

PENSIONS



OMBUDSMAN

**Annual Report  
of the  
Pensions  
Ombudsman  
2003-2004**

P E N S I O N S



O M B U D S M A N

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*The Pensions Ombudsman, David Laverick*

**To: The Right Hon Andrew Smith,  
Secretary of State for Work and Pensions**

I have pleasure in submitting the Annual Report of the Pensions Ombudsman for the year 1 April 2003 to 31 March 2004.

A handwritten signature in black ink, which appears to read "David Laverick". The signature is written in a cursive style and is positioned above a horizontal line.

**DAVID LAVERICK  
Pensions Ombudsman – July 2004**



## CHAPTER 1: Introduction

In my Annual Report for last year I noted that there had been a marked rise in the latter half of the year ending March 2003 in the amount of work flowing into the office. This year I can report a marked rise in the amount of investigative work flowing out of the office.

The increase in the number of investigations closed is largely due to changes I have made in the way the office is structured and in its working practices. I have tried to increase the resources devoted to investigation of complaints and this has meant that I have been able to complete work on some long-standing complaints while at the same time those complaints which have more recently been received have been dealt with more quickly. The news is, however, not all good. Despite the record number of investigations which have been closed I have in fact not managed to keep pace with the number of cases accepted for investigation and there remain some investigations which are taking far too long.

It was apparent in preparing my Business Plan for the year that the large increase in incoming enquiries received during the latter half of the previous financial year, would mean that considerably more members of staff were needed if backlogs were not to grow. Such an increase would not of itself tackle the backlog of work which was already in the system but would, I judged, prevent that backlog rising. I was disappointed that I was initially told that no more resources could be provided. In the event it was not until November 2003 that I received approval to recruit the additional members of staff that I had indicated were needed as from the previous April. That approval followed a review by a Consultant provided by the Department. The Consultant, who reported in the late Summer of last year, noted that by that time, the increase in staff that I had originally sought would not be sufficient to cope with the amount of work in hand which had by then increased.

When first faced with the need to operate with less resources than I judged necessary I decided that as a first priority I should seek to keep on top of the incoming enquiries, a policy I had indeed established the previous year when the rate of incoming enquiries had sharply increased. This avoided what might otherwise have been a long delay before enquirers were told that the complaints were not suitable for investigation or needed first to go through the IDR process. On the other hand it meant that those matters which were already in the investigative pipeline were dealt with less expeditiously than I would have liked.

I took two other measures. Firstly I used money brought forward from financial savings in the previous year to recruit four additional members of staff on short term contracts. When approval was later given for my establishment to be increased I was able to retain three of these four people who by then had of course completed their induction into the office. I would have liked to retain the fourth but by then he had obtained an established post elsewhere.

Secondly, as I noted in last year's Annual Report, the Casework Director moved on from the office early in the year to become an Ombudsman with the Financial Ombudsman Service. I decided to use the financial resources thus released to set up a third team of investigative staff. The manager leading that team also manages a number of ad-hoc caseworkers paid on a fee per case basis. This team has concentrated on clearing those cases which have been longest in the system beginning, by taking as their first tranche of cases those over 65 weeks old. By the end of the year they took a second tranche of cases this time over 60 weeks old and this pattern will continue.

The net effect of those and earlier changes in work processes is that despite not having in post all the additional staff I had requested, the office has completed work on far more investigations than at any time since it was founded.

The volume of casework makes it difficult to progress all cases effectively and efficiently. Time has to be devoted to explaining why some cases are not moving as quickly as the parties would like. I have had a particular difficulty with my personal time management in seeking not only to maintain the flow of work across my desk but also in undertaking the management and administrative work previously shouldered by the Casework Director. A complicating factor was the unexpected departure during the year of a long-serving member of the investigative staff who had been handling some very long running investigations.

I have been pleased to note the provisions in the Pensions Bill which will allow the appointment of one or more Deputy Ombudsmen. The present legislation inevitably means that the Ombudsman acts as a bottleneck. I am anxious that the legislation is expressed in a way which will allow that bottleneck to be either widened or circumvented.

The Department has been moving forward with plans to upgrade the IT system which supports my office but I remain concerned by the time this is taking and am hampered by the lack of a reliable system providing the Management Information I seek and enabling the electronic handling of casework papers.

Although my determinations are each made on their own facts and are not to be regarded as precedents in the way that decisions of the Courts are so regarded I am aware that those involved in managing and advising Pension Schemes do seek to take account of them and modify their processes accordingly. To assist them in so doing I have been working on the production of a short Guide which aims to pull out of the many determinations which have been made some general principles. External consultations are presently taking place on that draft guidance.

Chapter 4 of this report summarises the various appeals and applications to the Court about my decisions. I am concerned by the judgement in *Legal and General Assurance Society Ltd V CCA Stationary Ltd* in which the Judge expressed the view that I could not make an order of a kind which a Court could not make. I observe that there is no statutory statement to that effect. What the legislation says is “Where the Pensions Ombudsman makes a determination... he may direct the trustees or managers of the schemes concerned to take, or refrain from taking, such steps as he may specify in (the determination)”

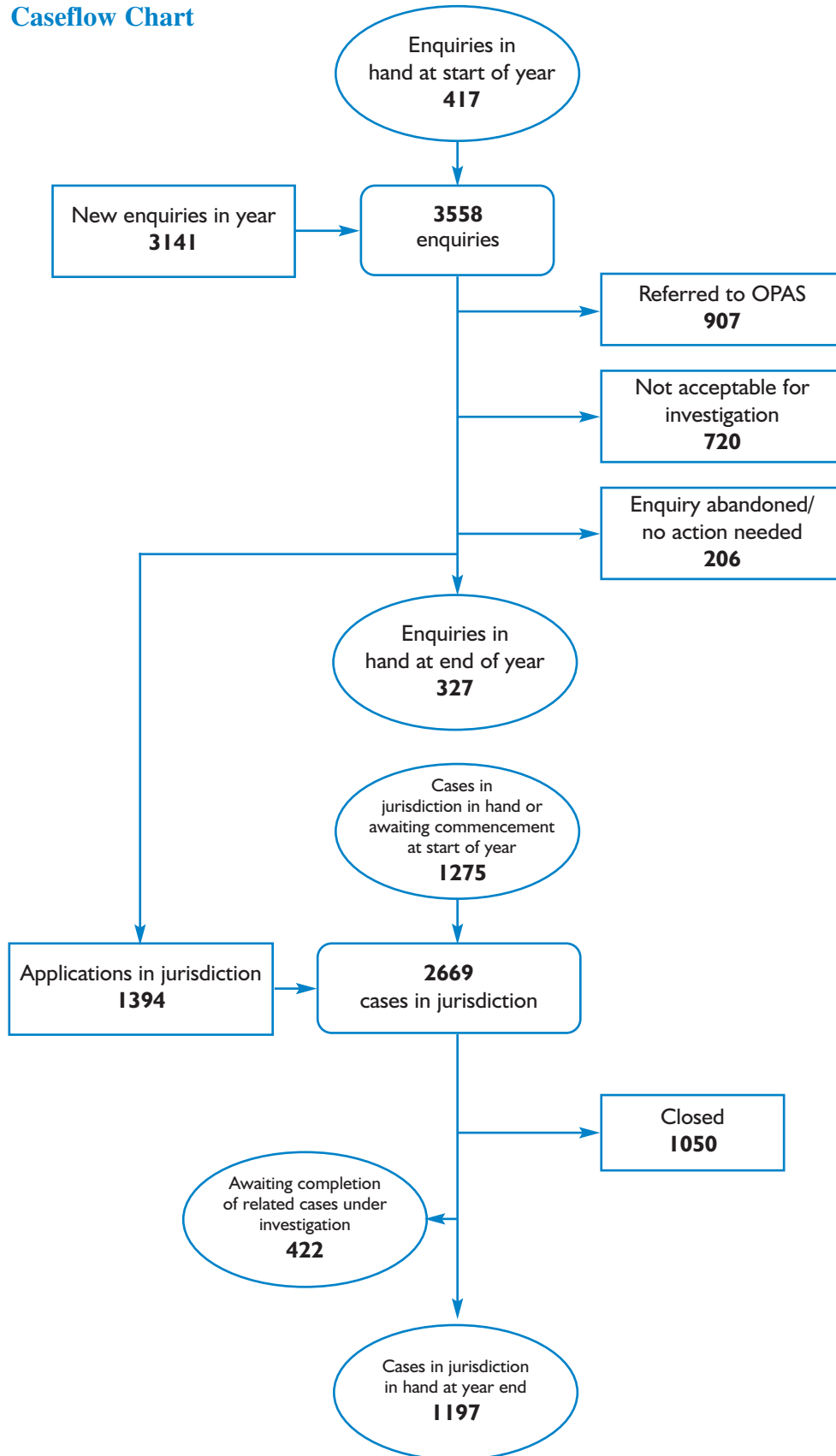
I am very doubtful whether it is indeed the will of Parliament that I should in effect replace these words by instead saying, “I may direct the parties to take such action as a Court could order them to take”. It says to me that Ombudsmen are intended to provide remedies in circumstances and where appropriate of a kind which differ from those available from the courts. I also note that a consequence of the decision in *Suffolk County Council V Wallis* it would seem to be that if a scheme member is denied a benefit because of negligence by a doctor advising the scheme, no remedy is available to him. That cannot be a fair outcome.

A user group has also been established and is providing me with some useful feedback on office practices and procedures. That group has also been consulted about the proposed guidance and in the revision of the leaflet which is produced for would-be users of the office.

As in previous years I have taken most of the opportunities offered to me to interact with those involved in the provision and receipt of pensions. This has involved speaking at various conferences and seminars, private discussions with representatives of various professional bodies and consumer groups, attendance at conferences and less formal functions, various written articles and radio and television interviews.

Finally I am pleased to report that the office was re-certified as fully meeting the Investors in People Standard following assessment in November 2003. While I take responsibility for all of the work of the office and am indeed involved (perhaps more actively than some members of staff might wish) in the process of making the final decision on complaints, most of the people who come into contact with my office do not talk directly with me and correspond with my staff rather than with me. Thus I am very dependent on the professional and personal skills of the staff of the office. Despite the pressure they have been under over the last year, they have risen to the challenge. I take this opportunity to express my thanks to them.

## Caseflow Chart



## CHAPTER 2: Casework

As I reported last year more people contacted my office in the year which ended in March 2003 than in any previous year since the office came into existence. Numbers of incoming enquiries have fallen back this year to what seems to be a more normal level. On the other hand last year's high intake has meant a very sharp increase in the number of complaints which have been under investigation during the year which ended in March 2004. For the first time the number of investigations closed in the course of the year was more than 1000.

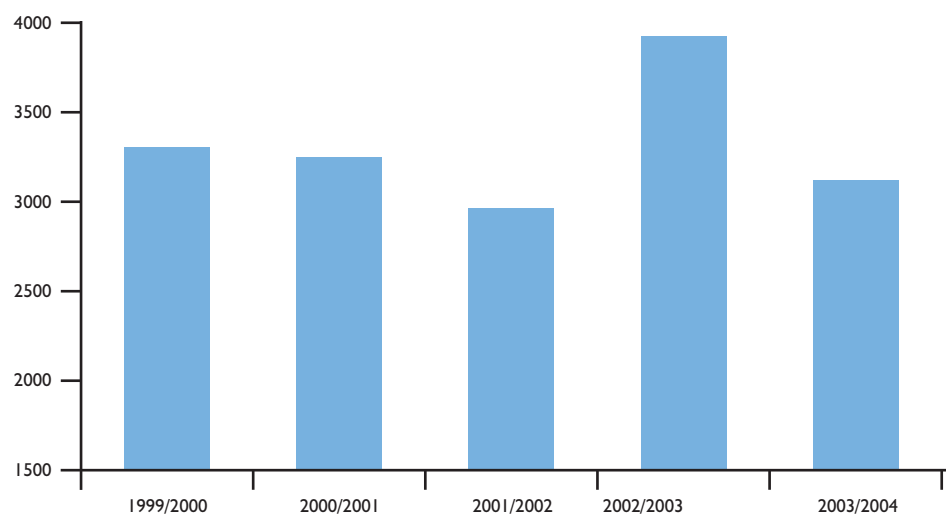
Many of the people who seek my assistance have either come to the wrong office (because I do not deal with complaints about the provision of the State Retirement Pension or because the complaint is about some other financial product) or have come to me at too early a stage in the process – before the matter has been considered by internal dispute procedures. Where the approach has been to the wrong office the complaints are passed on to the Financial Ombudsman Service or (in the case of disputes about state pensions) to the Department for Work and Pensions or the Parliamentary Ombudsman. About half of the written enquiries I receive are passed on to OPAS, the Pensions Advisory Service. OPAS also handles an even higher percentage of the telephone calls initially received by my office.

Assuming a complaint is about a matter within my jurisdiction I have a discretion as to whether to mount an investigation. OPAS will have had an involvement in about 80% of the complaints accepted for investigation. Their involvement is higher in matters connected with occupational pension schemes than with complaints about personal pensions. The latter kind of complaints usually presents fewer jurisdictional problems and is less likely to need referring back into the pension provider's own complaints procedure.

### Enquiries

In 2003-2004 I received 3141 enquiries and dealt with 3222. The figures for the previous year were 3891 and 3684 respectively, which was an exceptional number. It can be seen that the number of incoming enquiries has returned to a more normal level after last year's peak.

**Figure 1 – New enquiries received (last 5 years)**



The office's target for dealing with straightforward referrals (or rejections in the relatively few cases in which there is no other body which can deal with a matter which is outside my jurisdiction) is two working days. 94% of enquiries were dealt with within this time. 2% were dealt with in three days and another 2% in four.

Figure 2 sets out the reason why rather than half of the written enquiries considered did not move on to be accepted for investigation. The pattern is broadly consistent with the previous year.

**Figure 2 – Referrals and rejections (showing percentage of total referred/rejected)**

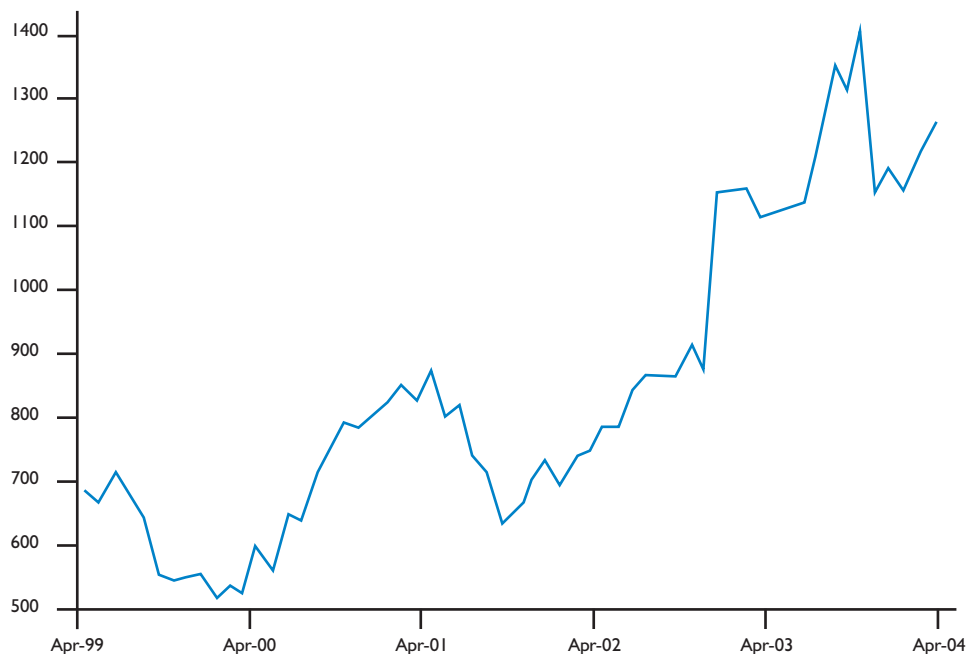
Reason	Number	%	%
State scheme benefits	151	8	(4)
Not relating to pension scheme	15	1	(0)
Seeking financial advice	1	0	(0)
Respondent not in remit	19	1	(3)
Not person permitted to complain	26	1	(1)
Enquiry not yet put to scheme/IDR not used	134	7	(13)
Referred to OPAS	907	50	(52)
Appropriate for FSA or FOS	190	11	(7)
Appropriate for Pension Schemes Registry	51	3	(2)
Appropriate for OPRA	6	0	(0)
Subject to prior court proceedings	12	1	(1)
Outside time limit	90	5	(6)
Discretion not to investigate exercised	9	0	(0)
Enquiry abandoned/no action needed	208	12	(11)
<b>Total</b>	<b>1819</b>		

## Investigations

1394 cases were accepted for investigation by comparison with 1187 in the previous year. This is an all time high for the office. Figure 3 shows the trend over the last six years mapped on a monthly basis. The increase is partly the result of last year's peak numbers of enquiries but may also be due to the increasing number of complaints about personal

pensions which arrive with fewer jurisdictional problems than apply to complaints about occupational pensions and are therefore more likely to be accepted for investigation.

**Figure 3 – Cases accepted in preceding 12 months (last six years)**



My aim is to deal with cases that fall within jurisdiction as expeditiously as possible. This consists of weeding out at an early stage those matters which cannot succeed, including identifying those parts of a complaint which may not be within jurisdiction.

If the caseworker takes the view that talking to, or corresponding with, the parties might result in a mediated solution then this will be done. Typically in such cases the caseworker will have reached the conclusion that the complaint is unlikely to succeed, or that it will only succeed to the extent of payment of a relatively small sum – perhaps for distress and/or inconvenience rather than financial loss. If the parties accept the caseworker's view then the case will be closed as satisfactorily resolved.

In cases where the caseworker does not think that the complaint can possibly succeed and that a reasoned decision to this effect is called for, then a letter will be written saying that the caseworker believes that I would not uphold the complaint and giving reasons for that view. The letter goes on to say that if the complainant is unhappy he or she may ask me to review the file. If the complainant accepts the caseworker's view then the file is closed. If the complainant asks for a decision from me then I do indeed review the papers. That review most usually involves my endorsing the caseworkers decision but I do sometimes refer the matter back to the caseworker for more investigation and a later determination.

In some cases my staff form the view that on the evidence that emerges during the investigation the case cannot be, or should not be, investigated further even though the case had originally been seen as likely to go through the full investigation process. An example of where this happens would be if I had initially accepted that the complaint had been made within three years of when the complainant knew of the matter but later discover that he or she had, or ought to have had, previous knowledge. In other cases

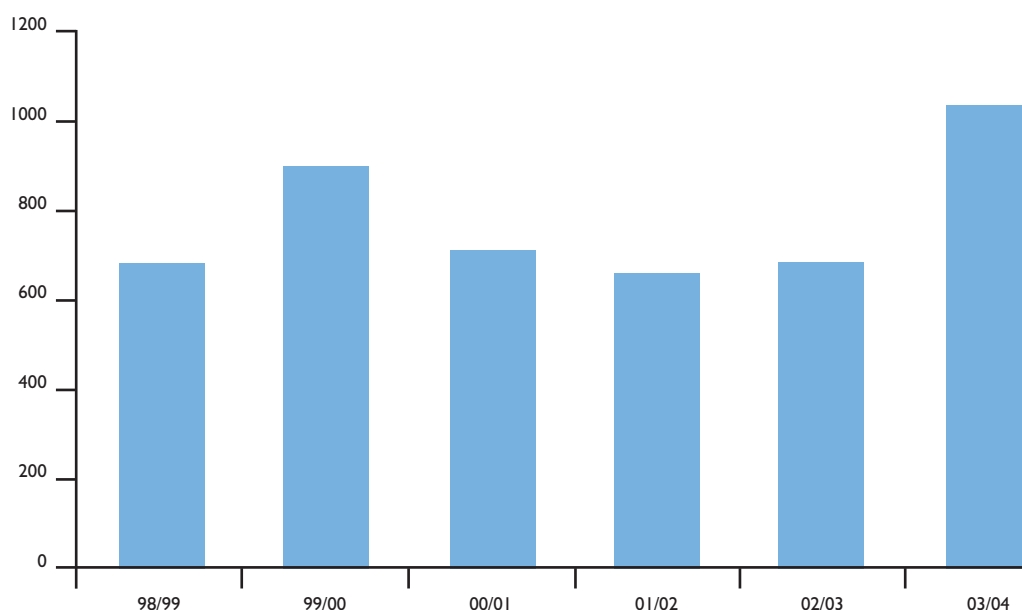
a document might, for example be uncovered which puts an entirely fresh complexion on the matter. The parties concerned are of course given an opportunity to comment on the changed view of the complaint before a formal decision is taken.

The longest path that an investigation will take is where the caseworker obtains submissions from all of the parties, obtains the complainant's observations on those submissions and pursues any other necessary avenues such as calling for documents, making enquiries or asking for specific points of view. A formal decision will be drafted and sent to the parties as a "Notification of Preliminary Conclusions" for final comment before my Determination is issued.

My practice is to settle that notification personally and I also personally consider the comments which are received in response to that notification. As the legislation presently stands only the Ombudsman has the power to issue a formal Determination and this is coming close to being an obstacle to maintaining a consistent throughput of work. The Ombudsman's desk (or more accurately his computer) sits at the end of several conveyor belts and if I am unable to work for any period then matters have to await my return.

In the year under review 1050 cases were closed compared with 679 in the previous year. Figure 4 gives a comparison with the last five years from which it can be seen that the closure level in 2003–2004 is much higher than in any of the last six years. Indeed the number of investigations closed is the highest in the history of the office.

**Figure 4 – Investigations closed (last six years)**



The increased output is partly due to changes in processes which had previously been introduced during the last financial year and which are now bearing fruit, and partly due to additional resources being devoted to investigative staff. In particular I did not make a direct replacement of the Casework Director who left earlier in the year, using the resources instead to employ staff more directly involved in the investigation process. Approval to appoint additional established staff was not received until the latter half of the year. Although the recruitment process was then quickly started not all of the staff appointed were able to take up their post before the end of the financial year.

Figure 5 gives a breakdown of how the closed investigations are categorised. The 288 cases in which the caseworker's decision was accepted compares with 126 the year before and 53 the year before that.

### Figure 5 – Closures

	2003–2004	(2002–2003)
Discontinued	89	(95)
Resolved	140	(72)
Caseworker's decision letter accepted	288	(126)
Determination following caseworker's decision	215	(137)
Full investigation and Determination	318	(249)
<b>Total</b>	<b>1050</b>	<b>(679)</b>

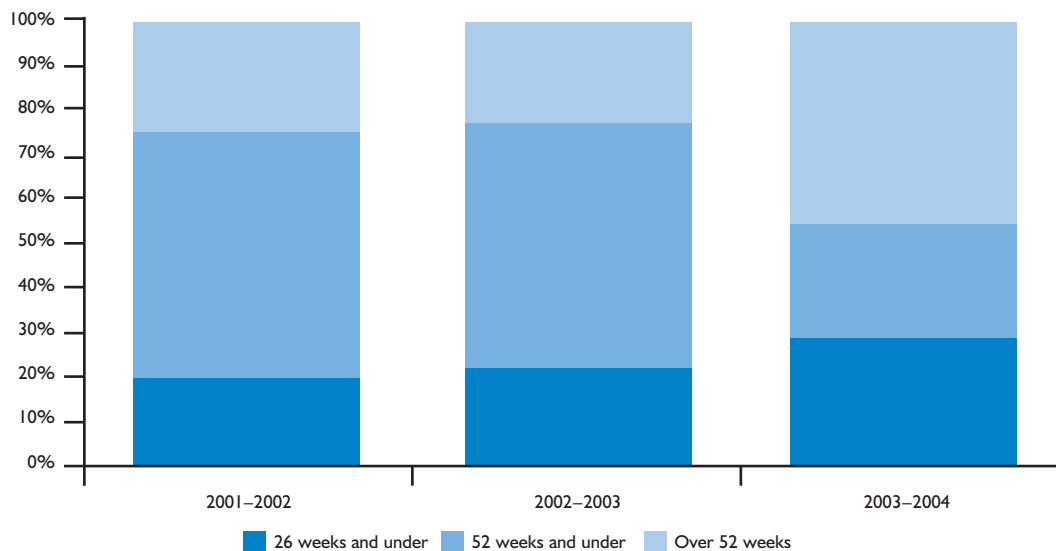
### Performance Indicators

Figure 6 shows the time taken to close investigations cases measured from the date of the application being first received by my office. It includes all cases rather than just those formally determined. Figure 7 shows the outcome for 2003–2004 on the same basis and gives a graphic comparison with the two previous year.

### Figure 6 – Closure times

	Number	%
6 months or less	283	27
12 months or less	277	26
Over 12 months	492	47

### Figure 7 – Closure times (last three years)



There has been some small progress towards my aim of increasing the proportion of cases closed within six months. There has, however, also been an increase in the number of investigations taking more than a year to complete. I have established a special team of staff to work on older cases but need to balance resources between clearing that backlog and dealing more quickly with newer cases and thus preventing another backlog developing.

## Subject Matter

The issues brought to me are often multi-headed and can be attributed to a number of related problems. Nevertheless, I seek to categorise each complaint according to one main issue. A sizeable proportion (27% this year) do not fit into any particular category.

**Figure 8 – Subject matter**

	2003–2004		(2002–2003)	
	No	%	No	%
Contributions refunds and queries	51	5	8	
Transfers	115	11	7	
Preservation requirements	5	0.5	1	
Membership conditions	47	4	4	
Enhancement of pensions	7	0.5	2	
Early retirement	46	4	6	
Ill-health benefits	97	9	10	
Spouse's and dependant's benefits	43	4	5	
Additional voluntary contributions	48	5	7	
Incorrect/late or no payment	51	5	4	
No response from scheme	13	1	1	
Winding up	56	5	6	
Use of surplus	17	1.5	1	
Disclosure of information	12	1	1	
Calculation of benefits	114	11	14	
Miss-selling	47	5	1	
Other	281	27	23	
<b>Total</b>	<b>1050</b>			

The overall picture is very similar to last year. The most frequent matters giving rise to problems are the calculation of benefit, transfers and the payment (or more probably non-payment) of ill-health pensions .

The heading “Calculation of benefits” covers a broad range of matters from simple calculation errors to allegations that promises have not been kept and to problems caused by benefits being quoted of higher amounts than eventually turn out to be payable. Receipt of a wrong calculation does not usually give rise to a right to receive a pension at the wrongly-quoted amount. What the member is entitled to receive is a pension which has been correctly calculated. But there may sometimes be circumstances which require a further payment to redress injustice caused by the error for example where a member has acted to his or her detriment as a result of receiving the wrong information.

The increase in the number of complaints about transfers is in part due to the increasing use by insurers of market value adjustments, the operation of which can lead to some marked differences in values if there has been some delay in the transfer process. The increase also in part reflects the greater proportion of complaints about personal

(as opposed to occupational) pensions. I have also noted a particular kind of complaint which arises from the transfer of an individual's employment between public authorities and the private sector. Ill-health pensions have historically always been a source of disputes which come to my office. A decision to pay such a pension may make the difference between a financially secure future and a life of poverty. It is also not always understood by members that different criteria may apply in deciding whether their employment should continue than those criteria which apply to whether an ill-health pension can be paid. For example an employer may fairly dismiss an employee because the latter's state of health means that he or she is not presently able to do the job. But whether an ill-health pension can be paid might depend on whether the employee's ill-health is likely to be permanent. Similarly different criteria may apply in deciding whether the scheme member is entitled to draw benefits from the state on the basis of incapacity. That different criteria might apply does not mean that those involved in considering the matter from the point of view of the pension scheme should refuse to have regard to medical evidence that may have been obtained with different criteria in mind.

## Outcomes

I record a case as upheld when I have issued a determination that there has been maladministration which has caused unredressed injustice or an error of fact or law which calls for a remedy. On that basis I have recorded that 161 cases were upheld during the year. The figure needs to be viewed with caution. It does not mean that each of the 161 complainants was satisfied with the outcome (though doubtless many were). For some however their claim will have been wider and larger than that which I upheld in part.

Additionally, as mentioned earlier, my caseworkers will have negotiated many settlements which have satisfied the complainant but these will have been recorded as discontinued or resolved. Similarly where injustice is redressed in the course of the investigation (often after the respondents have received any preliminary conclusions) the matter will not be recorded as upheld.

## Sources

Finally, a note on where the cases came from. My main jurisdiction remains complaints of maladministration made by scheme members and their dependants. Many of these complaints will also involve determining matters of fact or of law. I can also deal with matters referred by trustees and employers. The breakdown of cases closed in the year is set out in Figure 9.

**Figure 9 – Source**

	<b>Number</b>
From members etc	1026
From employers	17
From trustees or managers	5
From statutory independent trustees	2

Thus under 5% of cases came from employers, trustees or managers. The percentage is almost identical to the previous year.

## Expenditure

**Figure 10 – Expenditure/Total Investigations Closed**

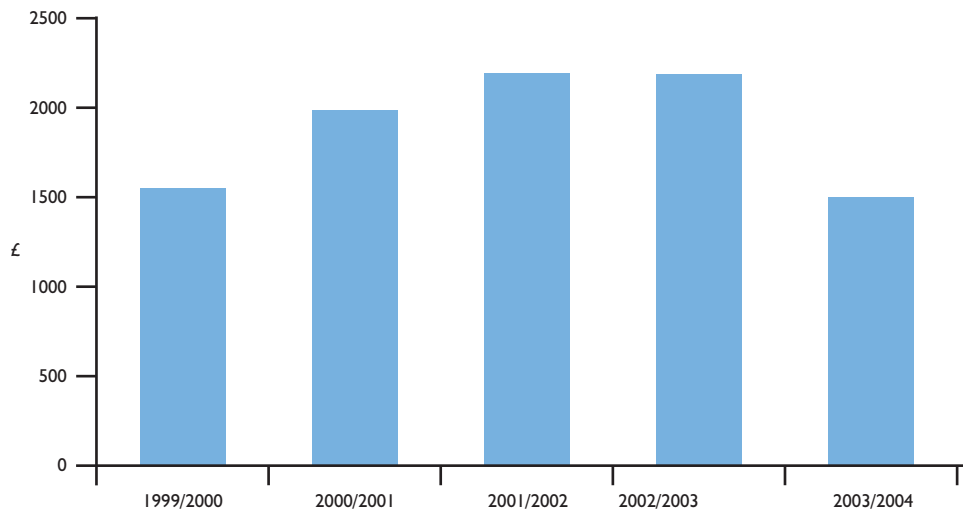


Figure 10 shows the total office expenditure divided by the total of investigations closed to give an average cost per closed case. The lower unit cost reflects the increase in the number of investigations which have been closed during the year.

## CHAPTER 3: Case Summaries

This chapter aims to draw attention to some of the noteworthy cases determined during the year. The full determinations are available on my website ([www.pensions-ombudsman.org.uk](http://www.pensions-ombudsman.org.uk)) and the formal document should be treated as authoritative rather than the summarised version.

### I. L00244

#### ***Additional contributions – miscalculation***

##### *Background*

Under the Scheme, married women such as Mrs B accrued Family Benefits for pensionable service from 6 April 1988. Mrs B applied in 1989 to backdate the provision of Family Benefits to 1972, and to all pensionable service prior to 1972. She agreed to meet the cost of these benefits by paying additional contributions of 2% of salary. Mrs B was due to retire at age 60 on 31 August 2000 and, some months beforehand, it became evident that her election had been processed incorrectly in 1989, as the cost of pre-1972 Family Benefits had not been taken into account. An additional amount of just over £4,000 was now required. Mrs B had been a teacher, and the Bursar at her school tried to negotiate on her behalf in the months leading up to her retirement date, but without success. Mrs B duly retired on 31 August 2000 and the outstanding £4,000 was taken from her tax-free cash sum on a without prejudice basis whilst she pursued her complaint to me. It had been suggested to Mrs B that she should quantify the tax relief she had lost and her accountant carried out this task for her, at a cost of just over £150. A small part of the tax relief she had lost was subsequently granted by the Inland Revenue.

##### *Outcome*

I considered that, from the information Mrs B had been given before her retirement, she could not have realised that she had not been paying for Family Benefits in respect of the whole of her period of pensionable service. The outstanding contributions did, however, have to be paid in full, although interest on them had not been charged. It would have been unreasonable for interest to have been charged but, by waiving the interest, and accepting a lump sum payment, the Scheme had suffered a loss it would not have suffered if contributions had been paid when due. I decided that the Scheme should compensate Mrs B for the tax relief she had lost and for the fee her accountant had charged for calculating the tax relief. The Scheme authorities considered I did not have the authority to direct compensation for the cost of professional fees, but similar directions have been made in the past and have been upheld on appeal to the High Court. Mrs B was also awarded £200 compensation for the distress and inconvenience she had suffered.

## 2. M00053

### ***Return of contributions***

#### *Background*

Dr W had all service between 1 October 1959 and 27 October 1973 transferred to the Scheme. On 1 November 1974, he joined a new scheme leaving his accrued benefits as a preserved pension in the Scheme.

Unbeknown to Dr W, the Scheme was wound up in 1984, with the administrator issuing a cheque to Dr W, to an address he was living at at the time, for an amount representing his full entitlement. The administrator provided evidence that showed the cheque had been paid into an account in the name of Dr W at a bank in Hove. Dr W says he never received this cheque.

#### *Outcome*

It was concluded that the complaint could not be upheld, as the Scheme had discharged its liability by issuing the cheque to the named beneficiary at an address he was then living at. The fact that the cheque may have then been misappropriated was not found to be due to any maladministration by the Scheme.

## 3. M01015

### ***The value of a refund of contributions***

#### *Background*

Dr G stated that the Manager and the Trustees failed to pay the correct value on the transfer of his benefits from the Scheme to a personal pension plan (PPP).

Dr G left the service of the Employer having completed less than 2 years qualifying service. At the time he left service, he was informed that his options under the Scheme were either a refund of his contributions (with any growth) less tax at the rate of 20%, or a transfer of the value of his pension account representing his own contributions plus growth. He was informed that the value of his contributions could go up as well as down and could not be guaranteed. He chose to take a transfer of the value of his contributions to a PPP.

When the transfer of Dr G's contributions were made to his PPP, he found that the value was less than the figure initially quoted to him. Dr G queried this with the Manager who admitted that there had been a delay in processing his transfer and paid £130 into his PPP to make up for the loss.

Dr G complained to the Manager about the transfer value from the Scheme. His complaint was dealt with under the Scheme's internal dispute resolution procedures (IDRP). Under stage one of IDRP, the appointed person discovered that an error had been made in that, under the Scheme rules, Dr G was not entitled to a transfer value as he had completed less than 2 years' qualifying service. He was entitled only to a refund of contributions less tax. However, the Trustees agreed that it would be unfair to seek

repayment of the amount already paid and instead decided to augment his entitlement to the amount paid to his PPP.

Dr G queried again the amount of the transfer value, pointing out that it was less than the total contributions he had paid to the Scheme. The Trustees agreed that the total contributions he had paid to the Scheme were higher than the transfer value, but pointed out that, under the rules, he was entitled to a refund of “the value as at the date of payment” of his contributions less tax. It was added that the value of his contributions less tax of 20% was less than the transfer value paid to his PPP.

#### *Outcome*

Dr G, on leaving the Scheme, was only entitled to a refund of contributions less tax. The Trustees and the Manager, having operated previously in the incorrect belief that a transfer could, and indeed had taken place, exercised the power of augmentation and granted him a transfer value which was higher than the refund of contributions that would have been paid. That incorrect belief and the purported transfer were maladministration on the part of the Trustees. This part of the complaint was upheld.

It is possible to interpret the rules of the Scheme in the way Dr G did, if the words “the value as at the date of payment” were taken in isolation. However, taking the rules in their entirety, the opposite view could be reached. If the refund was intended to be the total contributions paid, then the rules would not have needed to refer to the “value”. The only reason for referring to the “value” is because the refund at the date of payment could be higher or lower than the total contributions paid. Consequently, this part of the complaint was not upheld.

#### **4. N00221**

##### ***Retirement cash – whether applicant was misled – whether insurer acted on applicant’s instructions***

#### *Background*

Mr P had a number of retirement annuity policies with insurer S. He said that S told him that he could take tax free retirement cash of £165,504.46 in total. However, when he retired, S transferred his full policy proceeds to insurers L and C. L and C paid Mr P £161,214.69, and he complained that S should make good the shortfall of £4,289.77.

Regulations governing retirement annuities do not permit the payment of tax free cash from the holding insurer, with the balance of the policy funds transferred elsewhere to purchase annuities. At no time had S told Mr P or his financial adviser that it would pay the tax free cash to him and transfer the balance of his policy funds elsewhere. S had told him that either he could take £165,504.46 tax free cash and purchase an annuity with themselves (under retirement annuity rules), or he could transfer his entire policy proceeds elsewhere.

On investigation, it was discovered that Mr P’s financial adviser had recommended that he should take the £165,504.46 cash from S and transfer the balance of his funds to L and C, presumably to obtain higher annuities. When Mr P tried to instruct S to do so, his instruction was

misunderstood (because such a course of action was prohibited) and S paid out the full policy proceeds to L and C. L and C then set up immediately vesting personal pensions for Mr P (with tax free cash restricted to 25% of the policy value).

*Outcome*

Before paying the full policy proceeds to L and C, S should probably have contacted Mr P so that he could clarify his instructions. However, when S did so, Mr P's appropriate course of action should have been to have the monies repaid to S pending his further instructions, rather than demand that S should pay him additional monies to which he was not entitled.

Mr P's proposal to insurer C included the statement "I agree and understand that on receipt of the transfer payment the policy is immediately vested and the proceeds used as follows... The maximum tax free cash lump sum should be paid to me [and] the balance of the fund should be used by the trustees to purchase a separate Personal Compulsory Purchase Annuity." In view of his signing this proposal form, Mr P could not properly claim that he understood that S would be paying him the tax free cash.

Mr P's complaint was not upheld. It was noted that the advice on which he had relied came not from S but from his financial adviser.

**5. M01060**

***Retrospective part time membership***

*Background*

Mrs S commenced employment in February 1987 and made an application to become a member of the Scheme in 1994. The employer advised her on 3 May 1995 that membership would be backdated to six months after the date she commenced employment. However, there was an Inland Revenue complication with backdating contributions in that way and retrospective membership was held in abeyance until that aspect had been resolved. Mrs S was made redundant in 1996 and in 2001 she learned that the scheme had been wound up with benefits being bought out by the purchase of annuities but that her bought-out annuity did not reflect her retrospective membership. On learning that the tax position had been resolved in March 2002 Mrs S made further enquiries about her benefits but was unsuccessful in getting the matter resolved.

*Outcome*

The complaint was upheld and the employer was directed to make the necessary contributions to provide for benefits in respect of that retrospective pensionable service. Mrs S also agreed to pay the necessary employee contributions for the same period.

## 6. L00778

### ***Failed transfer from a self-invested personal pension (SIPP).***

#### *Background*

Mr H set up SIPPI in 1991 with the Provider acting as trustee and an associated company as administrator. He made a proper request for a transfer from SIPPI in February 2000. His aim was to transfer the funds to SIPP 2 where they would be used to help purchase the business premises he owned jointly with his business partner. This was to be achieved by SIPP 2 buying the business partner's share, Mr H then planning to rent the property which would then be owned by SIPP 2. He said he required the transfer to be completed by November 2000.

The Provider failed to arrange for the transfer to be completed and Mr H claimed that this failure meant SIPP 2 could not be established and that he had to take out a loan to buy his business partner's share of the property. He claimed to have suffered losses as a result of a failure to establish SIPP 2 and loss in the form of missed tax saving, interest payments on the loan he had to take out, missed growth on other funds transferred and missed returns on surplus funds that would have been created from the sale of the property. In total, losses amounting to £13,820.

#### *Outcome*

The Provider's failure to arrange for the transfer was identified as maladministration and the complaint was upheld. However, because the property transaction that Mr H was proposing was prohibited under Section 839(4) of ICTA 1988 and the Personal Pension Schemes (Restriction of Discretion to Approve) (Permitted Investments) Regulations 2001, Mr H's claim for financial loss was not supported. The Provider agreed to pay £1,000 in compensation, which was deemed to be appropriate in the circumstances.

## 7. L00454

### ***Transfer of benefits to a statutory scheme***

#### *Background*

Ms K took up employment where she was eligible for membership of a statutory scheme. She chose not to join the Scheme immediately but at a later date she did join and decided to transfer benefits from a previous employer's pension scheme to the Scheme. Ms K understood from information provided to her by the Scheme's administrator that, in return for the transfer value from her old scheme, she would receive 4 years and 283 days of "added years" in the Scheme. Ms K requested that the transfer be arranged in April 1999.

The administrator told Ms K that her transfer request had not been made within the required timescale of 12 months after entry to reckonable service. However, Ms K was told that the time limit might be waived if she could obtain written confirmation from her employer that she had not been given relevant information about transfers.

After some research, Ms K was able to obtain the confirmation needed and her request to make a transfer to the Scheme was approved in June 1999. In August, Ms K was told that the proposed transfer payment would translate into 3 years and 154 days of added years. This was calculated by reference to the amount of the transfer value and also to Ms K's benefit entitlement under the Scheme, based on her current salary. Ms K was asked to complete forms and send them to her previous scheme if she wished to proceed with the transfer.

In November 1999, the transfer was completed. The transfer value received by the Scheme purchased 2 years and 178 days of added years. The main reason for the reduction in the service credit was that Ms K's salary, and therefore Scheme benefit entitlement, had increased significantly between August and November 1999. The calculation of added years had been carried out in line with the Scheme's regulations which stipulated that, in the event of an inward transfer occurring outside the 12 month time limit, calculations must be based on data as at the date of receipt of the transfer value.

Ms K claimed that she had not received relevant information at the correct time. Further, when she started the transfer process she was not given correct instructions as to how to obtain the required documentary evidence. As a result, her application to transfer was delayed so that when the transfer did take place she had suffered a reduction in the added years available to her.

#### *Outcome*

Ms K was advised as soon as possible after making her application to transfer that documentary evidence was needed. From the evidence provided, she did not appear to have taken formal action to obtain this until May 1999. Ms K's previous employer provided the necessary documents in June 1999.

None of the evidence available indicated that either the Scheme's manager or administrator was responsible for the delays between June and November 1999. Whilst Ms K's frustration at discovering that her inward transfer would purchase less added years than she had hoped is understandable, her complaint could not be upheld.

## **8. M01135**

### ***Transfer – charges levied were unjust***

#### *Background*

Mr S made a complaint concerning the transfer penalty imposed by the insurer when he transferred the proceeds of a 'Section 226' Retirement Annuity Contract to another provider.

Mr S had previously requested that the policy be reviewed under the Financial Services Industry review of Personal Pensions as he believed that the policy had been mis-sold. He was advised that as the policy was taken out before 29 April 1988 it fell outside the scope of the review. However the insurer did agree to look at the circumstances surrounding the sale of the policy.

Mr S was advised that there was no evidence that the policy had been mis-sold but he had been given advice at a later date which had led to his

increasing his contributions when it is clear that at that time he was eligible to join his employer's occupational pension scheme. A review was carried out and an offer of redress was made which Mr S rejected. Mr S complained to the Financial Ombudsman Service. The Financial Ombudsman decided not to uphold Mr S's complaint that the policy had been mis-sold.

Mr S requested a transfer value quotation. The quotation showed a Fund Value of £104,128.60 and a Transfer Value of £94,532.28. Mr S maintained that the policy had been mis-sold and requested that the insurer waive the transfer penalty of £9,596.32. The insurer declined to waive the penalty and the proceeds of the policy were transferred to another provider.

Mr S subsequently accepted the final offer of redress.

#### *Outcome*

The complaint was not upheld on the basis that although the review of the policy found that disadvantageous advice was given to Mr S any loss he had suffered as a result of that advice had been redressed. I found that this did not prevent the insurer from imposing a transfer penalty on the benefits being subsequently transferred.

### **9. L00362**

#### ***Equitable Life Guaranteed Annuity Rates***

##### *Background*

Mr W volunteered for early retirement from his employer on 14 April 2000. He was a member of his employer's pension plan and had AVC assets invested with Equitable Life.

In late June 2000 his employer provided details of his AVC assets (£9,045) together with some annuity quotations. In October 2000 his employer provided a statement showing that his AVC assets had reduced to £8,817. This sum was used to buy an annuity elsewhere of £575 pa.

Mr W was understandably upset about the reduction in the value of his AVCs. Equitable Life wrote to him explaining that the reduction followed the House of Lords Judgement on Guaranteed Annuity Rates (GAR).

Mr W's AVC investment with Equitable Life had included a GAR but the Plan had not obtained a quotation for Mr W on this basis. Although Mr W had retired in mid-April 2000, it was not until late June 2000 that his employer wrote to him with details of his AVC assets and with some annuity quotations from Equitable Life. It seemed that if Equitable Life had taken less time to respond, Mr W's annuity could have been secured before the House of Lords Judgement and thus before any reduction was imposed on his assets.

It was noted that the trustees had failed to obtain a quotation from Equitable Life based on the GAR.

#### *Outcome*

It was found that the trustees were mainly responsible for Mr W's misfortunes and upheld his complaint. They were directed to increase his annuity by the amount, if any, needed to bring it to the level which would have been secured by the GAR. They were also directed them to pay compensation to Mr W.

## 10. M00033

### ***Transfer value - amount***

#### *Background*

A group of applicants complained that the employer and trustee acted improperly and in breach of contract because they failed to make available individual counselling sessions which would have or should have included information about a potential improvement to benefits. The applicants asserted that had this information been made available they would not have agreed to transfer their pension benefits and that in any event the scheme is obliged to adjust a transfer value payment as the applicants were deferred members at the time that a benefit improvement applied.

In 1998 the employer sold its distribution business. As part of the process of consulting with staff a question & answer sheet was circulated covering pensions, a consultation meeting was held and details of the new pension scheme were communicated. Members were given the opportunity to transfer their benefits. Completed options forms requesting the transfer of accrued benefits were received by the trustee. A bulk transfer payment was paid on 8 October 1999. Inadvertently, an announcement that integration of the state pension scheme with the pension under the scheme would cease (to be applied from 1 May 2000) was sent to the applicants. On 21 December 2000 a further transfer payment was made for two applicants in respect of an oversight regarding special qualifying service which should have been included.

#### *Outcome*

The matter was not upheld. The respondents fell short of providing individual counselling that was promised; that failure amounting to maladministration. But those offering counselling are not generally expected to have regard to possible future changes. The applicants when presented with enhanced transfer terms would not have rejected that option because of the possibility of a future benefit enhancement (the change not being effective until some 17 months after the applicants had requested a transfer). Nor did the applicants make any requests for the missing counselling.

The applicants were not deferred members under the scheme at the time of de-integration and thus not entitled to the benefit improvement. The transferred payment funds were divisible in so far that they bought each member individual benefits. The transfer payment, paid before the benefit improvement, correctly represented members' accrued benefits under the scheme.

As for two applicants whose part of the transfer payment was effected after the benefit improvement (May 2000), they had requested and authorised the trustee to make a transfer payment under the scheme to 31 January 1999 and had joined the new scheme from 1 February 1999. They had agreed they would no longer be members of the scheme after 31 January 1999 and that no benefit would be payable in respect of service accruing after 31 January 1999.

It was arguable that as assets remained in the scheme benefits remained payable in respect of them and they could be eligible for the benefit improvement. But it would have been inequitable for some individuals to benefit because part of the transfer was paid after the benefit improvement and such a benefit would be at the expense of a scheme they had chosen to leave. Equity looks to the intent rather than the form and looks on that as done which ought to be done. Agreements for value may be treated as if they had been performed at the time when they ought to have been so performed with the same consequences as if they had then been completely performed. The basis of calculating the applicants' benefits was agreed and paid. That a subsequent payment was made because of an oversight did not change the fact that the substance of the payment and the consequences following therefrom was made and had effect on 8 October 1999.

## **11. N00021**

### ***Transfer value – options***

#### *Background*

Mrs C asserted that in 1981 she was not made aware of the options, namely to take either a single life pension or additional service credit in respect of her transfer value to the scheme.

The scheme awarded her additional service credit. Mrs C asserted that had she been made aware of the options she would have taken advice and would have chosen single life pension.

The evidence suggested that the matter first came to Mrs C's attention in May 2001 and that she could not have reasonably known of its occurrence before then. Accordingly the matter was considered to have been referred in time.

#### *Outcome*

The complaint was not upheld. Under the scheme rules it was for the employer to determine the form of benefits. The Employer was not required to provide the applicant with a choice. An employer may look to its own interests financially or otherwise. It is not appropriate to judge events in 1981 in accordance with the standards of administration in existence now. Moreover, if Mrs C had stayed in the scheme until normal retirement date and her salary had increased at more than the assumed rate then the single life pension would not necessarily have been the better option.

## **12. L00191**

### ***Early retirement pension – winding up***

#### *Background*

Mr L had received an early retirement quotation as at 25 February 2000, but decided not to take early retirement, as his employer was in financial difficulties and he had hoped for a redundancy payment in the near future, as well as an early retirement pension (ERP), if the employer ceased trading. Receivers were appointed shortly afterwards, as was an independent trustee to wind up the scheme. The independent trustee advised Mr L on

14 April 2000 that the scheme appeared to be in deficit, and that no requests for ERPs could be entertained at that time. Mr L was made redundant on 5 May 2000 and, in view of the letter he had received, did not ask for an ERP.

The independent trustee advised Mr L on 25 May 2000 that it had been decided to wind up the scheme as at 23 May 2000, and that benefits for those with deferred pensions would have to be scaled down considerably. Those entitled to an ERP, which had not yet come into payment, could, however, receive an ERP. The independent trustee had assumed, from a study of the current scheme Rules, that those over age 50 with deferred pensions could not insist upon receiving an ERP, so had framed its letter of 14 April 2000 accordingly. It was now clear, however, from a study of the previous set of scheme Rules, that those over the age of 50 with deferred pensions could insist on receiving an ERP. This was one of the reasons why it had been decided to wind up the scheme as at 23 May 2000. If the independent trustee had realised this earlier it would have initiated the winding up of the scheme before Mr L had been made redundant, and he would have needed employer approval (which would not have been granted) to take an ERP from active member status.

The independent trustee advised Mr L that he might be able to claim priority treatment under section 73 of the Pensions Act 1995. Many other former employees had been in the same position as Mr L, and the independent trustee would be seeking guidance from the Ombudsman, once section 54 of the Child Support, Pensions and Social Security Act 2000 had come into force, on whether section 73 could be interpreted as allowing members in Mr L's position to claim an ERP. Section 54 of the 2000 Act would have allowed a class action to be put to the Ombudsman, with representative beneficiaries having been appointed. Section 54 was not, however, brought into force, although future legislation would be considered in the light of the Pensions Green Paper. This matter needed to be resolved before the scheme could be wound up, and a Determination by the Ombudsman on this point would obviate the need for the independent trustee to seek directions from the High Court.

#### *Outcome*

It was considered sufficient for the independent trustee to have studied the current scheme Rules before it issued its letter of 14 April 2000, and that the issue of this letter did not constitute maladministration. If the independent trustee had realised the discrepancy between the two sets of Rules earlier it would have initiated the winding up earlier, and Mr L would not have been in any worse position than if the letter of 14 April 2000 had not been sent to him. Mr L might, on the other hand, but for the letter of 14 April 2000, have opted, between 5 May 2000, when he was made redundant, and 23 May 2000, when the winding up was triggered, to receive an ERP, and would have been entitled to one. The former argument was judged to be stronger than the latter and Mr L's complaint was not upheld.

### **13. N00972**

#### ***Early retirement – different early retirement factors for leavers***

##### *Background*

In February 2002 Mr R requested and was given early retirement illustrations assuming that he retired from active employment at the age of 50 in January 2003. However, in April 2002 his employer terminated his employment.

In November 2002 Mr R said that he wished to take his pension on his 50th birthday. He then discovered that it would be lower than the amount quoted to him in February, because the pension scheme applied more severe early retirement reduction factors to members who had left the scheme by comparison with active members.

Mr R complained that the use of differing scales of early retirement factors was in breach of the scheme rules and that it was illegal and improper, and he claimed the benefits quoted to him previously.

##### *Outcome*

Contrary to Mr R's belief, it is an established legal principle that pension schemes are permitted to treat different categories of member differently; in particular, there is nothing unlawful about offering better early retirement pensions to active members than to people who have left the scheme. The scheme rules had been applied properly.

The trustees acted without maladministration. In February 2002 they provided Mr R with the illustration he had asked for. He made no suggestion that his employment was about to end, and the trustees were under no duty to provide him with information he had not asked for (i.e. that early retirement benefits for leavers are lower).

Mr R did not rely on the earlier, higher figures, in the sense that he made a financial decision which was to his detriment on the understanding that he would receive these higher benefits. Rather, his employment had already been terminated before his 50th birthday, which was the earliest date on which he could take his pension. Before deciding to take his pension, he was provided with a correct illustration of benefits in November 2002. It was then a matter for him whether to accept.

Mr R's complaint was not upheld.

### **14. L00816**

#### ***Claim to entitlement to payment of preserved pension at age 50***

##### *Background*

Mr B's application centred upon the correct interpretation of a scheme rule which provided for the payment of a member's deferred pension from age 50 in the case of a member aged 45 or over who had been required to leave service by the employer because of redundancy or reorganisation.

Mr B had become a deferred member of the scheme when his employment was transferred by way of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) to a new employer. At the time of the transfer Mr B was aged 46 years.

Mr B argued that he was entitled to the payment of his deferred benefits from age 50 on the basis that he had been required to leave service because of reorganisation when he was aged over 45. He accepted that he had not been made redundant.

#### *Outcome*

It was found that Mr B's service had ended as a result of the operation of TUPE, under which his contract of employment had been transferred to the new employer. As it could not be said that he had left service because of reorganisation he was not entitled to the payment of his deferred benefits from age 50.

### **15. N00230**

#### ***Injury benefits – accident at work***

##### *Background*

Mrs P complained that her application for injury benefits had been refused. The requirement is that the injury or illness must be sustained or contracted in the course of the relevant employment, and that it was attributable to the employment.

Mrs P had an accident at work in 1993 which she said resulted in her developing fibromyalgia, although she did not receive this diagnosis until some years later. The key issues as far as the Scheme administrators were concerned were whether she had an existing medical condition when the accident took place, or whether the accident was the trigger for the medical symptoms about which she now complained.

Two senior medical advisers to the Scheme concluded independently that the accident probably was not the cause of Mrs P's various symptoms. The administrators offered to reconsider her application if she could provide any fresh supporting medical evidence. Mrs P asked Dr G, whom she regarded as one of the very few specialists in fibromyalgia, to write on her behalf. However, Dr G's written opinion was not supportive.

Mrs P's answers to questions from the two senior medical examiners appeared inconsistent with, or contradicted, either her own account of her medical history and also earlier medical reports. She explained this by saying that her fibromyalgia had caused loss of memory.

Confusion was caused by Mrs P's general practitioner wrongly providing a medical report on a patient with a very similar name. This was eventually resolved, but Mrs P took the opportunity to try to discredit much of the medical review process.

#### *Outcome*

The complaint was not upheld. Weight was given to her apparently inconsistent replies to the medical examiners, and also to other medical evidence which suggested (although she denied this) that her chronic symptoms could be traced back to before the accident. It was felt that the administrators had considered her application for injury benefits properly. Extensive investigations had been carried out, and the administrators had received the advice of the Scheme's Senior Medical Adviser before refusing her application.

## **16. M00489**

### ***Death benefit – exercise of trustee discretion – whether trustee had full information***

#### *Background*

Mr T was the member of a Scheme which, upon his death, paid a death benefit to Mr T's brother. Mrs D, the unmarried partner of Mr T, complained because she believed Mr T had completed an Expression of Wish form nominating her as the death benefit recipient.

Mrs D also complained because she believed she was entitled to, but had not received, a funeral expenses grant from the Scheme.

#### *Outcome*

The substantive part of the complaint was not upheld. The original Expression of Wish form held by the Trustee nominated Mr T's brother as beneficiary. However, although there was no evidence that Mr T had completed a new Expression of Wish form, there was evidence that Mr T had wanted to leave "all his money" to Mrs D and, in fact, she was the residuary beneficiary under his will. Nevertheless, the Trustee was aware of this fact and it formed part of its consideration when deciding how to exercise its discretion to pay the death benefit. While the Trustee was not bound by the Expression of Wish form and Mrs D fell within the "named class" of individuals to whom the death benefit could validly be paid, the Trustee's decision was not so unreasonable as to be considered perverse.

The Trustee had given consideration to paying a dependant's pension to Mrs D, but she was unable to prove that she had been financially dependent on Mr T. The fact that Mrs D fell within the "named class" of individuals, precluded her from being considered for the funeral expenses benefit.

However, it was concluded that Mrs D had suffered injustice in the delays she experienced while attempting to gain information and responses from the Trustee. The Trustee was aware of Mrs D's relationship with Mr T and the reason for her interest about to whom the death benefit had been paid. Mrs D was awarded a modest amount of compensation

## **17. L00466**

### ***Cessation of payment of widow's pension***

#### *Background*

Mrs S became entitled to the payment of a widow's pension following the death of her former husband. The regulations which governed the scheme provided that a widow's pension was not payable during or after any marriage or cohabitation. Payment of Mrs S' widow's pension was stopped in December 1999 when she remarried.

Mrs S said that the cessation of payment of her widow's pension on her remarriage was in breach of her Human Rights. She also claimed that the Scheme's Internal Dispute Resolution (IDR) procedure did not comply with the Human Rights Act 1998 (the Act). In particular she considered that the second stage IDR decision should have been by way of a public hearing.

Mrs S relied on Article 14 of the European Convention (which prohibits discrimination on the grounds of status), Article 12 (the right to marry), Article 8 (the right to privacy), Article 1 (the right to peaceful enjoyment of property) and Article 6 (the right to a fair trial).

#### *Outcome*

The Act came into force in October 2000, some ten months after the decision to stop payment of Mrs S's widow's pension. The Act is not retrospective. The view was taken that it was not open to Mrs S to say that the decision to stop payment of her widow's pension (which was in accordance with the regulations governing the Scheme at the time) was unlawful on the basis of subsequently introduced legislation which did not have retrospective effect.

The IDR procedure ought to have complied with Article 6 of the Act (which was in force by the time Mrs S' application was considered under IDR). Although, as the respondent conceded, the procedure was not Article 6 compliant, defects of an initial decision making body can be cured by subsequent review, in this case, by me. Further, the European Court had held in a case before it that there was no violation of Article 6 in failing to hold an oral hearing when there was no issue of fact or law which required one.

## **18. M00858**

### ***Dependant's benefits***

#### *Background*

Mrs A said that in dealing with her family's claim for pension benefits following the death of her husband (Mr A) the Council's Pensions Section and its Pensions Administrator in particular treated her with bias; neglect and delay; inattention and arbitrariness; and incompetence and ineptitude. Accordingly she claimed compensation in an indeterminate sum.

Mr and Mrs A had three children, two of which were her husband's by a previous marriage. He was their legal guardian. When Mr A died on 3 January 1999 the Council refused to make any grant to Mr A's two children on the grounds that they had not been "wholly or mainly" dependent on Mr A.

At Stage II of the Council's Internal Dispute Resolution Procedure (IDRP) the person appointed by the Secretary of State to determine the appeal found for the Applicant but the Council refused to pay compensation to the Applicant as it believed the Secretary of State's decision had been wrong.

#### *Outcome*

This was "a sorry tale of administrative error and official high-handedness". Since the death of Mr A, senior officers of the Council had felt obliged to apologise to his widow on more than one occasion. The administrative errors which prompted those apologies related for the most part to the failure of the Pensions Section to respond to letters and to keep Mrs A properly informed. The cumulative effect of those errors on Mrs A was distressing in the extreme and he had no hesitation in categorising them as maladministration.

A decision was taken far too late in the day to have the matter handled by a different officer than the one whose actions or inaction had occasioned the apologies. There was little evidence, however, that the change of person led to a change of attitude on the part of the Council. The way the tax issue was handled was extraordinary. For all the wrong reasons this sorry saga can be used as a case study of how not to deal with a bereaved spouse.

“It was not easy putting a monetary figure on the injustice caused by the maladministration but a figure of £1500 was settled upon”. Having apologised to the Applicant for many of the errors detailed above the Council decided not to award her any compensation because it disagreed with the decision of the Secretary of State at Stage II of the IDR. That was petty in the extreme and was also unjust because, in effect, it penalised Mrs A for what the Council considered was the failure of the Secretary of State to address “satisfactorily the central issue which we raised in this matter”.

A further payment of compensation of £500 in respect of the distress caused by that decision of the Council was directed.

## **19. L00713**

### ***Dependant’s Benefits***

#### *Background*

The Applicants complained that, in distributing the death in service benefit of their late father, Mr H the scheme managers has provided a benefit for Mr H’s girlfriend, a Miss SW who was not a beneficiary under their late father’s will as were they and their two other siblings. Each claimed that he had suffered injustice in that he had received only one fifth of the benefit instead of one quarter. Miss SW had also received one fifth.

The Scheme Rules define the meaning of ‘beneficiaries’ and the definition is divided into four categories. The relevant one for the purposes of the complaint states: ‘Anyone whom the trustees consider the member was helping to maintain at his death’.

#### *Outcome*

For Miss SW to receive a share of the benefit she had to fall into one of the four categories of ‘beneficiaries’ within which the Trustees were entitled to exercise their discretion. There was only one category under which Miss SW could qualify. The basis of the Trustees’ decision in favour of Miss SW could therefore only have been that she was a person the late Mr H was ‘helping to maintain’ at the time of his death.

The Respondents argued that where a couple are living together and both are earning they are helping to maintain each other and that financial dependency is not an ingredient of maintenance.

I found this too broad a rule of thumb to establish what constitutes ‘maintenance’. The fact that both the parties were earning may or may not have meant that each was helping to maintain the other. Moreover, there was real doubt as to whether the couple were living together.

The Scheme Manager, by using a too broad rule of thumb, had ended up making inadequate enquiries to establish whether Miss SW was someone Mr H 'was helping to maintain'.

In coming to their decision, the Trustees had placed disproportionate reliance on the evidence of Mr H's work colleagues to the exclusion of evidence from members of the deceased's family. I noted that the Trustees had declined to award Miss SW a dependant's pension 'on the basis of financial interdependency

I concluded that no reasonable body of Trustees could have come to the decision which the Trustees came to in this case on the information before them and for that reason the decision made in favour of Miss SW was flawed.

I remitted the matter to the Trustees for reconsideration directing that the Scheme Manager submit to the Trustees a revised briefing note which should include evidence of family members on the issue of whether Miss SW was living with the late Mr H and whether Mr H and Miss SW were maintaining each other. I further directed that the briefing note contain independent legal advice on the meaning of 'helping to maintain' in the context of the Scheme's definition.

## **20. L0033 I/2**

### ***Dependant's benefits***

#### *Background*

Mr S died in January 1998 aged 35. He was the brother of one of the applicants and the son of the other. He had been a member of a Scheme, which later changed its name. He had completed a death benefit nomination form which was mislaid. It was never found.

When he died Mr S had been living with Mrs G and had been doing so for about eight months.

The Trustee wrote to the interested parties (including Mrs G) explaining that under the rules it had to decide whether at the date of his death Mr S was single or had a person dependent upon him for the ordinary necessities of life who was not his legal widow. If the Trustee regarded him as single there would be a lump sum death benefit of £86,000. If the latter, there would be a lump sum death benefit of £55,000 and Mrs G would receive a dependant's pension of £6,600 pa.

Both complainants felt that Mrs G was not dependent on Mr S and urged the Trustee to share the lump sum death benefit (£86,000) between Mr S' sister (one of the complainants) and her brother.

After extensive enquiries, the Trustee established that there had been some degree of dependency by Mrs G on Mr S. As a result the trustee could regard Mrs G either as a Dependant or a Qualifying Dependant for the purpose of the Scheme rules. If it decided Mrs G was dependent on Mr S for the ordinary necessities of life, she was a Qualifying Dependant and the Trustee had discretion as to whether she should receive a spouse's pension. If the Trustee decided she was completely or partly maintained or financially assisted by Mr S, she was a Dependant and the

Trustee would have discretion as to the amount of the lump sum death benefit she should receive.

The Trustee decided to pay £20,000 to Mrs G and share the balance between Mr S's sister and her brother.

Both complainants were very unhappy with the loss of Mr S's death benefit nomination form, the Trustee's decision to pay Mrs G £20,000 and the fact that the Trustee had appeared to take longer to pay the lump sum death benefit than the two years specified in the rules.

#### *Outcome*

I felt that the Trustee had dealt with the payment of the death benefit with commendable thoroughness. I agreed that the loss of the nomination form was maladministration. However, this had not caused any injustice or financial loss.

The timing of the Trustee's decision about paying the lump sum death benefit was less straightforward. The rules required the Trustee to pay or apply the death benefit within two years of Mr S's death. In my view, time ran from the day following his death (the usual practice in court rules on time). In Mr S's case the Trustee reached its decision exactly two years later. Even though the Trustee then referred the matter to its solicitor, the decision was not inconsistent with the requirement to apply the lump sum death benefit within two years.

## **21. M00871**

### ***Dependant's benefits***

#### *Background*

Mr L's brother was employed by the first company until 8 December 2000. On that date the second company bought the first company's engineering department and his employment was transferred to them. The second company purchased the assets of the first company but, other than this, there was no relationship between the two companies.

On 8 December 2000 Mr L's brother became a deferred member of the first company's pension Scheme. He was on sick leave at the time. Mr L's brother subsequently took a lump sum in lieu of his deferred benefits on the grounds of serious ill health. He returned to work for the second company on 13 December 2000.

The second company could not participate in the first company's pension Scheme but had set up a group personal pension plan with separate life cover. The life assurance policy came into effect on 6 April 2001. The policy contained a clause which stated that cover would not be provided for any employee who was not at work on the last working day prior to the date on which cover was due to commence. Such members would not be covered until they had returned to work and completed two months continuous full time active service or had provided the insurer with satisfactory evidence of their health.

Mr L's brother remained employed by the second company until his death on 30 August 2001. However, he had been admitted to hospital on 12

February 2001 and did not return to work thereafter. Following his brother's death, the applicant was informed that his brother had not been covered for death in service benefits. Mr L queried whether the TUPE provisions applied.

#### *Outcome*

The complaint was not upheld. It was found that the TUPE provisions were not applicable. Mr L's brother was no longer an employee of the first company and had received his retirement benefits as a lump sum. The second company was not a participating employer in the first company's pension Scheme and was not bound by the rules of that Scheme. There was no requirement for the second company to replicate the terms of the first company's pension Scheme.

The terms of their group life assurance policy excluded those members who were not actively at work at the time the policy commenced. This is not an unusual feature of such policies. There was no requirement for the second company to make special provision for Mr L's brother.

The circumstances were unfortunate but both companies had acted within the rules of their Schemes and the prevailing legislation.

## **22. M00524**

### ***Claim to entitlement to death grant***

#### *Background*

Mrs C's husband became ill in May 1999 and applied for ill health retirement benefits. His employment was terminated with effect from 31 August 1999 on the grounds that he was permanently unfit to work. On 30 September 1999 he was notified that his application for ill health retirement had been accepted. A lump sum was paid into his bank account on 26 October 1999. Mr C died on 31 October 1999.

Mrs C said that the regulations governing the Scheme provided that a death grant could be paid if the member had, not more than 12 months earlier, ceased to be in pensionable employment while incapacitated.

The Scheme manager said that as an award of retirement benefits had been made on 26 October 1999 Mr C fell within another regulation which dealt with death benefits after retirement and provided that a supplementary death grant could be paid if the total amounts of pension and lump sum paid up to the date of death did not exceed the average salary. However as in Mr C's case his average salary had been exceeded, no supplementary death grant was payable to Mrs C.

The argument as to whether the regulation cited by Mrs C applied centred upon whether Mr C was incapacitated at the time his pensionable employment ceased. The Scheme manager argued that this criterion had not been met as Mr C's incapacity was not formally determined until after he had left service.

#### *Outcome*

It was clear that Mr C was permanently incapacitated before his employment was terminated and that this was the reason for the termination of his

employment. The regulation which Mrs C relied upon did apply. As that regulation stated that a death grant “may” be paid, the manager was directed to reconsider the matter.

## **23. M00461**

### ***Trustee awareness of policy guarantees***

#### *Background*

Mr D transferred between occupational pension schemes as a result of the acquisition of his employer. In addition to his Scheme benefits, Mr D had accrued a fund with Equitable Life in respect of Additional Voluntary Contributions (AVCs). The AVC fund followed Mr D's Scheme benefits to the new employer. The AVC contract contained a Guaranteed Annuity Rate (GAR).

As he approached retirement, Mr D researched the market to assess where he could obtain the best possible pension from his AVC fund. Under normal circumstances, the trustees of Mr D's Scheme would use an AVC fund to increase the Scheme benefits. However, as a result of his research, Mr D found that he could obtain a higher pension by using his AVC fund to purchase a pension elsewhere. He therefore asked the Scheme's administrator to arrange for his AVC fund to be released in January 2001.

During March and April, the trustees considered Mr D's request for his AVC fund to be released and received advice from the Scheme's administrator that there was a GAR attaching to the AVC contract. Mr D was not told about the GAR at this stage.

In June, the trustees agreed that Mr C should be allowed to exercise the GAR and purchase a pension with Equitable Life and later in June Mr D was made aware of their decision. Mr D says that this was the first time he was made aware of the GAR attaching to the AVC contract.

Because of various delays in the administration process, Mr D received final details of his potential pension on 14 July 2001. He returned the relevant forms on 16 July. On the same day, Equitable Life reduced fund values by 16% thus reducing the amount available to Mr D to purchase his pension.

Mr D complained that the trustees were not aware of the existence of the GAR and ought to have been. By the time the existence of the GAR was known to the trustees, and then Mr D, there was insufficient time for Mr D to exercise the GAR before Equitable Life reduced the fund values.

#### *Outcome*

The Scheme rules and legal practice required the trustees to acquaint themselves with the nature and particular circumstances of the trust property they acquired – in this case the AVC fund. They did not do so.

Had the trustees been aware of the GAR, and acted with reasonable diligence and promptness, it is likely that Mr D could have set up his pension benefits before the fund value reduction.

It was directed that the trustees should provide additional pension benefits under the Scheme to place Mr D in the position he would have been had he been able to purchase his pension in March 2001.

## 24. N0003 I

### ***Overpayment – maladministration in way repayment sought***

#### *Background*

Ms F had been overpaid her pension due to an error by the Administrator when it revised her pension to take into account transferred-in service. The new amount was simply added to the existing pension in the payment system, rather than replacing it. The overpayment totalled £3635. Ms F accepted the Scheme had a right to have the money returned, but argued that it should be paid by the Administrator who had been responsible for making the mistake.

#### *Outcome*

The complaint was partially upheld. The Scheme is legally entitled to recover a pension paid where there is no entitlement. The various (correct) statements sent to Ms F around the time the overpayment commenced were sufficient for her to ascertain that the monthly pension she was receiving was in excess of the annual pension she was being told she should receive. The error was only in the amount being paid. There was no evidence to suggest the incorrect pension had impacted on her decision to retire. Thus, it was concluded Ms F had no defence to the over paid pension being recovered.

However, it was concluded that there was maladministration on the part of the Administrator in the way in which it sought to go about reclaiming the money. Ms F was written to on a number of occasions, with demands for the money to be repaid. During this time, Ms F was continually writing to the Administrator attempting to understand what had occurred and why she was being asked to repay the money in a lump sum. Ms F's correspondence met with little response apart from standard letters of an increasingly threatening nature seeking the repayment. Although, eventually, matters were taken in hand and Ms F's concerns were dealt with in a more sympathetic nature, it was clear that the tone of the earlier correspondence had added to the distress and inconvenience already being experienced by Ms F having been advised of the overpayment. Compensation was directed to remedy this injustice.

## 25. M0085 I

### ***Overpayment – recovery***

#### *Background*

Mr N was a member of an insured final salary scheme until 1989 when he reached his normal retirement date and commenced payment of his retirement benefits. The Scheme provided that pensions in excess of the Guaranteed Minimum Pension shall increase at a rate of 6% per annum in respect of service completed before 5th April 2000.

In December 2001 Mr N wrote to the administrator of the Scheme and requested that they check the amount by which his pension had been increased as he believed, having read an article in the newspaper, that it was in excess of the Inland Revenue maximum pension allowable. In response

the administrator confirmed that his pension had been calculated in accordance with the Scheme rules.

Mr N wrote to the administrator several more times requesting that they check the amount of pension he was receiving. The administrator agreed to carry out an audit of the pension increases which had been applied to Mr N's pension. In March 2002 Mr N was advised that his pension had been overpaid since 1997 and the overpayment amounted to approximately £5800. The administrator further advised that with effect from the following month the overpayment would be recovered by reducing the monthly payments for the following year.

Mr N advised the administrator not to clawback the overpayment before it had given him full details of how the figure had been made up. In April 2002 the administrator provided an explanation of how the overpayment had arisen and advised that it had found a more generous basis of calculating his pension which had reduced the overpayment to approximately £4500. Mr N again queried the calculation. However before he was provided with an explanation the administrator commenced deducting the overpayment from his pension.

Mr N accepted that his pension must be reduced in line with Inland Revenue limits but was not satisfied with the method of recovery. He believed that Section 91 of the Pensions Act 1995 was applicable in this case and therefore the administrator did not have the right to deduct the overpayment from his pension.

#### *Outcome*

Mr N's complaint was upheld to the extent that the manner in which the administrator recovered the overpayment was found to be at fault and the administrator was directed to pay £400 compensation.

Section 91 of the Act prohibits money being set-off against an entitlement to pension. However, it can be argued that, as Mr N had already received money beyond his entitlement, the deductions which were being made do not fall foul of this provision. There would only be a breach of Section 91 if more money was deducted than had been overpaid. I determined that the administrator was entitled to proceed with recovery.

## **26. M00241**

### ***Non-payment of benefits***

#### *Background*

Mrs P complained that, following the death of her husband (Mr P) the trustee, the scheme manager and the scheme administrator refused to give her the benefit to which she was entitled and took too long to arrive at a decision.

She claimed £66,000 in benefit which she said was due to her; interest on that amount; reimbursement of professional fees; and compensation for distress and inconvenience.

Mr P died on 19 June 1999 while still employed. His death in service benefit was tied to his salary. He received a salary increase in February 1999 but

upon his death the respondents refused to pay his widow the increased sum of £66,000 on the basis that there was an obligation to inform the insurer of the salary increase and it had not been so informed. Consequently it had been unable to send him a medical questionnaire then rather than much later after he was terminally ill.

#### *Outcome*

The administrator knew of Mr P's January salary increase on 14 February 1999 but did not inform the manager until 17 May. That delay amounted to maladministration.

Although the manager's stated policy required underwriting for additional cover following the earlier November 1998 increase, it failed to notify the administrator or the employer or Mr P that it required the necessary medical questionnaire. Moreover, when the administrator notified the manager of Mr P's January 1999 salary increase, the manager took no action to underwrite the requisite increase in cover until after Mr P died on 19 June 1999.

The manager said that where a salary increase took place and additional cover was required it would insure the increase for two months while underwriting took place. Since underwriting could not begin until the manager knew of the increase I concluded that any increase was underwritten by the manager for two months from the date the manager learnt of it, in Mr P's case for two months from 17 May 1999. The manager took no action until two days after that period expired by which time Mr P had died.

On the facts of this case I concluded that Mr P did benefit from cover during the two month period from May 1999 during which he died. The suggestion that had the administrator acted more promptly the manager would have asked for a Member Scheme Application earlier and the outcome would have been different, may have had some merit. However, that was not what happened and the respondents had to take the policyholder as they found him.

I found that there was maladministration by the administrator and the manager in varying degrees and he made directions accordingly:

The manager was to pay Mrs P the sum of £66,000.

The manager and the administrator were each to pay Mrs P one half of the interest on the sum of £66,000, the interest to be calculated on a daily basis from the date payment ought to have been made to the date of payment at the base rate for the time being quoted by the reference banks.

The manager and the administrator were each to reimburse Mrs P one half of the professional costs she incurred in pursuing her complaint with the respondents and me.

The manager and the administrator were each to pay Mrs P the sum of £250 by way of compensation for the distress caused by their failure to resolve the matter at an earlier stage

## **27. M00981**

### ***Refusal to assign policy***

#### *Background*

Requests by Mr C to his former employer to have his individual pension plan policy assigned to himself were unanswered. Further requests by the Pensions Advisory Service, OPAS on Mr C's behalf also remained unanswered until, in October 2002, when the employer telephoned to say that the policy would not be assigned to Mr C because of a dispute about an unresolved employment matter.

The employer was informed that there was no provision in the rules of the plan which prevented Mr C's right to have his policy assigned to himself. The employer agreed to sign any documents required for the assignment.

A draft deed of assignment was obtained which Mr C signed and sent to the employer for completion.

The employer then refused to sign the deed of assignment, asserting to me that it would be acting illegally as the funds in the policy were as a result of fraudulent action, although no court proceedings had been taken by the employer against Mr C.

#### *Outcome*

The complaint was upheld. The employer's failure to honour Mr C's right contained in the rules of the plan to have his policy assigned to himself was maladministration. The employer was directed to complete the deed of assignment within 7 days of the date of the Determination.

The employer did not comply with my direction and Mr C has since applied for enforcement of the determination in the County Court.

## **28. N00065**

### ***Calculation of benefits***

#### *Background*

In April 2001, in response to a request from Mr J, the insurer quoted a fund value of £19,673.42, which they said did not include Protected Rights of £13,598.02. They explained that benefits from the Protected Rights portion could not be paid until his 60th birthday. Mr J chose to take a maximum cash sum of £6,691.39 and a monthly income of £138.64. The insurer subsequently informed him that, following an internal audit, they could not pay any benefits from a policy which included Protected Rights until age 60. However, following a complaint from Mr J, the insurer agreed to pay the non Protected Rights benefits.

As the fund value was less than had been previously quoted the insurer proposed to backdate Mr J's pension to the date it would otherwise have been paid. Mr J signed an application for payment form on 3 July 2001 but wrote on the form, "Selection 3 of attached quotation dated 18.4.2001, as confirmed by your letter dated 28.6.2001". The insurer wrote to Mr J informing him that the fund value on 2 May 2001 was £20,304.17 and the early retirement value was £19,949.62. They said that his benefits would be

a tax free cash sum of £6,691.39 with a residual pension of £74.17 per month and enclosed a cheque for £6,691.39, together with an ex-gratia cheque for £50 for inconvenience.

The insurer explained that the quotation sent to Mr J in April 2001 had been based on both the non Protected Rights fund and the Protected Rights fund and was incorrect. They concluded that Mr J had not suffered a loss which was directly attributable to the incorrect illustration. The insurer enclosed a cheque for £150 in recognition of the 'compound problems' in his case. Mr J said that, if he had been provided with the correct quotation, he would not have proceeded with the insurer but would have transferred his fund to another provider. He also argued that the insurer was under a contractual obligation to provide the higher pension.

The insurer said that it was a regulatory requirement that Mr J could not take his Protected Rights until age 60. They argued that, in view of this, he had not suffered a loss in respect of this part of his pension because there had not been an offer to vest this element nor a request to transfer to another provider. The insurer did, however, accept that he might not have been provided with sufficient opportunity to exercise his open market option. They were prepared to consider matching a relevant illustration from another provider.

#### *Outcome*

I upheld the complaint but found that the provision of incorrect information did not entitle Mr J to the higher pension. It was likely that, because of his poor health, he would still have opted to take early retirement. However, he did have the choice of exercising an open market option to secure a higher pension. The annuity rate quoted by the insurer was very much higher than anything quoted on a list he had obtained in March 2001. Therefore it was understandable that he had not investigated this option further at the time. It was likely that Mr J would have exercised his open market option. His financial loss was the difference between the pension he would have secured on the open market and the pension offered by the insurer.

The insurer had not entered into a legally binding contract with Mr J. He did not have a contractual relationship with them. A contract would require certainty and there was no certainty or guarantee as to the value quoted. In addition, it was arguable that the alleged offer had been withdrawn. The argument that the insurer paid out following the completion of the form and established a contract by their conduct, was misleading. It could not be said that in making the lump sum payment the insurer had agreed to the higher annuity or that they had accepted the applicant's amendments to the form.

Since it was no longer possible to exercise an open market option, the appropriate remedy was for the insurer to compensate Mr J for his financial loss. I directed that Mr J was to obtain an annuity quotation as at May 2001 from a provider of his choice and the insurer was required to increase his annuity to match that quotation. I also directed them to pay any arrears of annuity from May 2001, together with simple interest at the rate quoted by the reference banks. However, I decided that the £200 the insurer had already paid was sufficient redress for any distress and inconvenience.

## 29. N00180

### ***Small self-administered scheme - Calculation of benefits***

#### *Background*

Mr B was the sole member and co-trustee of the small self-administered scheme (SSAS). He retired in October 1992 and took a pension of £35,494 p.a., to be paid twice a year. The pensioner trustee was appointed in March 1993.

In September 2001 the pensioner trustee informed Mr B that his pension would have to be reduced. Mr B e-mailed the pensioner trustee saying that he had always thought the percentage of the fund he was taking each year was too high but that it had suited him. He agreed that they had to reduce the pension but asked that they continue to pay him twice a year. Mr B said that he would be receiving his state pension in the following year so the reduction in his SSAS pension would not 'hurt too much'.

In October 2001 Mr B was paid £2,328.50. He raised a complaint with the pensioner trustee on 8 October 2001 and asked them to audit all transactions relating to the Scheme since their appointment. The pensioner trustee found a policy which had not been accounted for, which they thought should have a value of £90,000. According to the pensioner trustee, the policy had not been assigned to the trustees. There was a short delay in obtaining information from the insurer because they required authority from Mr B to provide details. The policy was eventually realised for £120,528.93.

The pensioner trustee provided Mr B with copies of cash books dating back to 15 March 1993. These showed that he received his pension at the rate of £17,747 per half year until March 2001. The pensioner trustee confirmed that the pension was first reduced to £14,600 p.a. and then £12,400 p.a. following the 2002 actuarial valuation.

The pensioner trustee said that Mr B had been anxious to take as much cash as possible when he retired and had accepted that, without further contributions from the company, his pension might have to be reduced. They took the view that he had not lost out financially but rather he had received more of his pension earlier rather than later.

#### *Outcome*

I did not uphold the complaint. There were no contributions being paid into the fund and the trustees had decided to defer purchasing an annuity for Mr B. Therefore the pension payments relied directly on the SSAS's investments. In order to pay Mr B's pension, assets had to be liquidated and the fund must inevitably diminish unless investment return can outstrip the amount withdrawn. As a trustee, the applicant should have been aware of this.

I agreed with the pensioner trustee that Mr B had not suffered a financial loss. He was the only member of the SSAS and received the benefit of all the assets. He received some of his pension sooner rather than later.

The reason his pension had to be reduced was that the SSAS's investments had not been doing as well as had been expected. I did not see that the

pensioner trustee should be held responsible for this, particularly when the applicant had a hand in choosing the investments. If Mr B had wanted to avoid the possibility of a reduction to his pension, it had been open to him, as a trustee, to purchase an annuity.

### **30. L00804**

#### ***Misselling***

##### *Background*

The Scheme's additional voluntary contribution (AVC) facility was managed by Company X. In 1993 Dr C asked Mr K, a Company X sales representative, for advice on increasing his pension. Mr K recommended that Dr C pay AVCs to Company X at the highest permitted rate. Dr C complained that Mr K told him that paying AVCs to Company X was preferable to purchasing an additional service credit in the employer's pension scheme. Mr K said that he would not have given a client such advice. Mr K was not trained or authorised to compare Company X products with those of other providers.

##### *Outcome*

Company X did not have copies of the forms completed by Dr C and Mr K, which might have recorded what recommendations were made and why. I was prepared to accept, on the balance of probabilities, that Mr K had given Dr C advice that he was not qualified to give. I directed that the administrator of the scheme calculate the amount of additional service credit that Dr C would have purchased, had he made payments to the scheme instead of Company X. If Dr C then elected to proceed, Company X was to pay the scheme the cost of setting up the additional service credit.

### **31. L00716**

#### ***Instructions on split of investments***

##### *Background*

Mr V claimed that the insurer failed to follow his instructions in 1989 to invest the contributions paid on his behalf into the Plan split 70% and 30% between the Managed Fund and the Equity Fund. The contributions were instead split equally (i.e. 50%/50%) between these two funds. He also claimed that: (a) the Plan was set up with a Selected Retirement Age (SRA) of 65 and not 62; and (b) the Insurer split the allocation of the investments into four different categories of funds (i.e. Accumulated Managed, Capital Managed, Accumulated Equity and Capital Equity) instead of just two.

Mr V had signed an application form for the Plan which clearly showed the investment split to be 50%/50% between the Managed and Equity Funds and the SRA to be 65. Mr V admitted that he signed the application form but this was before it was completed by the Insurer's representative, Mr R.

Mr V argued that he had expressed an intention in a previous aborted application for another pension arrangement with the insurer for 70%/30% split between the Managed and the Equity Funds. He claimed that the instructions given in respect of this previous aborted arrangement applied to the Plan.

### *Outcome*

The complaint was not upheld. There was no evidence to substantiate Mr V's claim that Mr R completed the application form after Mr V had signed it. If Mr V chose to sign a blank form then he must take the risk of his recklessness.

Mr V had given instructions for the previous aborted arrangement to be set up in the way he claimed. However, there was nothing to show that he had given the insurer any such instructions with regard to setting up the Plan in the same way.

With regard to the third part of Mr V's complaint, i.e. that the Plan should be invested in two and not four funds, any investment in the Plan would have bought both Capital and Accumulation units. The difference between the two types of units is that Capital units bear the charges for setting up the Plan and Accumulation units do not contain any charges. The practice of having Capital and Accumulation units is a common one within the insurance industry. This had been explained to Mr V.

## **32. M00505/M00705**

### ***Over funding – importance of actuarial valuation assumptions***

#### *Background*

Mr B was self employed. He contributed to a personal pension with Company A until January 1991. Mr B established a small self administered scheme (SSAS) with Company P in January 1992 to which he contributed until 1994. Mr B also had a preserved pension provided by a section 226 policy with a third company.

When Mr B came to take his benefits, it was found that he had overfunded his pension by approximately £150,000. His company had to be re-formed to receive the refund which was taxed at 35%. Mr B complained that Company A had provided information during the time he was making contributions to that fund, which indicated that an overfunding problem was being created. However, he says Company A failed to identify this and ensure Mr B's contributions remained within the relevant limits. Mr B also complained because Company P accepted an application for the SSAS, but failed to contact Company A to ensure there was no danger of overfunding.

#### *Outcome*

At various times while Mr B was contributing to the fund with Company A, he was considered to be overfunding. However, once Company A was provided with up to date salary information for Mr B, the concern no longer remained. Company A performed a final overfunding check in October 1991, at which time it wrote to Mr B saying that he needed to reduce his current premiums to remain within Inland Revenue limits based on his salary. As Mr B then ceased making contributions, Company A made no further checks.

When the SSAS was set up with Company P, it was made aware of the fund with Company A and contact was made, however no overfunding check

was made at the time. Company P was not made aware of the section 226 policy. In 1995, after contributions ceased to be made to the SSAS, an actuarial valuation was carried out of the SSAS, in which account was taken of the fund with Company A. The actuary recommended contributions be made at the level of £53,000 per annum for the remaining four years until Mr B reached his normal retirement date.

Although the actuary was not aware of the section 226 policy, by the time Mr B took his benefits in 2000, the section 226 policy was worth approximately £100,000. It was concluded therefore that the absence of knowledge of the section 226 policy did not contribute to the overfunding situation. However, in his valuation, the actuary referred to the salary assumption used – i.e. that Mr B's salary would increase at 8.5% per annum compound and he noted that one of the most important assumptions was the margin between the return of assets and the rate of salary increase. At the time of the valuation, Mr B's salary was £23,761. When he took his benefits in 2000, his salary was approximately £26,000. This did not constitute an 8.5% per annum increase and was a significant deviation from the salary increase assumption made, which rendered the 1995 valuation irrelevant. From 1996, the SSAS had been fully insured and, as it no longer met the definition of a SSAS, no further actuarial valuation was undertaken. As he was no longer contributing to funds with either Company A or Company P there was no obligation on them to undertake checks. Thus, the overfunding developed from a situation that was under Mr B's control (salary progression) and was not due to maladministration by either Company A or Company P. The complaint was not upheld.

### **33. L00552**

#### ***Incorrect interpretation of actuarial tests – incorrect preparation of actuarial valuation reports***

##### *Background*

M Ltd operated a small self-administered scheme (SSAS) for two members. The assets of the scheme comprised of a number of policies issued by the pension provider, which also acted as manager of the scheme and provided the services of a scheme actuary.

In mid-2000, M Ltd decided to transfer the scheme members to self invested personal pension plans (SIPPs). Before the transfers could take place, an actuarial test (GNII) had to be carried out. The scheme's manager advised M Ltd that the tests indicated that the transfers could not proceed unless both members could show increased remuneration for the tax year ending 5 April 2000. M Ltd asked for a second opinion from an independent actuary who suggested that only one member's benefits failed the GNII test and that the assumptions used in the original calculations may not have been the most favourable. The transfers proceeded without a need for increased remuneration.

In preparing actuarial valuation reports, certain information was omitted which led to the scheme being undervalued and additional, unnecessary contributions being paid by M Ltd between 1988 and 1998. M Ltd sought advice from independent advisers in order to address the issues raised by the incorrect

valuations. The manager asserted that there was no financial loss resulting from the error for part of the time under review, but offered M Ltd compensation to offset the fact that charges had been levied on the excess contributions paid before 1991. M Ltd accepted the compensation. A further ex-gratia goodwill payment was offered by the manager and refused by M Ltd.

M Ltd contended that the manager should pay the professional fees of the independent actuary and adviser since M Ltd had to obtain assistance to sort out problems caused by the manager's alleged errors.

#### *Outcome*

The manager advised M Ltd that the transfers to the SIPPs could not proceed without adjustments to the members' remuneration and this information was proved to be incorrect. I saw no evidence to suggest that the manager could justify its GNI I tests or the interpretation of these. Had M Ltd heeded the information provided by the manager, the transfers would not have taken place and I found that the manager's conduct amounted to maladministration.

As a result of this maladministration, M Ltd suffered financial loss since it had to pay a fee to the independent actuary and I directed that the amount of the fee be paid to M Ltd by the manager.

The manager admitted the existence of errors in the actuarial valuations and provided no evidence to justify the method used in preparing those valuations. I found that this amounted to maladministration. M Ltd suffered injustice as a result since it suffered a loss due the charges being levied on the excess pension contributions. However, in my view, the compensation paid to M Ltd was adequate recompense for the excess charges imposed.

### **34. L00354**

#### ***Insurer's failure to obtain Inland Revenue consent***

##### *Background*

In 1990 Mr S belonged to a one man pension scheme arranged by his employer. Mr S's pension assets from a previous pension arrangement were transferred to the scheme. The advisors learnt from the Inland Revenue that as a result of the transfer, Mr S's service could be regarded as continuous for the purposes of calculating maximum benefit limits. The insurers undertook to apply for continuous service treatment when the scheme was submitted for Inland Revenue approval.

The insurers told the advisors it had obtained Inland Revenue approval. The advisors and the employer assumed that approval had also been obtained for continuous service treatment.

However, the insurers had omitted to obtain Inland Revenue consent to continuous service but this only came to light seven years later, in 1997, shortly before Mr S's normal retirement date.

In view of the uncertainty about his benefit position Mr S had to defer his retirement, obtaining appropriate investment advice from the advisory company.

Eventually the insurance company obtained Inland Revenue approval to treating all Mr S's service as continuous. Mr S had incurred substantial legal costs in pressing his claim.

#### *Outcome*

I upheld Mr S's complaint against the insurers and directed it to pay Mr S the interest he had lost on his pension investment, his legal costs and a further sum for the distress and inconvenience it had caused him. I also directed the advisors to pay Mr S a modest sum in compensation for not making sure in 1990 that when the insurers obtained Inland Revenue approval it had also obtained agreement to continuous service treatment.

### **35. L00658**

#### ***Pension benefits – misleading information***

##### *Background*

In May 1991, the administrator wrote to Mr M about pension benefit options including the availability of a levelling option (designed to enable members to receive a larger scheme pension up to state retirement age and a smaller one thereafter; with total retirement income remaining approximately the same throughout retirement).

The letter referred to an illustration being enclosed showing comparison figures of the levelling option being taken and not taken. Mr M opted to take the levelling option. In July 2000 Mr M was advised that on reaching 65 a deduction would be made because of his decision to level up.

Mr M complained that he had not been sent an illustration about the levelling option in May 1991 or on subsequent requests; that when he phoned in June 1991 he was given inaccurate information about the levelling option calculation and that had he been in possession of the illustration and correct information he would not have opted for the levelling option and having done so had suffered financially.

##### *Outcome*

Part of the matter was out of time but part was tied up with the merits. Assuming that Mr M was given inaccurate information about the deduction it would have been reasonable for him not to have referred the matter until it first came to his attention.

The evidence advanced by Mr M was that he was minded to choose the levelling option before receiving the alleged missing illustration sheet. There was no time pressure to make a decision. On the balance of probabilities having regard to the specific facts the administrator was unlikely to have given inaccurate information, for example, the illustration itself provided the comparative figures. It is more likely that Mr M did not appreciate that the other figures discussed (but not on the illustration sheet) did not represent the amount that would be deducted at state retirement age if the levelling option was taken. Mr M's calculation using the alleged misquoted figure did not provide that his total retirement income would be the same – the purpose of levelling. Mr M was better off over the period between retirement and state retirement age. In the long term the levelling option

proved to be the less attractive option and this was a factor for consideration when making the initial decision.

Mr M asked that I review the case, referring to standards of best practice expected and time pressure. The matter was not upheld. It is not appropriate to judge events in 1991 in accordance with the standards of administration in existence now. A failure to inform him that any final decision should be delayed until the alleged missing illustration was to hand would be unlikely to amount to maladministration. The time pressure did not relate to the levelling option.

### **36. M00987**

#### ***Compensation payment for delay***

##### *Background*

Mrs P had been employed as a part-time night time care assistant and a member of the employer's scheme during this time. She claimed that her employer delayed investigating and responding to her concerns that her pension had been miscalculated.

Mrs P was satisfied that her pension had eventually been properly calculated. However, she claimed that she should receive compensation in recognition of the manner in which her employer dealt with the problem.

##### *Outcome*

I found that there had been delays by the employer in their responses to Mrs P and that they had failed to make proper enquiries in a timely manner in order to ascertain her proper level of pension. I directed that the employer should pay £300 in compensation in recognition of her distress and inconvenience.

### **37. IOMI**

#### ***Self-Invested Personal Pension Scheme***

##### *Background*

This was the office's first Isle of Man case. Like my predecessor I have also been appointed as the Pensions Ombudsman for the Isle of Man.

Mr H was an entrepreneur, and had set up a pension scheme on the Isle of Man for tax reasons. Two trustees had been appointed, and their company's pensions administration subsidiary (the administrator) handled the scheme administration. The two trustees were also directors of the administrator. Mr H was the only member of the scheme.

Mr H had been closely involved in the scheme's investment strategy. Some money had been invested in a company, which had not done well. Despite this further money was invested in the company, to allow the purchase of a property for the company, and the immediate lease-back of the property to the company was made by the scheme. Mr H had persuaded one of the trustees to invest in the company, and subsequently to become a director. Mr H, however, died on 16 September 1995, and the completion of the purchase of the property took place after his death. When the administration of the scheme was moved away from the administrator an

internal memorandum, sent by one of the trustees, was discovered on one of the administration files, stating that the scheme should not have been purchasing property when its prime concern was the purchase of a pension for Mrs H, Mr H's widow and the applicant to this office. Substantial loans had also been made to the company, during Mr H's lifetime, but the loans had subsequently been written down to 10%. The value of shares in the company held by the scheme had reduced significantly, and there were also substantial rent arrears owed to the scheme. The company was later placed in administrative receivership.

One of the trustees suggested that Mr H's company, the employer under the scheme, should be wound up, and its powers under the scheme were then conferred on the trustees. The trustees then retired, and were replaced by a trustee company, which was part of the same group of companies as the administrators.

Mrs H was unhappy with the way in which the scheme was being administered, and appointed a solicitor to represent her and to make enquiries. After much prompting a Consolidated Fund Account was produced by the administrator for the period from 28 September 1995 to 31 March 1998.

The trustee company was later removed as scheme trustee and was replaced by Mrs H and a trustee company of her choice. A new pensions administration company replaced the administrator, and it was agreed that the administrator would charge the scheme no more fees. It then transpired that no scheme accounts had been produced since the scheme had begun.

Prior to Mr H's death invoices for administrative and trusteeship services had been agreed with Mr H. There is some doubt about whether the first invoice following his death was agreed with Mrs H, but subsequently the administrator invoices were accepted by the trustees without reference to her. It was only when the scheme accounts were produced that she first became aware of the level of fees that had been charged to the scheme. During the investigation of Mrs H's application to this office solicitors representing the trustees (one of whom had died) produced copies of the invoices, which were detailed and itemised. The invoices included the cost of six trips one of the trustees had made to the mainland, and these trips appeared to have been related to the company business (the company's annual general meetings), rather than to scheme business. The fees totalled over £50,000 for the four years from October 1995 to September 1999 and, although some very small tasks were itemised, other larger items, such as consultancy services provided by one of the trustees, were not itemised. The first invoice since Mr H's death, issued late in 1995, included a charge of £1670 + VAT, plus other smaller amounts, for "dealing with the preparation of pension scheme accounts", though no accounts had been produced until the beginning of 1999.

Mrs H had also alleged that one of the trustees had a conflict of interest, being both a trustee and a director of the company.

Mrs H's solicitor contended that, because of the write-down in shares, Mrs H had been receiving a pension of only £14,000, whereas she would otherwise have been receiving a pension of £45,000. The solicitors representing the surviving trustee, on the other hand, contended that, because of the success of another unconventional investment, Mrs H was currently receiving a pension of £40,000.

Mrs H was seeking compensation of over £50,000.

The solicitors representing the trustees contended that they should be able to rely on the trustee indemnity clause, as they had not knowingly and wilfully committed a breach of trust.

#### *Outcome*

Most of Mrs H's individual complaints were substantially out of time. Mr H had clearly been a party to the investment decisions made before his death, and the write-down in the investments was clearly known to Mrs H, as was the decision, made before the death, to purchase the property. Mrs H had been well aware of the financial position of the company, and had accepted the failure to pay rent and to repay loans.

The scheme had clearly been poorly administered by the former administrator, and this had resulted in the new administration company having to charge Mrs H fees for rectifying the maladministration. It was reasonable that these charges should be met by the former administrators.

Mrs H had been aware of the surviving trustee's conflict of interest well before she contacted this office, and had accepted it. I could only consider matters occurring within the three years before Mrs H had first contacted OPAS and, during this period the trustee's interest in the company did not improperly influence his involvement with the scheme.

The trustees had no duty to refer to Mrs H's invoices charged to the scheme. Such invoices, however, had to be for reasonable amounts, and had to cover work validly carried out for the benefit of the scheme. As no scheme accounts had been produced until the beginning of 1999, the 1995 charges for "preparation of accounts" should not have been made, nor should the charges for consultancy work that had not been itemised. The cost of trips to the mainland for the company AGMs should also not have been charged to the scheme.

The trustees were entitled to rely on the indemnity clause, as they had not knowingly and wilfully committed a breach of trust. The indemnity clause did not, however, provide protection for the actions of the former administrator, and directions for compensation were made against them.

I did not direct that Mrs H's personal expenses should be met, including her solicitor's fees. She was, however, awarded £1,000 for distress and inconvenience.

The cost of the trips to the mainland (some £13,500) were to be refunded to the scheme, for the benefit of Mrs H, and Mrs H was also to be paid by the former administrator the charges the new administrator had made (some £6,700) for rectifying the maladministration that had arisen.



## CHAPTER 4: The Courts

Summaries of the cases that have been determined are set out below.

**7 May 2003**

**Wilby v Coal Staff Superannuation Scheme Trustees Ltd [2003] All ER (D) 58**  
**High Court, England – Jacob J**

Mr Wilby paid contributions to the Mineworkers Pension Scheme from January 1952 to May 1956. He then transferred jobs and his pension was transferred to the British Coal Superannuation Scheme (the Scheme). He paid contributions to the Scheme from May 1956 to September 1961 when he left his employment with the National Coal Board. The main complaint in his application to me was that no refund of contributions had been paid to him. The Scheme submitted that a refund of contributions had been paid.

I found, on the balance of probabilities, that the refund had been paid. The only independent evidence available was a letter from the National Insurance Contributions Office stating that a payment in lieu was made to reinstate him in the State Graduated Pension Scheme for the period from 3 April 1961 when the state scheme commenced, to 1 September 1961 when he left service. I took this as a strong indication that the Scheme took appropriate steps at the time he left service which would have included paying him a refund. I did not uphold his complaint.

Mr Wilby appealed, contending that he would not have been entitled to a refund unless he had filled in a form and that he had not done so. Further the trustees of the Scheme would have been unable to refund his contributions since he had moved house and he had not informed the trustees of his new address.

Jacob J dismissed the appeal. He held that it was clear from a construction of the rules of the Scheme that any payment would have been automatic. It was a question of fact whether a refund had been made. I had decided it had. It followed that the matter was not one in which the Court could interfere.

**21 May 2003**

**Wilde v British Broadcasting Corporation [2003] All ER (D) 297**  
**High Court, England – Etherton J**

Mr Wilde was employed by the BBC, from September 1989 to January 2000, as a senior broadcast journalist, producer and programme editor. He was a member of the BBC Pension Fund (the Scheme). In February 1998 he went on paid sick leave suffering from back pain. In June that year he underwent surgery to relieve sciatic pain in one of his legs. In August 1998 his paid sick leave came to an end, but he was not able to return to work.

Mr Wilde applied for incapacity benefits under the Scheme in November 1999. Incapacity was defined in the Scheme rules as deterioration in health or injury which the BBC was satisfied, on the evidence of a medical practitioner appointed by it, was likely permanently and substantially to impair a member's earning capacity. After Mr Wilde's application had been reviewed by three in-house medical officers, the medical practitioner appointed by the BBC concluded that Mr Wilde would become medically capable of performing his duties once he had had a further operation and rehabilitation. In December 1999, Mr Wilde's application for an ill-health pension was refused. He was dismissed shortly afterwards on grounds of ill-health. His appeal through the Scheme's internal review procedure was unsuccessful, and he complained to me.

I was satisfied that the BBC's medical practitioner had asked the right questions and that the BBC's decision to refuse incapacity benefits was based on medical evidence. I did not uphold his complaint.

Mr Wilde appealed. He submitted that there was insufficient evidence available to the BBC to enable it to reach an informed view on the relevant questions under the Scheme rules. Alternatively, if there was sufficient evidence to enable the BBC to reach an informed view, the only permissible option available to a reasonable employer directing itself properly in law was that Mr Wilde had satisfied the criteria for an incapacity pension.

The appeal was dismissed. Etherton J held that at the date of the initial decision, and at the review, the BBC had acted within the bounds of reasonable judgment in refusing Mr Wilde's application. The BBC was entitled to rely on the findings of its medical practitioner and, as such, it had material on which to base its decision. Under the Scheme the BBC had the right to determine the issue of incapacity and, provided it asked itself the right questions and had material on which it could properly form its view, that view could not be impugned merely because others might hold views to the contrary.

**11 July 2003**

**Alexander Forbes Trustee Services Limited v Mr D Halliwell [2003] All ER (D) 212 (Jul)**

**High Court, England - Hart J**

Mr Halliwell was a member of the Ravensdown Group of Companies Retirement Benefit Scheme (the Scheme), in liquidation since 1991. He complained to me that Alexander Forbes Trustee Services Limited (Alexander Forbes), the independent trustee of the Scheme, had failed to wind up the Scheme and distribute the surplus in a timely manner, had failed to consider moving Scheme assets into gilts, had failed to secure annuities with providers other than Windsor Life and had failed to deduct the costs of winding up the Scheme from the employer's share of the surplus.

I upheld the first and last of these complaints but did not find that Mr Halliwell had suffered any direct financial loss as a result. However, I directed that Alexander Forbes pay Mr Halliwell £500 for distress and inconvenience caused by their maladministration and that the costs of the winding up be deducted from the employer's share of surplus before distribution.

Alexander Forbes appealed. Although they had agreed to pay Mr Halliwell £500 on an ex gratia basis, they were concerned that my determination might open the way to identical claims from other members of the Scheme, exposing them to a significant financial outlay and further delaying the completion of the winding up.

Hart J upheld the appeal. An exoneration clause in the Scheme's trust deed provided that trustees would not be liable for any loss to Scheme assets or delay except where there had been wilful default or wrongdoing. My finding of maladministration was made on the basis that there was wrongdoing by the independent trustees but not wilful default. But Hart J found that the word 'wilful' in the exoneration clause applied both to default and wrongdoing by the trustee, and that since the wrongdoing identified was not deliberate, the exoneration clause protected it. Alexander Forbes submitted that there was no reason for Mr Halliwell to have suffered any anxiety and that an award for distress and inconvenience was therefore inappropriate. Hart J did not accept this and found that this was not a case where it could be said that there was no evidence upon which I could make the finding I did about distress suffered by Mr Halliwell.

I had found that the failure by Alexander Forbes to recover expenses from the employer was maladministration and that they were not acting in the best interests of the members. Hart J held that I had made an error of law in construing the relevant clause in the trust deed as imposing an absolute obligation on the employers to repay all the necessary expenses incurred in carrying out the provisions of the deed. Furthermore, he held that I had overlooked the fact that in exercising their discretion over surplus, the trustee was not bound solely to consider the interests of the members, but was obliged to consider the interests of the employer as well. There was no evidence that Alexander Forbes had failed to ask itself the right questions, or failed to direct itself correctly on the true construction of the relevant provisions or otherwise acted perversely. In these circumstances I was not entitled to substitute my own view as to how the discretion ought to have been exercised.

**17 July 2003**

**S G Balyan v The Pensions Ombudsman and The Commonwealth War Graves Commission [2003] EWHC 1826 (Ch)  
High Court, England – Patten J**

Mr Balyan complained to me that there had been maladministration by the trustees of the Commonwealth War Graves Superannuation Scheme (the Scheme) as a change in the rules provided improved pension rights for existing members without augmenting the benefits payable to existing pensioners from the same date. The rules were amended to allow members to opt to commute part of their pension for a lump sum but was not applied retrospectively therefore retirees prior to the amendment were required to surrender too much of their pensions for lump sums.

The Scheme rules prior to 1992 provided for payment of an annual pension of 1/80 of pensionable pay and a lump sum of 3/80 of pensionable pay. There was no commutation option. The trustees had the power to alter and amend the Scheme and the rules as may be considered expedient but subject (*inter alia*) to the condition that any modification alteration or addition should not be prejudicial to the main purpose of the Scheme. This was defined in clause 5, which provided that the fund was to be held on trust for “the members and other persons prescribed by the Rules”. The trustees also had the power to deal with any surplus, after appropriate advice and consultation, “for the purposes of the Scheme or the provision of more favourable benefits to members or their dependants.”

In 1991 the trustees were informed that the fund was in surplus and decided to eliminate this by a combination of increased pension benefits and a reduction in contributions by the employer. They therefore altered the rules, with effect from 1 April 1992, so that a member, reaching normal retirement age after that date, would be paid a pension of 1/60 of final salary. They also introduced a new rule allowing a member to commute part of his pension for a lump sum using a commutation factor of 9.

I did not think that the trustees’ action constituted maladministration and did not uphold the complaint. Mr Balyan had received the pension he was entitled to and had not suffered an underpayment of pension since 1992. The trustees’ duty was to treat all members equitably, not all the same. Mr Balyan appealed to the court.

The appeal was dismissed. Patten J found that the trustees were not entitled, under the rules, to use the surplus to benefit Mr Balyan and other pensioners, as “a member” was defined only as a member in active service. He held that even if this were not so, although the trustees were required to have regard to the interests of all members and former members who benefit under the Scheme, this did not require them to make any improvement in the pension entitlement of one group conditional on a similar

improvement in the entitlement of the other group. I was, therefore, entitled to conclude that there had been no maladministration. That was a question of judgement which the court could not interfere with unless it was satisfied that I had reached my conclusion on the basis of an incorrect interpretation of the trustees' powers or some other error of law.

**31 July 2003**

**Secretary of State for Education and Skills v Bailey and another [2003]**

**All ER (D) 552**

**High Court, England – Pumfrey J**

Mr Bailey was a teacher, employed by The English Language Centre (the School). He was a member of the Teachers' Pension Scheme (the Scheme). In January 1997 the School underwent a restructuring as a result of which Mr Bailey agreed to relinquish a degree of responsibility and take on more classroom time. A safety net provided by the School meant that Mr Bailey's actual salary was maintained. In January 2001 there was a second restructuring at the School, and Mr Bailey relinquished a further level of responsibility. His new position involved a lower pay scale, but the safety net continued to apply and his previous actual salary remained. Mr Bailey was anxious to ensure that he maintained his maximum pension entitlement under the Scheme by continuing to pay contributions at the rate allowed before the restructurings.

Where a teacher moves to a post of lesser responsibility, one of two kinds of 'stepping down provision' under the Scheme regulations may apply. I found that Mr Bailey had suffered a reduction in salary in January 2001 because, although his salary had remained the same in absolute terms, without a cost of living increase which would normally have been applied, it was worth less in real terms. For the purposes of an application under the 'two tier' stepping down provisions in the regulations, I found that Mr Bailey was employed in a different post at a reduced rate of contributable salary, from January 2001.

The Secretary of State appealed contending that the relevant comparison was not between the contributable salary received after the restructuring and the contributable salary had there been no restructuring. The correct comparison was between the salary before the restructuring and the salary after it.

Pumfrey J upheld the appeal. He held that Mr Bailey's new post was not to be considered as being at a reduced salary. The regulations were clear as to the comparison which had to be made, and the logical comparator was the last salary upon which contributions were actually paid. One should not look at a salary rate which had not and would not be paid in attempting to decide whether a fresh pension entitlement, beginning on the date on which the salary was reduced, was possible. The comparison effected by me was not supportable in law. The case was remitted to me for further findings of fact so that the correct comparison could be performed in the manner indicated.

**19 November 2003**

**The Secretary of State for Defence v Cheryl Ann Hulme [2003]**

**All ER (D) 270**

**Court of Appeal, England – Mummery LJ, Sedley LJ, Munby J**

This was an appeal by the Secretary of State against the judgement of Neuberger J, handed down on 4 April 2003 and reported in the last Annual Report for 2002-2003. Briefly the background to the appeal was that Mrs Hulme was the widow of Sergeant Hulme who served with the RAF and who was killed on 6 June 1996 in a mountaineering accident on Mont Blanc. He was on leave at the time and was preparing for an approved joint forces expedition to Greenland the following year.

Mrs Hulme applied for and was granted an attributable war widows pension under the War Widow's Pension Scheme (WPS), a state pension compensation scheme covering cases of disablement or death due to service in the armed forces. The WPS was administered by the War Pensions Agency on behalf of the then Department of Social Security (DSS).

Mrs Hulme then applied for an attributable family pension under the Armed Forces Pension Scheme (AFPS) but her application was refused on the grounds that her husband's death was not attributable to service. Although the two schemes were administered by different bodies operating under different procedures, the Queen's Regulations for the Royal Air Force (QR-RAF) which regulated the administration of the AFPS provided, under paragraph 3090(1), that:

“... where an officer or airman dies from causes accepted by the Department of Social Security as attributable to or aggravated by service, his eligible survivors may be awarded an attributable family pension at the discretion of the Defence Council...”

Mrs Hulme complained to me that the panel which administered the AFPS had no power to depart from the decision made by the DSS under the WPS on the issue of attributable service. I upheld her complaint on the basis that the determination made under the WPS that death was due to service was effectively determinative of the issue for the purposes of paragraph 3090 of the QR-RAF. Neuberger J upheld my determination and the MOD was granted permission to appeal to the Court of Appeal.

The Court of Appeal dismissed the appeal holding that the panel had misinterpreted paragraph 3090(1) of the QR-RAF as entitling it to determine afresh whether Mr Hulme's death was attributable to service. Only the DSS could determine whether an injury or death was attributable to service. The natural and ordinary meaning of the language used in paragraph 3090(1) was that the DSS would make that determination. Its decision on the question necessarily preceded an AFPS application to the panel and was meant to be binding on it. It was common ground that if the DSS determined that the death of the service man was not attributable to service that would conclude the issue for the panel. It would have no discretion in order to revisit the issue and arrive at a different conclusion from the DSS.

### **9 December 2003**

#### **Payne v Pensions Ombudsman & others [2003] All ER (D) 164 High Court, England – Etherton J**

This was an appeal from a determination by my predecessor upholding a complaint by Mr Gavin Meikle of maladministration by Mr Payne and other former trustees (the Trustees) of the Eastern Counties Farmers' Pension Plan (the Scheme).

Mr Meikle complained that the Trustees, in breach of trust, lent money to the employer, Eastern Counties Farmers, by way of an unsecured loan. The employer subsequently went into liquidation and the loan, which had been extended by the Trustees, proved irrecoverable.

In his notification of preliminary conclusions my predecessor said that while it was barely conceivable that a group of trustees would have come to a decision to grant the loan in July 1993, the decision to extend the loan in December 1993, in his judgement, was one which no reasonable trustee would have taken. He was, therefore, in no doubt that the Trustees were in breach of trust in deciding to extend the loan and hence were guilty of maladministration. However, he considered that the Trustees were entitled to the benefit of the exoneration provision in rule 37 of the Scheme rules as there was no sufficient evidence indicating that the Trustees did not act in good faith and with the best intentions,

however misguided they may have been. Rule 37 provided "... nor shall any Trustee be liable for any acts or omissions not due to his own wilful neglect or default...".

Following receipt of responses to my predecessor's notification of preliminary conclusions, from Mr Meikle and the Trustees, and before issuing his determination, my predecessor decided to hold an oral hearing to which the Trustees were invited to attend. The purpose of the hearing was to consider the Trustees' evidence as to the events up to and including 31 December 2003 in order to establish whether they should be given the benefit of the exoneration clause. All of the Trustees attended the hearing apart from Mr Payne.

My predecessor then issued his determination confirming his preliminary conclusion that the Trustees had committed serious breaches of trust constituting maladministration. He also found that four of the Trustees were exonerated from liability by reason of rule 37. However, he concluded that Mr Payne was guilty of wilful neglect and/or default constituting, in all the circumstances, dishonesty, and that he was not entitled to the benefit of the exoneration clause.

Mr Payne appealed against the determination, principally on the ground that the course of the investigation was procedurally flawed. He argued that there was no finding of any subjective dishonesty or wilful misconduct on his part in the notification and that no issue had been raised by Mr Meikle in his response to the notification as to the failure of my predecessor to find, on the facts, subjective dishonesty or wilful misconduct. Moreover, Mr Payne was given no prior warning or opportunity to rebut this dramatic change of view before the formal issue of the determination.

Etherton J upheld the appeal. He found that although the notice of intention to hold the oral hearing did not expressly state any limitation on the ambit of the hearing, it was not unreasonable for Mr Payne to consider that the issue to be addressed at the hearing concerned the proper meaning and effect of rule 37 in relation to recklessness and objective dishonesty. Etherton J found that in order for there to have been a fair determination of the complaint Mr Payne ought to have been given the opportunity to address a radical change of view by my predecessor which had not, prior to the oral hearing, been challenged by Mr Meikle and without significant new evidence coming to light. This was particularly so, bearing in mind that the change in view was on an issue of dishonesty, which might be likely to have severe consequences for Mr Payne as a qualified accountant. Furthermore, he held that my predecessor's findings that Mr Payne was dishonest were based on an objective test which could no longer stand, given a recent House of Lords decision which decided that the test for dishonesty involved a subjective, not merely an objective element. However, he did not remit the matter back to my office as Mr Payne had in the meantime settled the claim with Mr Meikle and the current trustees of the Scheme.

### **11 December 2003**

#### **Brennan v LRT Pension Fund Trustee Co Ltd and another [2003] All ER (D) 222 High Court, England- Etherton J**

Mr Brennan worked as a bus driver for London Regional Transport (the Scheme) and is a member of the London Regional Transport Pension Fund. In 1992 he was medically certified as being unfit to continue driving, although he was found to be fit for other types of work. He was dismissed on the grounds of ill-health and was paid an ill-health pension. The trustee monitored his medical condition annually and a few years later received a medical report indicating that he was in good health, without any qualification in respect of his driving ability. The trustee informed Mr Brennan that his pension would cease because of his improved medical condition.

After exhausting the Scheme's internal dispute resolution procedure Mr Brennan brought his complaint to me. I did not uphold the complaint as I found that the trustee had applied the appropriate rules correctly. Mr Brennan appealed on the basis, inter alia, that before he had been dismissed he had been assured by a representative of the trustee that there would be no possibility of the ill-health pension being stopped in the future provided he did not resume work for the Scheme. Had he known the true position at the time he would not have accepted the dismissal on the grounds of ill-health. He would either have claimed for unfair dismissal or redundancy. The trustee contended that Mr Brennan had not raised the issue of misrepresentation before me and that it had not, prior to the appeal, been aware of the true nature of Mr Brennan's complaint.

Etherton J upheld the appeal, holding that Mr Brennan had raised the issue in his complaint to me but it had not been subject to any finding by me. Etherton J acknowledged that it was difficult to ascertain the full extent and nature of Mr Brennan's complaint and that he had not identified the representative or set out what had been said. Nevertheless he considered that the matter had to be seen in the context of an application by a complainant who was acting for himself. He also considered that there had been other findings of fact which had not been adequately explained to Mr Brennan. Accordingly he found that the investigation by my office had not been full and fair and that my decision should be set aside and the matter remitted for reconsideration.

### **12 December 2003**

#### **Legal & General Assurance Society Limited v CCA Stationery limited [2003] All ER (D) 233 (Dec)**

#### **High Court England – Laddie J**

CCA made a complaint concerning the management of the CCA Stationery Limited Pension and Assurance Scheme v Legal & General (the Scheme), in particular in relation to surrender terms imposed by L&G under the Scheme's policy (its sole asset) which resulted in a loss of £734,000. A specific part of the complaint related to the failure by L&G to disclose the basis of the calculation of the surrender value.

In previous litigation arising from the complaint Lightman J said "L&G... refused to disclose the "basis currently in use" ...for the purpose of the calculation of the single cash sum ("the Formula")... the refusal on the part of L&G to disclose the Formula has been the occasion for dissatisfaction on the part of CCA and members of (the) scheme..."

Various figures were produced and described as the Formula. CCA asserted that no basis for the calculation of the market value adjustment factors (MVAFs – a factor in the formula) had been supplied so that it was not possible to verify the accuracy of the percentages quoted. It asserted that this is the key component of the Formula and ultimately the component responsible for reduction in surrender value.

I found that L&G was a manager of the Scheme at the time of the calculation of the MVAFs and that the calculation and payment of the discontinuance sum were concluding acts of management in relation to the Scheme. I found that although L&G had disclosed a formula, it had not disclosed the basis for the calculation of a factor in that formula. What should have been disclosed were such calculations as were necessary so that it would be possible to identify how the discontinuance sum had been calculated and verify it. L&G's failure to provide full details of the Formula was maladministration as was the subsequent loss of the supporting calculations. L&G was directed to instruct an independently nominated actuary to calculate the MVAFs likely to have been used in April 1992.

L&G appealed. On 6 February 2003 I wrote to the court clarifying a jurisdictional issue in relation to the appeal. I explained my view that my jurisdiction is wider than the courts in that I can investigate instances of maladministration, which is not a cause of action before the courts and that accordingly my power to direct should not be narrowly construed.

Laddie J upheld L&G's appeal. As regards providing details of the MVAFs, Laddie J held that the process by which L&G took into account factors which have a bearing on the current value of its long term fund, so as to arrive at MVAFs, was not a function it performed in its capacity as administrator of the policy. The same process of assessment would be carried out by L&G employees even if the policy did not exist. It followed that L&G's refusal to disclose its method of setting MVAFs was not within my remit. Even if done incompetently or in an arbitrary way, it did not amount to maladministration. I had no jurisdiction to investigate how L&G set the MVAFs.

Laddie J considered (obiter) that as the calculation of the surrender value took place about a year after L&G had been told it was no longer the administrator of the Scheme and that its functions had been taken over by another, it could not be properly categorised as an act of administration. The passage of time emphasised that the calculation of the surrender value was quite distinct from the setting of the MVAFs. Even if the calculation was an act of administration it did not bring the setting of MVAFs within my remit. Furthermore, the termination of the policy, calculation of the discontinuance sum payable and its payment did not fall within L&G's functions as administrator of the Scheme. Lightman J had held neither the entry into the policy nor its continuance in force constituted an act of management so Laddie J could not see how termination of the contract could be. In his view, everything pointed to the carrying out of the calculations being a purely commercial transaction by L&G and not an act of management of the Scheme.

As regards L&G's inability to locate the MVAFs supporting calculations, Laddie J held that it must follow from his earlier conclusion that the production and retention of the document of supporting calculations was not an act of administration of the Scheme. Even if misplacing the document was incompetent or worse it was not within my remit. In any event Laddie J was not persuaded that there is a general obligation on a former administrator to keep all documents for over seven years after ceasing to act in that capacity.

Whether there had been maladministration or not, it was also submitted that my direction was inappropriate and that it is important to clarify what directions I may make. There was no dispute that the direction is not one which the court would make. Laddie J had regard to a range of cases about the scope of my powers and held that although I purported to exercise my powers in a way which differed, the underlying issue was the same. In his view, I could not make an order which the court could not make. Since the direction could not have been made by a court, I should not have made it either.

Laddie J thought that the effect and the purpose of the direction was unclear. He considered the purpose of the direction was to delegate my investigating power to a third party, ie an actuary, appointed by someone else, the president of the Institute of Actuaries. He held I had no power to delegate like this and, even if I did, it was difficult to see how this type of delegation could be justified. The obligation to make relevant findings of fact rests with me and it is not proper for me to pass that task to someone else, particularly someone who is not chosen by me and over whom there would be no control once appointed. Laddie J assumed the purpose of the direction was really an exercise designed to test whether the MVAFs used by L&G were reasonable in all the circumstances and that it left L&G in the air as to what would be the consequence of the actuary's determination.

**12 December 2003**

**Minister for the Civil Service v Oakes [2004] All ER (D) 112  
High Court, England – Lindsay J**

Mr Oakes was employed as a labourer by the Ministry of Defence (MOD). In August 1998 he was involved in two incidents involving colleagues and managers. First, a special cleaning project which Mr Oakes had been persuaded to lead, despite his reservations, was undermined by the movement of a vehicle across a workshop after Mr Oakes had been assured that the vehicle would not be moved until the following day. Then, when Mr Oakes decided that he no longer wanted to lead the project, the production manager for the section made derogatory comments about the labourers which were reported to Mr Oakes. The day after, Mr Oakes went on sick leave with stress related illness, and never returned to work.

Although the formal grievance procedure led to an unreserved apology to Mr Oakes and the withdrawal of the derogatory comments, he felt his position at the MOD was intolerable and applied on 18 December 1999 for ill-health and injury benefits under the Principal Civil Service Scheme (the Scheme). His application for ill-health early retirement was eventually granted on the grounds that he suffered a depressive illness and was permanently incapacitated. But the MOD maintained that Mr Oakes had not suffered an injury which would qualify him for injury benefits under the Scheme, the decision essentially resting on whether the events which precipitated his illness were reasonably incidental to his duty or related to the nature of his duties. Mr Oakes complained to me.

Mr Oakes submitted that there was a causal relationship between the incidents at work and his subsequent ill-health. The Cabinet Office, representing the MOD in my investigation, submitted that it was not the events which occurred in Mr Oakes' workplace which caused his injury, but rather his perception that those events were aimed personally at him and indicated a lack of management support for him. My investigation led to questions about the proper construction of the relevant Scheme rule, ie rule 11.3 of the Scheme, which states that an injury award is payable if a member:

“suffers an injury in the course of official duty, provided that such injury is solely attributable to the nature of the duty or arises from an activity reasonably incidental to the duty.”

In essence, the Cabinet Office contended that for a member to be eligible for an award, the injury sustained must be solely attributable to the nature of the duty and solely arising from an activity reasonably incidental to the duty. I considered, interpreting the rule by giving the words their ordinary and natural meaning and applying normal grammatical rules, that the word 'solely' did not qualify the phrase 'or arises from an activity reasonably incidental to the duty'. I upheld Mr Oakes' complaint and directed the Cabinet Office to reconsider Mr Oakes' entitlement to injury benefits, but my decision did not turn on the construction argument just described. Instead I found that the incidents at work were the actions of the management of the section in which Mr Oakes worked and such actions could certainly be regarded as incidental to the duties of those they manage. Further, I considered that a subjective test should be applied to the question of whether the incidents caused Mr Oakes' injuries, and medical evidence was available which supported the view that the incidents at work had led to his depressive illness. The fact that there was no evidence to support Mr Oakes' perception that these incidents were intended to undermine him, or that others might have reacted differently, was irrelevant.

The Minister for the Civil Service appealed my findings about the proper construction of rule 11.3 and submitted that my interpretation, while grammatically correct, led to perverse, anomalous and uncertain results.

Lindsay J upheld the appeal. He held that examining the rule from a linguistic point of view, it was correct to say that the word 'solely' was not to be read into the phrase 'arises from an activity reasonably incidental to the duty' and that if it had been intended to qualify it, the draftsman would have written the word again. However, he went on to find that the consequence of this interpretation was that the more remote the attributability of the injury to the nature of the duty, the less also the need to show the injury to have been caused solely by the duty or by anything reasonably incidental to the duty. He found that this was not the logical intendment of the draftsman and that the second part of the test for whether a member could qualify for injury benefits should be as stringent as the first. So the word 'solely' should be read as if it applied to the latter part of the rule. The matter was remitted to me for reconsideration in the light of his decision.

### **16 December 2003**

#### **East Sussex County Council v Barbara Jacobs [2003] EWHC 3323 (Ch) High Court, England – Blackburne J**

Mrs Jacobs was employed by the East Sussex County Council (the Council) from 1976. She joined the Local Government Pension Scheme (the Scheme) in 1984 and from 1990 to 2001 she worked, first for the Probation Service and then for the Children and Family Courts Advisory and Support Service (CAFCAS). In May 2001 the Scheme administrator, acting on behalf of the Council, sent her details of her deferred benefits.

Mrs Jacobs retired in December 2001 aged 63. In January 2002 she was informed that the benefits that had been supplied were incorrect. A revised notification indicated a significantly lower pension and lump sum payment. Mrs Jacobs complained to me alleging that she had retired in reliance on the incorrect information and that she would have stayed in employment for at least another year had she been given the correct information.

I found that had she not been given the incorrect information she would, on balance, have stayed at CAFCAS rather than retire on 31 December 2001. She had taken reasonable steps to mitigate her loss by taking sessional work with CAFCAS. I directed the Council to pay her the equivalent of the difference between the incorrect annual pension and lump sum quoted in May 2001 and the correct amounts quoted in January 2002, either by way of a lump sum or an annuity. Income received by Mrs Jacobs from her sessional work with CAFCAS was to be taken into account. I made no separate award for distress and inconvenience as I recognised that Mrs Jacobs might end up in a better financial position so far as her income was concerned than if there had not been any maladministration. The Council accepted my substantive findings but appealed against my directions.

Blackburne J upheld the appeal. In relation to financial loss, he found that the effect of my award was to put Mrs Jacobs in a more favourable position than if she had successfully taken her complaint to the courts as it put her in the position she would have been in had the incorrect information been correct. He also found that my directions required the Council to make payments in excess of those permitted under the Scheme. The appropriate remedy should have been directed towards compensating her for her losses as a result of her retiring early. In relation to compensation for distress and inconvenience, he considered that my award was open ended. It was incumbent on me to assess the extent of the inconvenience for distress suffered by Mrs Jacobs and then to set an appropriate level of compensation. However, as the parties had come to an agreement on compensation he did not remit the matter to me for further consideration.

**21 January 2004**

**Keith Spreadborough v Wandsworth London Borough Council [2004] All ER (D) 152  
High Court, England – Lightman J**

Mr Spreadborough was employed by Wandsworth London Borough Council (the Council) as an arrears officer. Under the Local Government Pension Scheme (the Scheme), of which he was a member, he was entitled to payment of preserved benefits prior to the normal retirement date of his 65th birthday, on his becoming incapable by reason of permanent ill-health of discharging efficiently the duties of the employment he had ceased to hold.

Mr Spreadborough suffered the onset of Chronic Fatigue Syndrome (ME) in 1989, and in October that year he went on sick leave. He resigned in August 1990. In December 1994 he applied for ill-health benefits under Regulation E(2) of the Local Government Superannuation Regulations 1986. This Regulation was replaced in 1995 by D11 of the Local Government Pension Scheme Regulations 1995 (the Regulations). Ill-health benefits were refused: the Council's occupational health physician concluded there was insufficient evidence that Mr Spreadborough was permanently unfit (ie that his illness would last until his retirement) although it was accepted that he was suffering from ME.

In May 1998 Mr Spreadborough, having seen a consultant physician specialising in ME, applied again for the early payment of deferred pension benefits. The Council's occupational health physician advised that his symptoms and incapacity continued, referred to recent Department of Health guidelines that a patient suffering from ME for more than 4 years will have a 'tendency to chronicity', and concluded that on the balance of probabilities it was unlikely that Mr Spreadborough would recover sufficiently to return to his full time employment before normal retirement date. The Council granted Mr Spreadborough ill-health benefits, to run from September 1998.

Mr Spreadborough appealed through the Scheme's internal dispute resolution procedures with respect to the date from which benefits should be granted. He argued they should run from the date of onset of incapacity, which he claimed was in 1989. The outcome of that appeal was that benefits should run from 1 May 1998, the date of Mr Spreadborough's meeting with the ME specialist.

Mr Spreadborough applied to me for a direction that his benefits be backdated to 1989, but I upheld the Council's final decision that benefits were properly payable from May 1998. I found that 'appropriate date' under the Regulations (that is, the date on which a member becomes permanently incapable) meant the date on which a member's medical condition was found to have met the criterion, not the date on which the incapacity may have first occurred, as there was no provision in the Regulations which allowed for the retrospective payment of preserved benefits from the Scheme.

Mr Spreadborough appealed. Lightman J upheld the appeal. Lightman J held that, while a member will not ordinarily be entitled to contend that a previous final or unappealed decision was wrong on the evidence then adduced, he might be entitled to revive an earlier failed claim on new evidence in exceptional circumstances where justice so required. Developments in the field of ME were capable of being considered such as to justify reconsideration of whether Mr Spreadborough's permanent incapacity dated back to 1989.

Lightman J further held that 'appropriate date' under the Regulations meant the date of onset of incapacity, not the date of diagnosis, and found that there was provision in the Regulations for retrospective payment of preserved benefits from the Scheme. He remitted the matter to me for reconsideration. He directed that Mr Spreadborough's application be reassessed with clarification from the physician whom he consulted in 1998 as to when any reasonable prospect of recovery ceased.

**12 February 2004**

**Trustees of the ELG Haniel Metals Limited Pension and Assurance Scheme v  
Roger Newman [2004] All ER (D) 214 (Feb)  
High Court, England – Etherton J**

Mr Newman was employed on a contract basis by ELG Haniel Metals Limited. The contract was due to end on 31 December 2002 but in early September 2001 Mr Newman entered into negotiations with the chairman of his employer for the early termination of his employment. Mr Newman believed that, during a discussion with the chairman, who was also a trustee, a verbal agreement had been given that he could take early retirement. On 19 September 2001, the chairman wrote to Mr Newman, on company notepaper, and dealt with the question of early retirement. Part of his letter appeared to confirm that Mr Newman could take his pension from the date his contract expired, though reduced for early payment. However, the employer submitted that the chairman did not intend to indicate that he had given consent for Mr Newman to be granted early retirement benefits, and that other evidence showed this to be the case.

Negotiations regarding the ending of Mr Newman's contract continued, and there was disagreement about whether he could take an early pension and to what extent a compromise agreement signed by Mr Newman affected his entitlement to a pension. The trustees were prepared to offer either a transfer of Mr Newman's benefits to purchase an annuity, or for his benefits to remain in ELG Haniel Metals Limited Pension and Assurance Scheme (the Scheme) until normal retirement age.

Mr Newman complained to me. I found that the rules of the Scheme provided that early retirements were possible. I also found that the chairman of the employer, also being a trustee, had given consent for Mr Newman's early retirement and had ostensible authority to do so. It was not necessary for me to determine whether Mr Newman could mount a successful claim in contract for early retirement, because he was seeking a pension in accordance with the trust deed and rules. In view of these findings, I determined that there had been maladministration by the trustees in refusing Mr Newman early retirement benefits and I directed that they should arrange for him to be awarded such benefits with effect from the date of the ending of his contract, and that they should pay him a sum for distress and inconvenience.

The trustees appealed. They submitted that I was wrong in law either in construing the letter from the chairman as indicating that he had consented to an early retirement pension for Mr Newman, or in finding that the chairman had in fact consented to a pension. Alternatively, they submitted, I was wrong in law in finding that the chairman had ostensible authority to give consent on behalf of the trustees, or if he did have authority, I ought to have held that such consent was void or voidable under the rule in *Re Hastings-Bass*. Finally, it was submitted that I was wrong in law to order a distress and inconvenience payment.

Etherton J upheld the appeal. He considered first the question of ostensible authority and held that the decision whether or not to grant Mr Newman an early pension was a matter to be determined by the trustees in accordance with the provisions of the trust deed. No such decision was taken, nor was there any evidence that the trustees had made any express or implied representation that the chairman had authority to act on their behalf in granting consent for early retirement.

The last two grounds of the trustees' appeal were not addressed at the appeal hearing, and Etherton J did not consider it necessary to reach a decision on the first two grounds, though he made observations about them. Etherton J said that the exercise to be carried

out by me, in determining what the chairman had intended by his letter of 19 September 2001, required me to look at all the evidence and not just that letter and it might be necessary for me to hold an oral hearing. Had he not reached the decision he had reached in relation to the question of ostensible authority, Etherton J would have remitted the matter to me for further consideration.

**20 February 2004**

**Suffolk County Council v Malcolm Wallis [2004] All ER (D) 360**

**High Court, England – Peter Smith J**

Mr Wallis retired as a fireman in June 1993 on medical grounds. In February 1993 he had been examined by an occupational health consultant, Dr Astbury, who concluded that he had a hearing disablement, but it was not caused by carrying out his duties as a fireman, and thus was not an injury such as would qualify him for injury benefits under the Firemens' Pension Scheme (the Scheme). Mr Wallis appealed and as a result was awarded an injury pension. The matter was referred back to the occupational health consultant to determine the degree of his disablement. She issued a revised opinion as to his disability in October 1993, putting his degree of disablement at 25% (which was categorised as a 'slight' disablement). Mr Wallis did not challenge this figure at this time, despite his right to do so.

A review of his disability entitlement was due in 1998, but did not in fact take place until 2000. In that year, the doctor who examined him confirmed that Mr Wallis' hearing did not reach the standard required for operational fire fighting duties and put his degree of disability at 60%. His report said although there had been some change in Mr Wallis' hearing impairment, the noise induced element which affected the operation of fire fighting duties was essentially unchanged. Mr Wallis' injury benefits were increased, with the increase backdated to October 1998, when the review should have taken place.

Mr Wallis concluded from this that there had been some mistake in the previous assessment of his disability at 25% and complained to me. He submitted that there had been a lack of material submitted to Dr Astbury about the prospect of re-employment in comparable jobs having regard to his skills, that no interview had been arranged with her to discuss this and that his disability had been categorised as 'slight' with no scope for negotiating or discussing this. He also complained of delays in the internal dispute resolution procedure.

I upheld Mr Wallis' complaint. I found that there was no evidence to indicate how the figure of 25% had been arrived at in 1993, or how it was that his re-employment prospects were higher then than in 2000. I made a direction that his injury benefits, at the higher level, be backdated to July 1993, the date I found that Mr Wallis would have retired had the certificate of disablement been issued correctly. I also made a direction for the payment of £250 for Mr Wallis' time and trouble in relation to the delays in the internal dispute resolution procedure.

Suffolk County Council (the Council) appealed. Their grounds of appeal included the contentions that the doctor who examined him in 1993 was not responsible for the management of the Scheme, that they could not be held liable for her decision, that I did not have jurisdiction to consider the correctness of the medical opinion, and that even if I did, it was perverse to find that she had reached the wrong conclusion.

Peter Smith J upheld the appeal. He held that even if the acts of Dr Astbury who examined Mr Wallis in 1993 were found to be negligent, they could not be laid at the door of the Council so as to make them guilty of maladministration. There was no causal connection

nor was the complaint about the manner in which something was done. While there might be maladministration if, for example, a medical report had been suppressed, in this case, the Council had only acted on the unchallenged medical opinion of an independent doctor. Dr Astbury was not responsible for the management of the Scheme, and I had not provided reasons why the Council was liable for her decision. There was no evidence on which to conclude that Dr Astbury's decision was necessarily wrong, or negligent, so as to make the Council liable for it in terms of maladministration. The obligation was on Mr Wallis to establish that Dr Astbury's decision was incorrect, whereas, Peter Smith J said, my determination had effectively reversed the burden of proof.

**26 February 2004**

**Mansfield v Leeds City Council and another [2004] All ER (D) 441  
Chancery Division, England – Lloyd J**

After several years absence from work due to ill health, Mrs Mansfield's employment was terminated in 1997 on the ground that she was incapable of fulfilling her contract of employment. She was not granted ill-health early retirement benefits.

Mrs Mansfield considered that she ought to have been retired early on grounds of ill-health but neither her initial application for ill-health retirement benefits nor subsequent appeals under the internal dispute resolution procedures (IDRP) were successful. Her appeal to the Secretary of State was dismissed on the grounds that there was no conclusive medical evidence that she was permanently incapable of discharging her employment duties within the meaning of the Local Government Pension Scheme Regulations 1995 (the Regulations).

Mrs Mansfield complained to me. I concluded that the Council had not taken sufficient steps to discharge its duty to consider whether she was entitled to any retirement benefits under Regulation D7 of the Regulations. However, although I found that there had been maladministration, Mrs Mansfield had not suffered injustice because her eligibility was subsequently considered during the IDRP. Mrs Mansfield also asked me to find that medical evidence provided during the IDRP showed that she qualified for ill-health retirement benefits and raised concerns about the handling of her appeal at the first stage of the IDRP, by the appointed person.

I did not agree with Mrs Mansfield's contentions and did not uphold her complaint. She appealed contending that I had erred in law as I had refused to hold an oral hearing and had not followed two precedents produced in support of her arguments.

Lloyd J dismissed the appeal. He held that Mrs Mansfield had failed to raise a point of law on which her appeal could be founded. I had discretion in the conduct of the case and could not be criticised for refusing to hold an oral hearing. I had considered the precedents but neither were relevant to the particular facts before me.

## CHAPTER 5: Management

### Costs

The office is funded through the Department for Work and Pensions. A budget of £1.693m was set. Actual expenditure at the year end was £1.588m (£1.464m in 2002-2003).

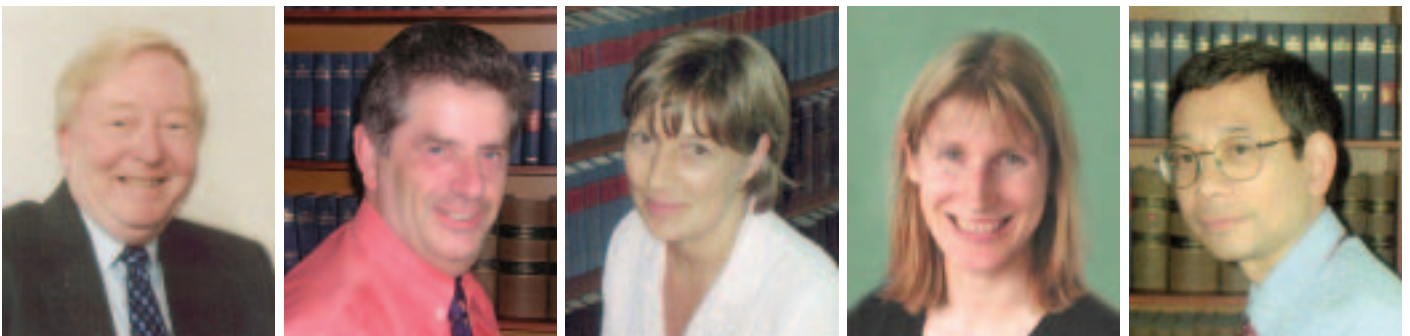
The major costs are those relating to staff, £1.194m (£1.088m in 2002-2003). During the year staff members had increased from 27 to 32.



*Business Manager, Mike Lydon*

## Appendix 1 – Staff in post at year end

	<b>Pensions Ombudsman</b> David Laverick*	
	<b>Business Manager</b> Mike Lydon	
<b>Team Leader</b> Tony Krishna	<b>Team Leader</b> Chrissie O'Rourke	<b>Team Leader</b> Fiona Nicol
<b>Senior investigators</b> Michaela Brown Rod Joyce Caroline Leal Aruna Sud Ken Buckley	<b>Senior Investigators</b> Tom Bick Geoff Naldrett Terry Stevens Jane Stephens Jerry King Chris Bunn	<b>Senior Investigators</b> Patrick Mills Peter O'Brien
<b>Legal Advisor and Investigator</b> Lesley Stead+ (*)	<b>Legal Advisor and Investigator</b> Velia Soames* +	<b>Legal Advisor and Investigator</b> Claire Ryan*
<b>Investigators</b> Paul Strachan Robert Orr	<b>Investigator</b> Vasanthy Vijayaratna	
<b>Investigation Assistants</b> Carl Monk Natasha Goncalves	<b>Investigation Assistant</b> Kai Lau	<b>Investigation Assistant</b> Liz Smith
	<b>Management Assistants</b> Katherine Auty Suzannah Little	
	<b>Administrative Officer</b> Tanveer Chana	
		+ Part time * Solicitor (*) Solicitor (non practicing)



From left to right: David Laverick, Mike Lydon, Fiona Nicol, Chrissie O'Rourke, Tony Krishna

## Appendix 2 – Expenditure

	2003–2004	(2002–2003)
	£'000	£'000
Staff	1,194	1,088
Telecoms/Computers	73	92
Printing/Stationery/Postage	58	43
Legal Costs	81	136
Other	182	105
Total Running Costs	1,584	1,464
Capital Expenses	-	-
Total Expenditure	1,588	1,464

Other includes £90k recruitment costs incurred towards year end when we were in process of significantly increasing staff numbers.













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