

Ombudsman's Determination

Applicant	Mr R
Scheme	AstraZeneca Pension Fund (the Fund)
Respondents	AstraZeneca Pensions Trustee Limited (the Trustee) AstraZeneca PLC (AstraZeneca)

Outcome

1. I do not uphold Mr R's complaint and no further action is required by the Trustee or AstraZeneca.

Complaint summary

2. Mr R complained that when his employment was transferred from AstraZeneca to Avara Avlon Pharma Services Limited (**Avara**) under the Transfer of Undertakings (Protection of Employment) Regulations (**TUPE**) on 1 December 2016, he should have been allowed to retire immediately with an unreduced pension.
3. Mr R said that if in 2010 he had known that he would not be allowed to receive an unreduced pension in the event of a TUPE transfer, he would have chosen to become an Employee Member, thereby allowing him to receive an unreduced pension rather than accepting a TUPE transfer to Avara.
4. As his pension subsequently started to be paid on an unreduced basis on 31 March 2020, Mr R claimed that he should be paid the missed pension payments between 1 December 2016 and 31 March 2020, plus interest.

Background information, including submissions from the parties

5. Mr R was an active member of the Fund with benefits accruing in a Pre-96 Retirement Account (**the Retirement Account**). The Fund is a defined benefit pension arrangement, with the option for members (**Members**) to pay additional contributions into a defined contribution Investment Account (**the Investment Account**). Normal Pension Date (**NPD**) for the Fund is 62, but Members can retire from age 60 without their pension being reduced. Mr R's NPD would fall in May 2027 (his **Pension Date**).

6. Mr R was employed by AstraZeneca at its Avlon Works Site (**Avlon**) in South Gloucestershire.
7. In January 2010, AstraZeneca proposed changes to the Retirement Account, which were described in a document issued to Members titled “Pension Proposal Guide” (**the Guide**).
8. The Guide set out the following information:-
 - AstraZeneca would consult with the Pensions Information & Consultation Forum (**the PICF**) about the proposed changes. Members were encouraged to share their views with PICF before 5 April 2010.
 - Members had two options to choose from:-
 - Continue as an employee Member (**Employee Member**) with future service accrual but with a frozen pensionable salary. Employee contributions in respect of defined benefits would continue. No new contributions would be allowed to the Investment Account, but contributions could be paid to a new Group Self-Invested Personal Pension (**GSIPP**).
 - Become a deferred Member (**Deferred Member**) with no future service accrual and no future employee contributions in respect of defined benefits. Indexation would apply to pensionable salary. AstraZeneca would contribute an additional 14% of base salary per annum into a flexible benefits pot (**the Advantage Fund**), which could then be used to purchase employee benefits, including being invested in the GSIPP.
 - On page 12 it stated:-

“Early retirement terms may be less favourable for deferred members than employee members, if they leave in certain circumstances. The table below compares the early retirement terms for employee members who leave service of their own choice, or at AstraZeneca’s request (e.g. redundancy) and for reasons beyond their control, with those available to deferred members.”
 - The table showed that:
 - Employee Members who left employment at AstraZeneca’s request “and for reasons beyond your control”, would not have their pension reduced on early retirement;
 - Employee Members who left employment at their own choice would have their pension reduced by 2.5% for each year prior to age 60; and
 - Deferred Members who left employment at their own choice or at AstraZeneca’s request would have their pension reduced by 2.5% for each year prior to age 60.

- On page 30 it stated:-
 - For Employee Members: “If you are made redundant, your benefits on early retirement may be different from those described above [what if you choose to retire early?]. In this case, you may retire immediately from the age of 55 (or if certain conditions are satisfied, from age 50) and there will be no early retirement reduction to your Retirement Account, subject to the terms of the Rules.”
 - For Deferred Members: “If the Trustees consent, you can retire from age 55 with an immediate pension. Your Retirement Account will be reduced by 2.5% for each year and complete month you retire before age 60.” It did not refer to redundancy.
 - The document was intended to provide an overview and did not replace the terms of the Fund’s Rules. If there were any inconsistencies, the Fund’s Rules would prevail.
9. During February and March 2010, AstraZeneca organised one to one meetings with Members to allow them to ask questions about the proposed changes.
 10. On 14 May 2010, after the end of the consultation period, AstraZeneca wrote to Members to inform them of two changes to the proposed terms (**the Change Letter**).
 11. The Change Letter extended the deadline by which members were required to choose between becoming an Employee Member or a Deferred Member to November/December 2010. It also stated the following under a heading titled “Early retirement redundancy terms”:

“We will extend the early retirement redundancy terms so they apply to your deferred Retirement Account whilst you remain employed by AstraZeneca. Given the current uncertainty in our business, we want you to be able to keep the current early retirement redundancy terms (as they apply to active employee members of the Pre-96 Retirement Account under the Rules of the AstraZeneca Pension Fund) for your deferred Retirement Account, if you decide that leaving the Retirement Account is the best option for you. This means that if you become a deferred member of the Pre-96 Retirement Account, and you leave AstraZeneca by redundancy at any time between age 50 and 62 and take a pension within three months of leaving AstraZeneca no early retirement reduction factor would be applied to your Retirement Account if you are made redundant”
 12. Mr R has said that at pension presentations organised by AstraZeneca, Members were told that in the event of a future transfer of their employment rights to another employer by TUPE, both Employee and Deferred Members would be allowed to retire from the Fund from age 50 without their pension being reduced.
 13. AstraZeneca offered to provide Members with regulated financial advice at no cost. After receiving advice, Mr R elected to become a Deferred Member.

14. On 1 July 2010, changes to the Retirement Account became effective.
15. On 6 April 2012, the Fund's Rules were updated to include changes to the Retirement Account (**the 2012 Rules**). Sections of the 2012 Rules relevant to this complaint are set out in the Appendix.
16. In August 2016, AstraZeneca announced the sale of Avlon to Avara. Mr R's employment was due to be transferred to Avara, with his employment rights being protected under TUPE. As Mr R was already over age 50, he had expected to be able to retire with an unreduced pension immediately after being transferred to Avara. However, he discovered that an unreduced pension was not available to him.
17. On 26 October 2016, Mr R and a colleague in a similar position, Mr A, conducted a meeting with representatives of AstraZeneca and Avara to discuss the Fund's early retirement terms.
18. On 28 October 2016, Mr R emailed the participants of the meeting with the following points:-
 - AstraZeneca was changing how it allowed Members to retire from age 50. This was contrary to the information previously provided to Members and inconsistent with how the process has been carried out in the past.
 - Information provided to Members prior to the 2010 changes had stated that early retirement terms for Employee and Deferred Members were the same when they left employment at AstraZeneca's request. It did not define what circumstances were included or excluded, so it did not say that it excluded TUPE Members, nor that it was exclusively referring to redundancy.
 - Members had been told at pension presentations that TUPE would "trigger activation of the pension" for both Employee and Deferred Members over age 50.
 - Since 2010, it was understood by employees, including senior management team and union representatives, that both Employee and Deferred Members were entitled to retire from age 50 in the event of Avlon's closure or sale if it resulted in TUPE transfers.
 - Since 2010, there had been no pension rules shared with members that differentiated between Employee and Deferred Members when taking early retirement after TUPE.
 - Fund statements had supported the position that there was no differentiation between redundancy and TUPE for members who subsequently left employment at the company's request and wanted to retire early.
 - He had chosen to become a Deferred Member based on the information provided to him in 2010.

- During the meeting it was agreed that “relevant stakeholders” should be consulted on the matter.
- Prompt action was required due to the impending TUPE process.

19. On 2 November 2016, the following actions took place:-

- Mr R emailed AstraZeneca and said that it had agreed to set out the actions it had carried out to clarify the position of early retirement for Deferred Members. He asked what information would be provided to him, and for AstraZeneca to reply promptly.
- AstraZeneca emailed Mr R. It said that it understood that Mr R was challenging the decision that AstraZeneca made in 2010, and it had agreed to discuss the issue with “relevant stakeholders” and respond to Mr R as part of the informal stage of the grievance process. He would have sufficient time to raise a formal grievance before the TUPE process was due to complete. AstraZeneca’s position on the issue was confirmed in a Questions & Answers document (**the Q&A Document**) when Avlon’s sale had been announced.

20. On 10 November 2016, AstraZeneca emailed Mr R with the following points:-

- It had not changed its position from that set out in the Q&A Document. Members who had chosen to become Deferred Members in 2010 were not entitled to an immediate unreduced pension after a TUPE transfer to another employer.
- Members who chose to become Deferred Members in 2010 were treated as early leavers. On page 30 of the Guide, in respect of retiring early at AstraZeneca’s request, there was specific reference to redundancy, and no assurance in relation to TUPE transfers. So, Deferred Members who retired before age 60 would have their pension reduced.
- After the consultation period in 2010, AstraZeneca had agreed to extend the early retirement terms to Deferred Members in the event of redundancy while they remained employed by AstraZeneca, and this was set out in the Change Letter. No assurances had been sought by parties during or after the consultation process about TUPE transfers and none had been given.
- The Trustee had agreed to amend the Fund’s Rules.
- While the Government had announced in 2010 that the minimum retirement age would increase from 50 to 55, AstraZeneca had obtained agreement that Members would be allowed to retire from the age of 50 in the event of redundancy.
- Members’ contractual right to the 14% contribution to the Advantage Fund was being transferred to Avara.

- It understood that Members' contractual rights to an immediate unreduced pension if made redundant would be transferred to Avara.
 - It believed that AstraZeneca's position was clear, and it would not be consulting with "relevant stakeholders".
21. On 11 November 2016, Mr R emailed AstraZeneca and requested a copy of its formal grievance process (**the Grievance Process**).
 22. On 15 November 2016, AstraZeneca emailed Mr R and attached the Grievance Process. The email said that his concerns had been the subject of detailed consultation with Members in 2010, and the subsequent result had been confirmed in writing. Mr R had not raised any concerns at the time. AstraZeneca had closed the matter but said that he could raise his complaint with Avara if he wished.
 23. On 17 November 2016, AstraZeneca confirmed to Mr R that he had exhausted the Grievance Process.
 24. On 30 November 2016, Mr R emailed AstraZeneca and asked for a future point of contact. He also asked for confirmation that no Deferred Member had received an unreduced pension since 2010 having retired early after a TUPE transfer, and that no other agreement in lieu of eligibility to an unreduced early retirement pension after TUPE had been arranged by AstraZeneca with a Deferred Member.
 25. On 1 December 2016, Mr R's employment was transferred to Avara under TUPE.
 26. Mr R has said that some colleagues who transferred to Avara under TUPE but were Employee Members, were allowed to take an unreduced early retirement pension.
 27. Mr R took no further action on the matter until 5 November 2018, when he wrote to the Fund's administrator (**the administrator**). He said that it was not clear whether his previous correspondence with AstraZeneca had constituted Stage One of the Fund's Internal Dispute Resolution Procedure (**IDRP**). Mr R restated his complaint about early retirement reductions after a TUPE transfer.
 28. On 20 December 2018, the administrator replied to Mr R's letter with the following points:-
 - It asked for clarification about his complaint and the loss that he was claiming to have suffered.
 - If his complaint was about AstraZeneca's correspondence with Members prior to the TUPE transfer to Avara, he should take the matter up with AstraZeneca.
 29. On 25 January 2019, Mr R wrote to the administrator and restated his complaint. He said that as he had effectively left AstraZeneca at the request of the employer when his employment had transferred to Avara under TUPE, he should have had right to receive an immediate unreduced early retirement pension.

30. On 5 February 2019, the administrator confirmed receipt of Mr R's complaint under Stage One of the IDRPs.
31. On 13 February 2019, due to its financial position, an Administrator was appointed to take control of Avara (**the Administrator**). Mr R has said that this was also the date that he was made redundant by Avara, although he continued to carry out paid work for the Administrator until December 2020.
32. On 5 April 2019, Mr R wrote to the administrator and asked for an update.
33. On 11 April 2019, the administrator wrote to Mr R with its Stage One IDRPs response as follows:-
 - The basis of his complaint was governed by "Rule 5.3 Early Retirement (not Incapacity)", which it summarised.
 - It was relevant whether Mr R left service at the request of his employer when his employment was transferred by TUPE to Avara.
 - Having discussed the matter with the Trustee's advisers, the administrator understood that Mr R did not leave service at the request of his employer for the purposes of Rule 5.3, so he was not entitled to receive an unreduced early retirement pension.
 - He may have been entitled to receive a reduced early retirement pension.
34. On 29 April 2019, Mr R wrote to the administrator under Stage Two of the IDRPs. He made the following points:-
 - The TUPE transfer was carried out at the request of AstraZeneca, and not voluntarily. He quoted page 12 of the Guide, which confirmed the entitlement to early retirement if the member left "...at AstraZeneca's request (e.g. redundancy) and for reasons beyond their control....".
 - The 2012 Rules referred to in the Stage One IDRPs response were dated two years after he had chosen to become a Deferred Member.
 - He requested a copy of the 2012 Rules and details of the changes made since 2010.
35. On 14 May 2019, the administrator wrote to Mr R and acknowledged receipt of his complaint under Stage Two of the IDRPs.
36. On 26 May 2019, the administrator responded by email to a telephone enquiry from Mr R. It said that it understood that Avara was responsible for paying any enhanced early retirement benefits if Avara made him redundant. Under the 2012 Rules his early retirement benefits would normally be reduced if taken before age 60.

37. On 27 May 2019, Mr R emailed the administrator with the following points:-

- He did not agree with the administrator's understanding, as he had not been informed of this at the time of the TUPE transfer.
- He anticipated being made redundant by Avara on 30 June 2019 and wanted to know the cost of his enhanced early retirement pension and how it could be paid to the Fund. In the event of a shortfall in the funding of the cost, he wanted to know what would happen to a partial cost payment to the Fund.
- Due to his imminent redundancy, he asked for a prompt response.

38. On 17 June 2019, Mr R emailed the administrator. He said that The Pensions Ombudsman (**TPO**) had told him that it was reasonable for him to ask for the cost of his enhanced early retirement pension.

39. On 21 June 2019, the administrator emailed Mr R with the following points:-

- It confirmed that he should continue his complaint through the IDRP.
- He would need to raise his questions directly with Avara. The Trustee could not accept or have responsibility for providing any enhancement to his pension which Avara was contractually liable for.

40. On 25 June 2019, Mr R emailed the administrator with the following points:-

- He clarified that he had two ongoing disputes with the Trustee, one about the TUPE transfer in 2016, and the other about the impact of his impending redundancy.
- He needed to provide the cost of his enhanced early retirement pension to the Administrator prior to Avara's liquidation.

41. On 16 July 2019, the administrator emailed Mr R with the following points:-

- It apologised for the delay in its response and said that it had been consulting with its advisers on the matter.
- It had no prescribed process for calculating the cost of providing an unreduced early retirement pension.
- The Cash Equivalent Transfer Value (**CETV**) of his normal benefits in the Fund was £640,800.
- The CETV of his unreduced benefits in the Fund if he retired at 55 was £760,500.
- An indicative value of the "shortfall" he may have incurred on redundancy was the difference between the two CETVs.
- The CETVs were not guaranteed, and the Trustee was not responsible for paying the "shortfall".

42. On 17 July 2019, Mr R wrote to the administrator. He said that he should be entitled to receive an unreduced early retirement pension from age 50, not 55. He asked for a response to the outstanding points in his complaint under Stage One of the IDRPs, and for a response to his complaint under Stage Two of the IDRPs.
43. In July 2019, due to Avara's financial position, AstraZeneca agreed to set up a fund to pay for Avara's redundancy payments (**the Redundancy Fund**) for employees.
44. On 12 August 2019, Mr R emailed the administrator for an update. He asked for confirmation that the cost of his unreduced pension on early retirement after redundancy would be covered by the Redundancy Fund. He also asked whether his complaint under Stage Two of the IDRPs had been upheld, and if so, whether it would be included in the Redundancy Fund.
45. On 13 August 2019, Mr R emailed the administrator and said he was progressing his redundancy claim with the Redundancy Fund. He asked for an update on his complaint under Stage Two of the IDRPs.
46. On the same day, the administrator emailed Mr R. It said that from a Trustee perspective, it understood that former AstraZeneca employees who had transferred to Avara could receive compensation in respect of pension benefits that they would have received had they been made redundant by AstraZeneca.
47. On 29 August 2019, Mr R emailed the administrator for an update on his complaint under Stage Two of the IDRPs. He asked for a response within 14 days, or he said that he would submit his complaint to TPO.
48. On 2 September 2019, the administrator emailed Mr R. It apologised for the delay and said that it was waiting for further developments about the Redundancy Fund. It had asked the Trustee to review his complaint under Stage Two of the IDRPs.
49. On 11 September 2019, the administrator emailed Mr A and said that the Trustee was meeting to discuss his and Mr R's complaints on 13 September 2019.
50. On 25 September 2019, the Trustee wrote to Mr R with its response to his complaint under Stage Two of the IDRPs. It made the following points:-
 - The Trustee was not responsible for the contents of the Guide, or the Change Letter and it did not agree that the basis of the Change Letter had been written into the 2012 Rules.
 - It noted that the Change Letter said that AstraZeneca would extend the early retirement redundancy terms to Deferred Members while they remained employed by AstraZeneca. So, there was no suggestion that AstraZeneca had intended for the unreduced pension benefit to apply to Deferred Members who were subsequently made redundant by a future employer.

- The 2012 Rules stated that as a Deferred Member, he was entitled to receive a reduced pension from age 55. Any enhancement to his pension resulting from the Change Letter should be viewed as a separate contractual right with AstraZeneca. The Change Letter specified that an early unreduced pension would be contingent on a Deferred Member being made redundant by AstraZeneca between the age of 50 and 62, and subject to the Member starting their pension within three months of leaving AstraZeneca. The Trustee was not responsible for granting this unreduced early pension if it was relevant.
 - Rule 9.2 specifically referred to leaving service at the request of a “participating employer”, and Avara was not a “participating employer”. It confirmed that the issue was whether the TUPE transfer meant that Mr R had left service at the request of his employer.
 - The Trustee understood that the term “leaving service at the request of the employer” had received judicial consideration by the Court of Appeal in *AGCO Limited vs Massey Ferguson Works Pension Trust Ltd & Ors*¹ (**AGCO**) in July 2003. This determined that the legal meaning was that an employee leaves “at the request of their employer” only in circumstances where the employer has approached the employee and asked them to leave service and the employee had the right to refuse the employer’s request. In a TUPE transfer the employee did not have a voluntary right to refuse the transfer. So, Mr R did not leave service at the request of the employer and in accordance with the 2012 Rules, his early retirement pension should be reduced.
 - It agreed that up until his employment was transferred to Avara, he was entitled to receive an unreduced early pension in the event that AstraZeneca made him redundant.
 - The TUPE transfer to Avara had not affected his benefits in the Fund.
 - It did not uphold his complaint that he should have been offered an unreduced early retirement pension at the time of the TUPE transfer in 2016.
51. Mr R subsequently received a redundancy payment from the Redundancy Fund on the terms that he would have received if he had been made redundant by AstraZeneca.
52. On 1 April 2020, Mr R put into payment his pension from the Fund. It was not reduced for early retirement as the Redundancy Fund had paid an additional amount to the Fund.
53. Following the complaint being referred to TPO, Mr R made further submissions that have been summarised below.

¹ *AGCO v Massey Ferguson Works Pension Trust* [2003] EWCA Civ 1044

54. Mr R's further submissions:-

- At the time that the changes to the Retirement Account were implemented in 2010, some of the Fund's benefits were "opaque".
- He had understood that the change set out in the Change Letter only referred to a lowering of the age when an unreduced early pension could commence for a Deferred Member.
- He wondered why AstraZeneca had allowed Deferred Members to retire early with an unreduced pension after the Redundancy Fund had been set up, but not at the time of the TUPE transfer to Avara.

Adjudicator's Opinion

55. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee or AstraZeneca. The Adjudicator's findings are summarised below:-

- The Adjudicator considered Mr R's complaint from two perspectives as follows:
 - whether the 2012 Rules permitted him to receive an unreduced pension when his employment was transferred to Avara in December 2016; and
 - if not, whether AstraZeneca then should have allowed him to receive the unreduced pension by paying to the Fund the additional cost of providing it.
- The Sections of the 2012 Rules relevant to whether Mr R was permitted to receive an unreduced pension from the Fund were set out in the Appendix and summarised below:-

"5.3 Early retirement....a Member....who....is leaving Service at the request of his Employer between age 50 (age 55 if the Member leaves Service on or after 6 April 2010....) and age 60....will be entitled to benefits as described in Rule 5.1 [benefits being unreduced]."

"9.2 Early benefits....where an Opt-out Member leaves actual employment with the Employers at the request of his Employer between age 50 (or age 55 if the member leaves actual employment with the Employers on or after 6 April 2010....) and the date described in Rule 9.1 he will be entitled to benefits payable from a date earlier than that described in Rule 9.1."

- Mr R was an Opt-out Member as he chose to become a Deferred Member in 2010. Determining whether the 2012 Rules allowed Mr R to receive an unreduced pension relied on the interpretation of the phrase “leaving Service at the request of his Employer”. While the Adjudicator accepted that its meaning could be open to interpretation, there was legal precedent from a case heard in the Court of Appeal in July 2003. In the case AGCO Limited vs Massey Ferguson Works Pension Trust Ltd & Ors, it was determined that the phrase meant that the employer had asked the employee to leave service, and the employee had the right to refuse the request. As Mr R was not given the option to remain employed by AstraZeneca, this definition did not describe Mr R’s situation when his employment was transferred to Avara in 2016. So, Mr R did not leave service at the request of the employer, and the 2012 Rules did not allow Mr R to receive an unreduced early pension when his employment was transferred to Avara in 2016.
- In respect of whether AstraZeneca should then have allowed Mr R to receive an unreduced pension by paying the additional cost of it to the Fund, the Adjudicator considered the following evidence:-
 - The Guide stated that Deferred Members who left employment at their own choice or at AstraZeneca’s request would have their pension reduced by 2.5% for each year prior to age 60.
 - The Change Letter subsequently amended terms for Deferred Members in the event of redundancy. It said that current early retirement redundancy terms would continue to apply to Deferred Members while they were employed by AstraZeneca. There was no mention of early retirement terms in the event that a Member left AstraZeneca by way of a TUPE transfer or for any other reason.
 - Members were consulted about early retirement terms before the changes were made, and the conclusions of the consultation were set out in the Change Letter. AstraZeneca has said that Mr R did not raise any concerns about the changes at the time.
 - Mr R stated:-
 - During the pension presentations in 2010, Members were told that in the event of a transfer of employment rights by TUPE, both Employee Members and Deferred Members would be allowed to retire with an unreduced pension.
 - At the time that the changes to the Retirement Account were implemented in 2010, some of the Fund’s benefits were “opaque”.

- If in 2010 he had known that he would not be allowed to receive an unreduced pension in the event of a TUPE transfer, he would have chosen to become an Employee Member, thereby allowing him to receive an unreduced pension rather than accepting a TUPE transfer to Avara.
- Since 2010, employees, including senior management team and union representatives, had understood that Employee and Deferred Members would receive an unreduced pension if Avlon was closed or sold.
 - He was not able to provide any written evidence to support these claims.
- Mr R said that there was a lack of clarity around some of the changes to the Fund's benefits. In the Adjudicator's opinion, if this was the case, a reasonable action of a person who might be impacted by the changes would have been to at least endeavour to formally clarify the matter before making their decision in December 2010. Mr R did not raise the specific issue about early retirement terms with AstraZeneca until after the announcement of Avlon's sale to Avara in August 2016.
- The Adjudicator noted that Mr R also said that he and other Members were told at presentations that Employee and Deferred Members would receive an unreduced pension in the event of TUPE. However, this is not supported by either of the two documents provided as evidence. The Adjudicator expected any material discrepancies identified between the written documents and the information provided orally to have been challenged by Members, including Mr R, at the presentations.
- The Guide made it clear that AstraZeneca was proposing for Deferred Members who left employment at their own choice or at AstraZeneca's request to have their early pension reduced. The Change Letter then updated the terms in certain circumstances. It confirmed that due to the "current uncertainty in our business", it would allow Deferred Members who subsequently left "AstraZeneca by redundancy", to be allowed to receive an unreduced early pension. It did not mention leaving for any other reason.
- The Change Letter was clear about the early retirement change, and the specific circumstances under which it would apply. Taking both the Guide and the Change Letter into account, the circumstances under which Employee and Deferred Members would receive an unreduced pension were clear. In the absence of any other contractual agreement between Mr R and AstraZeneca, as a Deferred Member, he could only expect to receive an unreduced early retirement pension in the event of his redundancy from AstraZeneca.

- So, AstraZeneca was not obliged to pay for the additional cost of providing Mr R an unreduced pension in December 2016. The Adjudicator accepted that if Mr R had chosen to become an Employee Member in December 2010, he would most likely have been allowed to receive an unreduced pension in December 2016, paid for by AstraZeneca. However, in this scenario, he would also not have been employed by Avara at the time of the redundancy program in 2019, and so would not have received his redundancy payment three years later.

56. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R's comments are summarised below:-

- If he had elected to become an Employee Member in 2010, he could have received an unreduced pension in December 2016 while also having his employment transferred to Avara, and subsequently would have received a redundancy payment in 2019.
- He questioned why Employee Members who met the criteria received an unreduced pension in December 2016 while Deferred Members did not.
- AstraZeneca was not explicit in its formal communications about the changes in 2010. It did not ensure that Members could make an informed decision about the critical issues, in this case the impact of a TUPE transfer, particularly when there was uncertainty about Avlon's future.

57. I have considered Mr R's comments, but they do not change the outcome. I agree with the Adjudicator's Opinion.

Ombudsman's decision

58. I empathise with Mr R's position and note the additional comments he has made. I also agree with the Adjudicator that there are, essentially, two questions to answer:

58.1. whether the TUPE transfer to Avara triggered a right to an unreduced pension under the 2012 Rules – which would be the case if a TUPE transfer was sufficient to amount to Mr R leaving "...actual employment with the Employers at the request of his Employer...", and

58.2. whether AstraZeneca had made a separate (i.e. outside of the 2012 Rules) agreement to provide an enhanced redundancy right to Mr R through the Guide and 2010 Letter.

59. In relation to the first question, the live issue² is linked to the second part of the phrase: whether he left employment “at the request of the Employer”. The Trustee has pointed to the Court of Appeal case of *AGCO* and argued that it provides a “settled legal meaning of that phrase”. The Trustee argues that *AGCO* found that “an employee could only be said to leave employment at the request of his or her employer in circumstances where it is open to that employee to refuse that request (as is the case, for example, in the scenario of voluntary redundancy)”.
60. However, in my view, *AGCO* does not provide a settled legal meaning of the phrase “at the request of the Employer” in quite the way the Trustee argues. Rather the Court of Appeal in *AGCO* was considering the entire phrase: “retires from Service at the request of the Employer”. The interaction between “retires” and the remainder of the phrase was of importance in the eventual outcome – and indeed the judgment drew distinctions between that rule, and others which did not include the word “retires”³.
61. Nonetheless, *AGCO* is, in my view, still of assistance when construing the phrase “at the request of the Employer” in this case – looking, as it does, at the nature of an employer’s “request” (with Rix LJ pointing out that the “natural meaning of “request” suggests that the employee can choose whether or not to comply with the request”). The nature of a “request” was then of assistance to the Court in drawing a distinction between a voluntary redundancy (where “it is a matter of choice” and the individual could refuse and remain in employment) and compulsory redundancy (where, in the judgment of Rix LJ, it was “requiring too much of this phrase to suppose that it is intended to include cases where the employer not merely requests but successfully enforces retirement”⁴).
62. As a result, I do agree with the Trustee that Mr R’s departure from employment, when an Opt-out Member under the 2012 Rules, as a result of the TUPE transfer, was not at the request of his employer. This is because, as the Trustee sets out, Mr R left employment as a result of the operation of law under Regulation 4 of TUPE, rather than as a result of any “request” of his employer. Furthermore, I also agree with the Trustee that, following the guidance of *AGCO*, the nature of a TUPE transfer cannot be described as voluntary in the sense that Mr R could decide to refuse and remain in employment with his existing employer. An individual can object to a TUPE transfer (again under Regulation 4), but the outcome of that objection would not result in the individual remaining in employment, rather he or she would find that their employment terminated on the transfer date (but would not be deemed to have been dismissed⁵).

² As it is clear that he left employment with the Employers.

³ For example, see paragraph 19 of *AGCO* where Rix LJ points out that: “*It will have been observed that rule 13 is drafted in terms of members who retire from service, whereas rule 23 is drafted in terms of members who leave service.*” Later paragraphs of the judgment look in detail on the meaning that the word “retires” then brings to the construction of the rule as a whole – for example, paragraphs 53, 58, 62 and 63.

⁴ *AGCO*, para 58.

⁵ Regulation 4(8): “*Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.*”

63. I turn now to the second question – whether Mr R had a separate right that he had triggered, outside of the 2012 Rules, as a result of the Guide or the Change Letter. Mr R was a Deferred Member and the Guide outlined, clearly, that he had different rights to those that would be available to an Employee Member (see paragraph 8 above). The Guide did make some later concessions for Deferred Members – but I note that the explanation contained in the Guide made it clear that these were linked to Mr R remaining “employed by AstraZeneca” and that “this means if you become a deferred member of the Pre-96 Retirement Account, and you leave AstraZeneca by reason of redundancy at any time between age 50 and 62 and take a pension within three months of leaving AstraZeneca...”. Mr R did not leave AstraZeneca by reason of redundancy, and he was not employed by AstraZeneca when his later redundancy did occur. These terms do not assist Mr R’s complaint.
64. In passing, I note that while the 2012 Rules allow neither Employee Members nor Deferred Members to retire early with an unreduced pension unless they leave service “at the request of the Employer”, the Guide produced by AstraZeneca states that Employee Members who leave employment at AstraZeneca’s request “and for reasons beyond your control”, would not have their early retirement pension reduced. So, if an Employee Member did receive an unreduced early retirement pension when they transferred their employment to Avara, this would have been consistent with the Guide, and I would expect AstraZeneca to have paid for the additional cost of providing it. However, I do not make any finding on that point, as it relates to other individuals for whom I have not received any evidence or argument.
65. If this is the case, hypothetically it is possible that if Mr R had chosen to become an Employee Member in 2010, he could have received an unreduced pension in December 2016 and transferred his job to Avara until being made redundant in February 2019. However, he did not choose to become an Employee Member, so this situation does not apply to him.
66. I do not uphold Mr R’s complaint.

Dominic Harris

Pensions Ombudsman
17 June 2024

Appendix – Extracts from the Fund’s Rules (2012)

“5.3 Early Retirement (not Incapacity)

Entitlement to benefit

A Member (other than an Astra member) who:

- leaves Service between age 60 and NPD; or
- with the consent of his Employer leaves Service between age 57 and age 60; or
- is leaving Service at the request of his Employer between age 50 (age 55 if the Member leaves Service on or after 6 April 2010 and if the pension payable before age 55 would be “unauthorised” by virtue of Section 160 of the Finance Act 2004) and age 60;

and who is not suffering from Incapacity, will be entitled to benefits as described in Rule 5.1.”

[Rule 5.1 sets out how an unreduced pension is determined.]

“If the member has a Pre 1996 Retirement Account this will be reduced by 2.5% for each year by which retirement precedes NPD....

No reduction will, however, be applied to the Member’s Pre 1996 Retirement Account in circumstances where he has completed 10 years’ Service and is leaving for reasons beyond his control.”

“9 Early Leavers

9.2 Early benefits

....if the Trustee agrees a member entitled to preserved benefits may elect for those benefits to become payable from a date earlier than described in Rule 9.1 but not from an age which is earlier than 50 (or 55 if the pension starts on or after 6 April 2010 and if pension payable before age 55 would be “unauthorised” by virtue of Section 160 of the Finance Act 2004) unless the Member is suffering from Incapacity.

If the Member has a Retirement Account this will be reduced by 2.5%....of the amount in that Account for each year (if any) by which the date upon which benefits come into payment precedes age 60 (or age 57 in cases where the Member left Service at the request of his Employer and his benefits come into payment within three months of leaving Service).

Notwithstanding the above, where an Opt-out Member leaves actual employment with the Employers at the request of his Employer between age 50 (or age 55 if the member leaves actual employment with the Employers on or after 6 April 2010 and if pension payable before age 55 would be “unauthorised” by virtue of Section 160 of the Finance Act 2004) and the date described in Rule 9.1 he will be entitled to benefits payable from a date earlier than that described in Rule 9.1.

If the Opt-out Member has a Retirement Account this will be reduced either as described above or in accordance with the provisions of Rule 5.3 which would have applied had the Opt-out Member not opted-out (whichever will provide the greater benefit).”

“Opt-out Member means a Member who opted out of the Plan [and became a Deferred member]... with effect from 1 July 2010 or 1 January 2011.”

“Member” means a person who has joined the Fund.

“Service” means employment with the Employers.

“Employer” means an employer participating in the Fund.

“Principal employer” means AstraZeneca.

AstraZeneca is also the only participating Employer of the Fund.