox needed to obtain that agreement to the transfer in order for its business to be viable

on an ongoing basis, and its assurances to the transferring employees became contractually binding.

151. I accept that Magnox consulted with Prospect prior to the transfer. However, I have not seen sufficient evidence to conclude that Magnox's assurances regarding Serco's payment of an enhanced pension on redundancy from Serco's employment, as documented in the 2005 Booklet, constituted a contractual agreement in that regard between Magnox and the transferring employees.

152. The 2005 Booklet, which was signed on behalf of both Magnox and Prospect, documents the benefits that Serco had agreed to provide to the transferring employees following their transfer to E&TS and its acquisition by Serco. The 2005 Booklet documented the various protections that were in place in relation to the transferring employees' pension benefits under the ESPS. It also included a schedule of the transferring employees' protected pay and benefits, which referred to the various documents in which those benefits and pay were set out, and confirmed that those documents had been provided 'both to Serco and to the Trade Unions.'

153. The 2005 Booklet states that its purpose is "to record the employment and pension rights of E&TS staff transferring from [Magnox] to a new subsidiary company, E&TS Ltd." It refers, in places, to "the commercial agreement between [Magnox] and Serco", but it does not document any contractual arrangement between Magnox and the transferring employees in relation to pensions on redundancy from Serco, and it is not expressed as being legally binding. Notably, the 2005 Booklet has not been signed by Serco and there is no indication of any intention for Serco to have signed it.[25]

154. Mr Y has submitted that the correspondence that he has sent to TPO, between union representatives and Magnox, together with statements made by Magnox in presentations given to the transferring employees prior to the transfer of their employment from Magnox to E&TS, should be taken into account when assessing whether Magnox was under any contractual obligation to Mr Y with regard to his redundancy benefits following the transfer.

155. Mr Y has sent TPO copies of correspondence from around the time of the transfer of his employment from Magnox to E&TS. The correspondence that pre-dates the transfer shows that a union representative had raised queries with Magnox concerning the wording of the then draft version of the 2005 Booklet, in relation to the provision of enhanced redundancy benefits following the transfer. The union representative explained, in his email to Magnox of 20 September 2005, that 'many of us are trying to get some basic information on [SPLAS] so that we can start analysing the options before consulting our own financial consultants.', and asked for confirmation of when they would receive the 2005 Booklet. The union representative went on to raise queries with Magnox, including: whether a transferred employee who transferred his accrued benefits under the ESPS to SPLAS would receive a full

[25] For example, there is no signature block which could have been signed by Serco had that been the intention.

enhanced pension on redundancy from Serco; and whether the protected minimum pension age of 50 would apply under SPLAS as it did under the ESPS.

156. There is nothing in that email exchange that implies that the 2005 Booklet was to be anything other than informative.

157. I have also considered the questions and answers document, which Mr Y sent to TPO, in particular the questions set out in paragraph 22 above. That document appears to have served as a preparation tool prior to the IFA seminars that took place on 20 and 27 October 2005. There is nothing in the questions or answers that suggests that any agreement was made that the transferred employees would remain entitled to enhanced redundancy benefits in the event of being made redundant by any employer outside the Serco group. It seems, from the nature of the questions and answers, that the purpose of the IFA seminars was to address any queries from the transferred employees concerning the extent to which ceasing to be able to accrue benefits in the ESPS and accruing benefits in SPLAS instead might affect their pension benefits. The answers to the various questions set out in the questions and answers document were informed by the statutory protections in place, for example under the Protected Persons Regulations. There is no evidence that any promise or assurance, beyond the relevant statutory protections, was made to the transferring employees at the IFA seminars.

158. Looking at the memorandum from Mr EY dated 21 March 2006, the obligations that were placed on Serco under the Sales Agreement, broadly to ensure that any obligations placed solely on E&TS in relation to employees' benefits could not be circumvented by Serco's disposing of E&TS, were summarised. There is nothing in the memorandum that suggests that the genesis of those obligations on Serco, which built upon the statutory protections given to the transferred employees under statute (such as TUPE), was any agreement other than the Sales Agreement.

159. On that basis, and on the evidence I have seen, I do not find that Magnox entered into any contractual agreement with Mr Y concerning the benefits that were to be provided to him following the transfer of his employment from Magnox to E&TS.

**The effect of the transfer from Magnox to Serco on Mr Y's entitlement under the ESPS**

160. I shall consider now Mr Y's submission that, should I find that the 2005 Booklet did not create any contractual right for him with regard to his pension benefits on redundancy, he should instead be entitled to an early pension on the basis that his transfer from Magnox to Serco triggered Rule 17(1A)(c) of the ESPS Rules.

161. Rule 17(1A)(c) (set out in Appendix 3) provided that, on ceasing to be a contributing member of the ESPS before the age of 50 on account of redundancy or reorganisation, a member would be treated as having retired on his 50$^{th}$ birthday once had had reached that age, 'unless, with the consent of his Employer, he has waived his right on so leaving Service to have his Frozen Benefits payable from that age.'

162. Mr Y had not reached the age of 50 when his contributing membership of the ESPS ceased. However, he elected to transfer his accrued benefits from the ESPS to SPLAS when his employment transferred to E&TS, at which point Rule 17(1A)(c) of the ESPS ceased to apply to Mr Y as he had no frozen benefits in the ESPS following the transfer of those benefits into SPLAS. On reaching age 50, Mr Y was still an active member of SPLAS, and therefore had no frozen benefits under SPLAS, so any mirror image provisions under SPLAS, in respect of Rule 17(1A)(c) of the ESPS, would not have applied to Mr Y.

163. Mr Y has stated that I should also consider the position of transferred employees who were not protected persons and/or who did not transfer their accrued benefits from the ESPS to SPLAS. However, as Mr Y's complaint can relate only to his own situation[26], it would not be appropriate for me to make any finding concerning the position of other transferring employees.

**The extent of the assurances given to Mr Y by Magnox**

164. Mr Y submits that statements made in documents issued as part of the TUPE transfer to Serco confirm his entitlement to the early payment of his deferred pension from SPLAS. He relies, in particular, on the Severance Benefits Statement (see Paragraphs -26 - 27 above) that severance benefits would be the same on redundancy from Serco regardless of whether a transferring employee had left their accrued pension in the ESPS or transferred it to SPLAS. Mr Y considers that it was clear, from the Severance Benefits Statement, that a deferred ESPS pension would be paid early in the event of redundancy from any future employer and not just Serco.

165. I disagree with Mr Y's view. The Severance Benefits Statement specifically states that the severance benefits he would receive would be the same if he later took redundancy from Serco. The Severance Benefits Statement is specific in its reference to Serco. In accordance with the Severance Benefits Statement, it is redundancy from Serco that would have triggered an early unreduced deferred pension from the ESPS (had Mr Y deferred his ESPS pension rather than transferring it to SPLAS).

166. There is no reference in the Severance Benefits Statement to the entitlement being triggered on redundancy by any employer other than Serco. Other than a statement that Serco is also prevented from selling E&TS without the consent of [Magnox], there is also no reference in the 2005 Booklet to any obligations of Magnox or Serco in relation to any future transfers. To hold otherwise, and to accept Mr Y's interpretation of the paragraph, would require me to read words into the paragraph which are inappropriate on the facts of this case.

167. I do not consider that the 2005 Booklet constituted a contract between Magnox and Mr Y, or any of the other transferring employees. However, I have also considered whether, applying the rules of interpretation of contracts imposed by case law, the explanation in the 2005 Booklet concerning pensions on redundancy could be taken

[26] As has been confirmed in the case of *Edge v Pensions Ombudsman* [1999] 4 All ER 546, TPO's jurisdiction does not allow me to consider class actions.

to mean that the transferred employees would be entitled to an early pension in respect of accrued benefits in respect of their service with Magnox and any subsequent service with other employers.

168. When interpreting contracts, the Courts aim to adopt the natural and literal meaning of the words the parties have used with a view to uphold the parties' intentions. The Courts would consider the disputed terms within the context of the contract as a whole and would also take into account the overall purpose of the contract, the facts and circumstances known by the parties at contract formation, and commercial common sense (see for example *Arnold -v- Britton [2015] UKSC 36,* at paragraph 15).

169. Having considered all of these factors, I do not agree that the clear wording of the Severance Benefits Statement can be interpreted other than to mean that it was redundancy from Serco (as opposed to redundancy from any other employer) that would have triggered an early unreduced deferred pension. There is no scope, in law or otherwise, for me to reject the clear meaning of the Severance Benefits Statement simply because Mr Y, or any other transferred employee, disagrees with it.[27]

170. Mr Y has submitted that if protection of his pension rights under the ESPS, in the event that his employment was transferred to a further employer following its transfer to E&TS, had been conditional upon his transferring his accrued rights from SPLAS to any further relevant scheme, then Magnox would have been under a duty to have mentioned this, I do not agree.

171. From the point in time immediately following the sale of E&TS to Serco, Mr Y was no longer an employee of either Magnox or of any company owned by it, so Magnox was no longer an employer owing a duty under Regulation 19(1) of the Protected Persons Regulations.[28] Following the transfer of Mr Y's accrued benefits from the ESPS to SPLAS, Regulation 19(2) of the Protected Persons Regulations ceased to apply to Magnox. So, any obligation or duty owed by Magnox to Mr Y concerning Mr Y's membership of the ESPS ended when Mr Y transferred his accrued benefits from the ESPS to SPLAS.

172. When Mr Y's employment was later transferred to ESRC (in anticipation of ESRC's sale to AMEC), Serco, ESRC and, on acquiring ESRC, AMEC, each owed duties to Mr Y, under the Protected Persons Regulations and they fulfilled those duties.

173. Mr Y has sought to rely in part on the wording in the ESPS Guide, set out in paragraph 14 above, as evidence of Magnox's assurances that he would remain entitled to an unreduced early retirement pension on redundancy from any subsequent employer. I do not accept that submission.

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[27] I note that Mr Y has referred to the other transferees as having interpreted this provision of the 2005 Booklet in the same way as he did.

[28] Regulation 19(1)(a) provides that any duty owed under the 1990 Regulations by the employer of a protected person shall also be a duty owed by the parent company (if any) of that employer.

174. Looking first at the content of the statement to which Mr Y has referred, the "Company" referred to in that statement was Magnox. No reference was made to any obligation to pay members an unreduced early retirement pension on redundancy from the employment of any other company. Even if I were able to accept Mr Y's reading of that statement, the introductory section of the ESPS Guide made it clear that the ESPS Guide did not provide any definitive statement of the benefits to which ESPS members were or might become entitled.

175. It is clear, from the introductory section of the ESPS Guide, that the ESPS Guide was not meant to provide any assurances to members concerning their entitlement or prospective entitlement to benefits under the ESPS. Further, the ESPS Guide is dated January 2002, more than two years prior to the start of the consultation with staff and Prospect concerning the eventual transfer of Mr Y's employment from Magnox to E&TS. I cannot see that it could have been meant to provide any assurances to transferring staff concerning their pension rights in relation to that transfer of employment.

176. So, I do not find that Magnox provided any assurances to Mr Y, or made any misstatement, that he would remain entitled to an early pension on redundancy from any future employer in the event that his employment was later transferred on from E&TS and/or E&TS was sold by Serco to another company.

177. Mr Y has submitted, very late in the investigation of his complaint, that he considers Magnox to have been 'disingenuous' in its representation, in the 2005 Booklet, of the transferring employees' rights, and that Magnox purposefully withheld from Prospect the existence of the benefit under Rule 17(1A)(c) of the ESPS. He also submitted that Magnox was intentionally vague in its answers to questions that were raised by transferring employees prior to the Magnox to Serco transfer in relation to pension benefits on redundancy.

178. Consultation between a transferring employer and a recognised trade union is an employment law matter, for the Employment Tribunal or the Courts to decide. Even if Mr Y had raised this point earlier in the investigation, it would not have been appropriate for me to have considered it.

**E&TS' dissolution**

179. Mr Y has submitted that the dissolution of E&TS, in 2011, is significant and should be taken into account, as he considers that Serco might have dissolved E&TS, shortly before it transferred his and other employees' employment to ESRC. That Serco sold ESRC to AMEC, with the purpose of testing the extent of Magnox's engagement with its obligations to the transferees in order to assess the likelihood of its being able to transfer the transferring employees out of Serco altogether without Magnox's interference.

180. Mr Y has provided no evidence of any such intention, and has raised this point very late in the investigation, in response to my Preliminary Decision. However, I consider that, rather than this being an attempt by Mr Y to expand his complaint, he has made

this submission in support of his assertion that Serco failed to fulfil its duties to him in respect of pension benefits on redundancy. In any case, E&TS' dissolution in 2011 was of no consequence to Mr Y.

181. The evidence that TPO has received suggests that Mr Y's employment had been transferred from E&TS to Serco shortly after Serco's purchase of E&TS, and that Mr Y was informed by Serco of that transfer. The transfer would not have affected Mr Y's pension rights adversely; Serco's agreement to fund any enhanced pension benefits in the event that it made Mr Y redundant (to any extent that funding for such benefits was not provided from SPLAS' funds) remained valid notwithstanding that Mr Y's employment had transferred from E&TS to Serco. This was explained in the 2005 Booklet which said:

> "All obligations transferring to E&TS Ltd., including your employment and pension rights, are explicitly underwritten by Serco in the commercial agreements for the acquisition. These obligations therefore fall on Serco as well as E&TS Ltd., having the same effect as if the transfer had been direct to Serco. Serco is also prevented from selling E&TS without the consent of [Magnox]."

182. Further, the statutory requirements of the Protected Persons Regulations fell on Serco, as the parent company of E&TS (see paragraph 171 above and the footnote to it), as well as on E&TS during its time as Mr Y's employer. Transferring Mr Y's employment to Serco and then, some years later, dissolving E&TS did not affect Mr Y's membership of SPLAS or his entitlement to enhanced redundancy benefits in the event that he was made redundant by Serco or any other company within the Serco group. I do not consider that Mr Y has sustained any loss or injustice as a consequence of E&TS' dissolution in 2011, or that this submission adds weight to his argument that Serco failed to fulfil any duties it might have had towards him regarding pension benefits on redundancy.

**The Sale Agreement**

183. Mr Y has sought to rely on the provisions of the Sale Agreement between Magnox and Serco in support of his submissions that he has a right to be paid an early, unreduced pension in respect of his pensionable service prior to having left active membership of SPLAS. I do not consider that the Sale Agreement confers on Mr Y any right to be paid his deferred pension in SPLAS early and unreduced, or to obtain such a payment from any other source, following redundancy from ESRC.

184. Fundamentally, the Sale Agreement is a contract between Magnox and Serco. As Serco has submitted, Mr Y is not a party to the Sale Agreement and Clause 20 of the Sale Agreement expressly excludes the provisions of The Contracts (Rights of Third Parties) Act 1999, save in relation to NDA. Further, Clause 20.2 states that "Nothing in this agreement will be construed as creating any rights in respect of any third parties under, as a result of, or in connection with this agreement." On that basis, I find that Mr Y is unable to rely upon any of the provisions of the Sale Agreement. So,

I have not undertaken any analysis of the provisions of the Sale Agreement on which Mr Y seeks to rely.

185. With regard to Mr Y's submissions, as summarised in paragraph 54.21 above, concerning an increase of £9,999,999 in E&TS' share capital payment on 31 October 2005, the day on which it was sold to Serco, and the subsequent reversion funds of £8,200,000 to Serco Holdings Limited, I have found that any obligations imposed upon Magnox under the Sale Agreement were/are enforceable only by the parties to the Sale Agreement and that the contents of the 2005 Booklet[29] did not amount to any contractual rights or assurances in favour of Mr Y. So, it would be inappropriate for me to investigate these allegations further. Doing so would achieve no benefit for Mr Y. However, I note Serco's submissions that there would have been provisions, in the Sale Agreement, to deal with any shortfall in the bulk transfer value from the ESPS, in order to protect SPLAS in the event that the actuarial value placed on the liability by the ESPS was deemed insufficient by SPLAS. I see no reason to doubt that submission.

**Communications from Serco and AMEC**

186. I shall consider now whether any information provided to Mr Y by Serco or AMEC (whether on behalf of ESRC or in its own right) could have caused Mr Y to have held the belief that he would be entitled to an early pension in respect of all of his accrued pension rights, whether accrued under SPLAS or the ASPS, should he be made redundant by ESRC.

187. I have seen no evidence that AMEC made any statement to Mr Y that he would be entitled to an early pension in respect of all of his accrued pension rights, whether accrued under SPLAS or the ASPS, should he be made redundant by ESRC. The only evidence that I have seen concerning information provided by AMEC to Mr Y, in relation to his pension rights, is a copy of the slides that were used in the presentations given to the transferring employees concerning their pension arrangements following AMEC's acquisition of ESRC. Those slides informed Mr Y that he would accrue future pension benefits under the ASPS on the same basis on which he had been accruing pension benefits under SPLAS. They said nothing about the pension benefits that he had accrued while in active membership of SPLAS. AMEC informed Mr Y that he would need to speak to Serco concerning his benefits under SPLAS.

188. In September 2012, during the two-year transfer window, Mr Y was provided with the Deferred Benefit Statement. There was no mention in this Statement of any ability to claim an early deferred pension on redundancy.

189. In 2013, Mr Y queried with Mercer whether he would be entitled to an early pension if AMEC made him redundant and Mercer informed him that the SPLAS Rules did not provide for this. In its letters to Mr Y, Mercer did not refer directly to any specific Rule

[29] In particular, the statement that "Serco is prevented from selling E&TS without the consent of [Magnox]."

under SPLAS. Instead, Mercer quoted from the ESPS Rules on which the relevant SPLAS Rules were based. I note that Mercer referred specifically to the requirement, under the ESPS Rule 17(1A)(c), for Mr Y to have been under 50 years of age on the occurrence of the redundancy or reorganisation in order to benefit from an early pension. It stated that, as Mr Y was by then aged 56, he would not be eligible for such a benefit. In fact, under the corresponding SPLAS Rule (Sub Rule 6.2.3.1), there was no such maximum age limit.

190. As Mr Y has noted in his submissions, Mercer's explanation of his entitlement to an early pension (or lack of) did not correspond with the ESPS Guide or with Sub Rule 6.2.3.1 of SPLAS. However, I do not consider that Mercer's incomplete and/or incorrect statements to Mr Y give rise to any claim of negligent misstatement against the Trustees on Mr Y's part. In order for such a claim to be founded, Mercer would have had to have made a clear, unequivocal statement to Mr Y on which he relied to his detriment. I cannot see that Mr Y relied upon Mercer's statements in deciding not to transfer his benefits to the ASPS. Based on what Mercer had told him, Mr Y had no reason to believe that it would have been more beneficial for him to have left his accrued pension rights in SPLAS than it would have been to transfer them to the ASPS.

191. Having been told by Mercer that he would not be entitled to an early pension from SPLAS if AMEC made him redundant, Mr Y chose not to transfer his accrued pension rights from SPLAS to the ASPS. Mr Y has explained that he did so having considered his options under SPLAS and the ASPS, and the financial benefits of deferring his SPLAS benefits.

192. I am satisfied that Mr Y made an informed decision to leave his accrued pension rights in SPLAS at the relevant time.

**Duty to provide information**

193. Although Mr Y has not raised this point in his complaint, it features significantly in the submissions from AMEC and Serco. So, I have considered whether there was any duty on the Trustees, Serco and/or AMEC to inform Mr Y about the implications on redundancy of not transferring his pension from SPLAS to the ASPS. I find that this issue does not concern Magnox and NDA since their involvement with Mr Y ceased at the time of his TUPE transfer from Serco to ESRC.

194. The question of whether and to what extent an employer has a duty to provide information about pension scheme options for an employee was considered by the House of Lords in Scally. In Scally, the complaint was that the member should have been given more information by his employer about valuable rights that he could have accessed in his statutory pension arrangement.

195. The House of Lords found that, in a limited set of circumstances, a duty to inform employees about a contractual right could be implied into a contract of employment. The circumstances are that: the terms of the contract have not been negotiated with the individual employee; a particular term of the contract makes a valuable right

available contingent upon the individual taking some action; and the employee cannot reasonably be expected to know of the term unless it is drawn to his attention. Subsequent cases, such as Eyett, have indicated that this implied duty is to be narrowly construed as only a duty to take reasonable steps to inform an employee about any contractual rights.

196. Assuming that the right to an early deferred pension is a contractual right and Mr Y did not negotiate the terms of his contract, it appears to me that there is nothing to indicate that the Trustees, Serco, or AMEC had a duty to advise Mr Y about the risks on redundancy of deferring his benefits. They also did not assume any responsibility for providing such advice. The duty on the Trustees, Serco, and AMEC in particular, was limited to providing Mr Y with accurate information about his contractual rights (including his pension rights) which, I consider, they did. The duty is restricted to informing employees of their options under the scheme, so as to enable them to make the choice which is in their best financial interests. In relation to Mr Y's complaint, I am satisfied that this obligation was discharged in September 2012, when Mr Y was sent the Deferred Benefit Statement and on the two occasions in 2013, when Mercer wrote to Mr Y.

197. In any event it cannot, on the facts, be argued that Mr Y could not, in all the circumstances, reasonably be expected to be aware of the term unless it was drawn to his attention. Mr Y could have been, and indeed was, aware of this very term. Mr Y was informed, during the two-year transfer window following AMEC's purchase of ESRC, about the consequences on redundancy of deferring his benefits. He was also provided with sufficient information by Mercer (albeit this information was incomplete), on the two occasions in 2013 when Mercer wrote to him, to have caused him to query his belief that he would be entitled to an early retirement pension on being made redundant by ESRC.

198. I am not satisfied, on the balance of probabilities, that Mr Y would have reached a different decision had the Respondents done anything different (albeit there was no higher duty on them to do more than to provide Mr Y with accurate information about his contractual rights, which they did). Mr Y has confirmed that he took into account various considerations (including those cited by Serco and AMEC) and that the balance lay in favour of deferring his SPLAS benefits.

199. I consider Mr Y's decision to defer his benefits was one he made independently, with adequate knowledge or awareness of his options and having considered the financial benefits of deferring his SPLAS benefits. He decided that deferring his SPLAS benefits was a more attractive option, and I do not consider that he would have transferred his SPLAS benefits in any event had the Trustees, Serco or AMEC done anything different.

200. I find that neither the Trustees, Serco nor AMEC are in breach of any duty or implied duty of care to have provided Mr Y with further information concerning the benefits or consequences of transferring his benefits to the ASPS or leaving them in SPLAS.

**Beckmann rights**

201. In making his complaint, Mr Y has clearly considered the matter carefully and has made very thorough submissions. I have considered all aspects of Mr Y's complaint fully and, in addition, I have considered the issues which led to Mr Y submitting his complaint in the wider context. As part of this, I have considered whether the enhanced redundancy benefits under Rule 4.2 of SPLAS may have constituted Beckmann rights which would have been passed to ESRC under TUPE when Mr Y's employment transferred from Serco to ESRC.

202. If any Beckmann rights did exist, the liability for those rights would have belonged to ESRC, in its capacity as Mr Y's employer, following the transfer of his employment from Serco to ESRC. No such liability would have fallen on Serco or AMEC. ESRC is not a party to Mr Y's complaint, and I do not consider that I would have had jurisdiction to consider ESRC's liability for any Beckmann rights if it had been added as a further respondent. This is because this complaint relates to SPLAS, not to the ASPS, and ESRC is not an employer in relation to SPLAS for the purpose of meeting any liability that may have passed to it under TUPE in respect of Mr Y.

203. Further, I can see no merit in Mr Y bringing an additional complaint against ESRC in relation to the ASPS as, to the extent that such a complaint might be within my jurisdiction, the Limitation Act 1980 would prevent me from directing any remedy for Mr Y. Accordingly, I do not consider it appropriate for me to make any findings on the existence of, or liability for, any Beckmann rights in relation to Mr Y's employment covered by this complaint.

**Summary of my Conclusions**

204. For the reasons set out in this Determination, I have reached the following conclusions:-

204.1. I have seen no evidence that NDA breached its statutory obligations.

204.2. I do not consider that Mr Y became entitled to immediate payment of his pension under Sub Rule 4.2.1.3 or Sub Rule 6.2.3.1, either on the sale of ESRC from Serco to AMEC, or on Mr Y's redundancy from ESRC in 2015.

204.3. The Respondents have fulfilled their obligations under the Electricity Act and the Protected Persons Regulations (as applicable).

204.4. I have not found that Magnox entered into any contractual agreement with Mr Y concerning the benefits to be provided to him after the transfer of his employment from Magnox to E&TS.

204.5. Mr Y retained no benefits under or originating from Rule 17(1A)(c) of ESPS following the transfer of his employment from Magnox to E&TS.

204.6. I have seen no evidence that Magnox provided Mr Y with any assurance, or made any misstatement, that he would remain entitled to an early pension on

redundancy from any future employer in the event that his employment was transferred from E&TS and/or E&TS was sold by Serco to another company.

204.7. I do not find that Mr Y has sustained any loss or injustice as a consequence of E&TS' dissolution in 2011.

204.8. I do not consider that the Sale Agreement between Magnox and Serco confers any right on Mr Y.

204.9. I do not consider that Serco or AMEC gave Mr Y cause to believe that he would retain entitlement to an early pension from SPLAS if AMEC made him redundant and I am satisfied that Mr Y made an informed decision not to transfer his accrued pension rights in SPLAS to the ASPS within the two year window.

204.10. I have not found that the Trustees, Serco or AMEC have acted in breach of any duty or implied duty of care to have provided Mr Y with further information concerning the benefits or consequences of transferring his benefits to the ASPS or leaving them in SPLAS.

205. I do not uphold Mr Y's complaint.

**Anthony Arter CBE**

Deputy Pensions Ombudsman

30 September 2024

## Appendix 1

**Relevant sections of the Electricity (Protected Persons) (England and Wales) Pension Regulations 1990 (SI 1990/436)**

Regulation 2:

"**Interpretation**

2. - (1) In these Regulations—

…
"accrue" means to become entitled to pension rights in respect of employment while a member of a relevant scheme, including increases in accrued pension rights under that relevant scheme arising pursuant to increases in remuneration;
"accrued pension rights" means the pension rights, other than future pension rights and (except where the context otherwise requires) any pension rights provided by a state pension scheme, to which a protected person is from time to time entitled;
"alternative scheme" means a scheme to which **regulation 8** applies;…"

Regulation 5:

**Continuity of employment**

"5.- (1) Subject to paragraph (2), references in these Regulations to a protected employee being in continuous employment shall be construed in accordance with paragraph 4 of Schedule 14 to the Act…"

Regulation 6:

**Accrued pension rights**

"6. - (1) Subject to paragraphs (2) and (3), the employer of a protected person shall at all times ensure that, in respect of each protected person in his employment, the assets of the relevant scheme provided by the employer in respect of that person are such that, in the event of the winding up of that scheme, there would be available to provide accrued pension rights for such protected person a sum equal to or exceeding the liability of that scheme in respect of those accrued pension rights.

…

(4) If a protected person shall transfer or be transferred to a relevant scheme, and if a transfer payment shall be made in respect of his accrued pension rights to that scheme, the employer providing that scheme shall procure that the rules of that scheme will secure accrued pension rights which, on the basis of good

actuarial practice, are at least equivalent in value to his accrued pension rights so transferred from the former scheme.

(5) Any new employer shall also procure that if the protected person notifies or is deemed to have notified his new employer in accordance with the terms (if any) of the relevant scheme provided by the new employer, and otherwise within two years of transferring to the new employer, that he desires to transfer his accrued pension rights to the relevant scheme provided by the new employer, he shall be entitled to transfer to that relevant scheme in accordance with paragraph (4) any accrued pension rights which are capable of being transferred…"

Regulation 7

**Future pension rights**

"7. - (1) The rights described in paragraphs (2) and (3) are the future pension rights for the purpose of these Regulations.

(2) The right of a protected employee to participate in a relevant scheme and (subject to paragraph (5))—

…

(d) in the event of a change of employer to an employer who participates in an alternative scheme, to accrue pension rights on the same basis as that applicable to protected employees in that scheme,

…

Provided that the pension rights referred to in sub-paragraphs (b) and (d) of this paragraph do not include any addition to or improvement of the pension rights provided by the alternative scheme in question which is made after the date upon which it is provided pursuant to these Regulations.

(3) Subject to paragraph (4), the right of a protected employee, who is participating in a relevant scheme and who changes employer to an employer who provides a relevant scheme in which no protected employees are then participating, to accrue pension rights which are no worse than transfer date rights.

(4) Where an employer has no protected employees participating in a relevant scheme which he provides to a protected employee pursuant to these Regulations at any time after the date of commencement of the total winding up of the Pension Scheme and—

(a) he has at any time since that winding up provided a relevant scheme for protected employees who participated in the Pension Scheme on that date; or

(b) he has not provided such a scheme but is a wholly owned subsidiary of a parent company which has provided such a scheme,

there shall be substituted in paragraph (3) for the reference to transfer date rights a reference to the rights so provided…"

Regulation 19

**Persons owing a duty**

"19.- (1) Any duty imposed by these Regulations on the employer of a protected person shall also be a duty owed by—

(a) the parent company (if any) of the employer of the protected person;

…

(2) If a protected employee changes his employer and does not require the accrued pension rights to which he is entitled immediately before the change to be transferred to the relevant scheme provided by his new employer in accordance with these Regulations, any former employer of whose relevant scheme those rights remain a liability shall be treated as the employer of that person for the purposes of these Regulations in respect of those rights until they are transferred to another relevant scheme…"

# Appendix 2

**Key provisions of the SPLAS Rules**

**GENERAL RULES**

**SCHEDULE 1**

**Definitions and Interpretations**

**Associated Employer** means any company, firm or person which is associated with the Principal Company. For this purpose, an employer is associated with another employer where one is controlled (either directly or indirectly) by the other or both or all are controlled by a third party. The word “control” shall be construed in accordance with Section 840 of the Taxes Act or, in the case of a close company, Section 416.

…

**Employer** means such of the Employers as shall employ the Member for the time being.

**Employers** means the Principal Company and any Associated Employers which are participating in the Scheme.

…

**Service** means permanent employment with any of the Employers and Service shall be deemed continuous although broken by periods of one month or performed partly with one Employer and partly with another Employer.

**MAGNOX SECTION: SECTION F – MAGNOX MEMBERS**

1.2 In respect of Protected Magnox Members, these Sub-Rules (when read in conjunction with the Rules) are intended to meet the requirements for an alternative scheme for the purposes of the Protected Persons Regulations and are subject to those Regulations.

1.3 Where an individual benefit provided to a Protected Magnox Member under the Scheme is less than the equivalent individual benefit which would have been provided to a Protected Magnox Member on the basis of the provisions of the ESPS as at 31 March 1990, the Trustees shall take such steps as are required in order to deal with the discrepancy.

…

1.4.15 **Pensionable Service** means: (a) any period of continuous Service during which the person concerned pays contributions to the Scheme or during which the person is listed as an active Protected Magnox Member; plus (b) any credited pensionable service provided to or in respect of the Magnox Member;

plus (c) any Added Years to which a Magnox Member is entitled, provided that the calculation of a period of Pensionable Service:

1.4.15.1 is subject to Sub-rule 2.2;

1.4.15.2 is counted in complete years and proportionately in days…

1.4.15.3 is subject to a maximum of 45 years.

…

**4 BENEFITS ON RETIREMENT APPLICABLE TO GENERAL RULE 4**

4.2 Early retirement of an Active Member applicable to General Rule 4.2

4.2.1 A Normal Pension and Retirement Lump Sum shall be payable under General Rule 4.2.1 where an Active Member retires:

…

4.2.1.3 on or after age 50 where the Member is compulsorily retired from Service by his Employer due to redundancy or a reorganisation of the Employer's business;

…

4.2.2 The Normal Pension and Retirement Lump Sum payable under General Rule 4.2.2 in respect of an Active Member shall be:

4.2.2.1 if the active member retires in circumstances other than because of Incapacity, an amount equal to the Normal Pension and Retirement Lump Sum which would have been payable to him at Normal Pension Age but calculated at the date of his actual retirement. Unless the Magnox Member has reached his 50th birthday and has 10 years' Pensionable Service or is compulsorily retired from Service by his Employer due to redundancy or a reorganisation of the Employer's business, the Normal Pension and Retirement Lump Sum will be reduced by the Trustees on Actuarial Advice to take account of early payment in respect of the period between the date of retirement and Normal Pension Age…

**6. TERMINATION OF PENSIONABLE SERVICE**

6.2 If a Magnox Member leaves Pensionable Service other than on death or retirement having completed more than one years' [*sic*] Qualifying Service or in respect of whom a transfer payment has been received from a Personal Pension Scheme, he shall be entitled to the following benefits:

…

6.2.3. Early retirement due to redundancy or reorganisation

6.2.3.1 Subject to Sub-Rule 6.2.3.2, where the Magnox Member's Service ended, in the Trustees' opinion, due to redundancy or a reorganisation of the Employers' business, the Magnox Member will receive a Normal Pension payable during his lifetime and Retirement Lump Sum immediately (or, if later, from age 50) calculated as at the date when the Magnox Member's Service ended (or, if later, from age 50).

6.2.3.2 Where deferred benefits would otherwise come into payment prior to the Magnox Member's Normal Pension Age in accordance with Sub-Rule 6.2.2, the Magnox Member may, within 12 months of leaving Service and subject to the consent of the Principal Company, elect by notice in writing to the Trustees to defer the payment of such benefits until his Normal Pension Age (and, in those circumstances, his benefits will become payable at his Normal Pension Age).

## Appendix 3

**The Rules of the Electricity Supply Pension Scheme that deals with redundancy.**

Rule 16(2):

> "The Benefits specified in and calculated as provided by Rule 14 shall, in the case of a Member who is retired compulsorily by the Employer employing him on or after attaining age 50, be paid to him if such Retirement is consequent on reorganisation or redundancy and may, in the discretion of such Employer, be paid to him if such Retirement is for any other cause."

Rule 17(1):

> "A Member who leaves Service (otherwise than with an entitlement to Benefits under Rules 4(1), 14, 15, 16 or 17A) and who at the time he leaves Service has at least one year's Qualifying Service or in respect of whom a Transfer Value Payment shall have been received from any Personal Pension Scheme shall be granted Frozen Benefits of a value and payable on the terms set out in paragraphs (1A) to (1H)."

Rule 17(1A):

> "Benefits calculated as specified in Rule 14 shall be paid to a Member entitled to Frozen Benefits, and he shall be treated as having retired:
>
> …
>
> (c) on his reaching age 50 where he has ceased to be a Contributor on leaving Service prior to that age consequent on reorganisation or redundancy unless, with the consent of his Employer, he has waived his right on so leaving to have his Frozen Benefits payable from that age."

# Appendix 4

### Regulation 4(1) TUPE

### 4 Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

…

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.