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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 2001 to 31 March 2002.

A handwritten signature in black ink that reads "David Laverick". The signature is written in a cursive style and is positioned above a short horizontal line.

**DAVID LAVERICK**  
Pensions Ombudsman - July 2002

## CHAPTER 1: Introduction

This report covers two distinct periods: that to 31 August 2001 when the Pensions Ombudsman was Dr Julian Farrand and the remaining seven months of the year when I have been in post. Perhaps inevitably, the changeover caused some disruption to the smooth flow of work through the office.

An ombudsman's office has some similarities to a production line with the ombudsman putting the final touches to the product and exerting also a degree of quality control. The analogy should not be pushed too far: for a variety of reasons the ombudsman necessarily deserts his post at the end of the line and involves himself from time to time in the earlier stages of processing a particular complaint. Julian Farrand was anxious to try to complete work before he departed on those complaints with which he had previously had a particular involvement. He therefore concentrated on that task in the last few weeks of his time in the office. One deliberate, and welcome, consequence of that approach was to avoid my inheriting ongoing investigations where some decisions had already been taken that I might not myself have taken had I been in office.

In an effort to minimise the disruption I was given sight of draft Determinations before they were provisionally issued during July 2001 and only those with which I was happy were issued. These became the first few formal Determinations I made a few weeks later after I had taken account of the parties' comments on the provisional findings.

At the same time I was also immersing myself in a crash course of reading about pensions law generally and the work of the Pensions Ombudsman's office, having postponed thoughts of a summer holiday.

I tried to spend my first few months observing how things were done and listening to a wide range of people who had dealings with the office in order to form a view on whether changes to practices or procedures should be made. That process is still going on and I hope to establish a user group to provide feedback on a regular basis.

I decided, however, that some things should not wait and regular readers of the decisions from the Pensions Ombudsman will, I hope, have noted that decisions are now written with less emphasis on, and less discussion of, legal judgments.

Keen readers of the Ombudsman's annual reports will notice that this year's report contains a much less colourful review than previously of the way the courts have dealt with those of the Ombudsman's decisions which have come before them on appeal. My reading of the situation was that I had stepped into an office whose previous inhabitant had frequently found himself in conflict with the judiciary some of whose members seem also to have relished that conflict. In my view such conflict, and the style of such conflict, was not good for the Ombudsman's office, for the courts or for members or providers of the pension schemes. Those who have been accustomed to look through the Annual Report of the Pensions Ombudsman to enjoy the baiting of courts and lawyers will, I fear, be disappointed by the current offering.

At the time when I took office there were about twenty appeals outstanding against the decisions of my predecessor. His practice, although it was one he had indicated should be reviewed, was to take an active part when the appeal came to be heard in the Chancery

Division. He was concerned that if he did not participate the arguments of those who wished to overturn his decision (usually the more wealthy of the parties in the issue before him) would not be thoroughly tested because the complainant would be unable to afford, and usually would be without the knowledge needed, to fight the case before the court.

Nevertheless the effect of the Ombudsman's intervention in the legal proceedings might give the impression that the person who had judged the matter at first instance was then taking on the role of advocate for one of the parties when the matter was subject to appeal. I was uneasy about giving that impression and also found it unusual for one dispute-resolving body to seek itself to justify its decisions before an appellate court. I felt that in fairness to the courts, to the complainants involved and to my predecessor, I ought to be prepared to maintain his stance in relation to those appeals where he had already entered an appearance. Otherwise I will usually seek to participate only if an appeal raises some issue which would involve the court determining a point in a way which would represent a significant threat to the future effectiveness of my office.

I reached that view only with some misgiving as to whether justice will result for a person who has been successful before the Ombudsman but who cannot afford the legal costs associated with appearing before the courts. I am assured by the Vice-Chancellor who heads the Chancery Division that the judges there are astute in protecting the interests of an unrepresented or absent party.

While I have indicated to a range of audiences, including judges, that I intend to adopt a less confrontational posture I have also indicated that I intend to approach my task on the basis that the Ombudsman has a different role from the courts and that different role may lead to a different outcome for the parties. My crash-course in reading about pensions law and particularly in reading the various case law involving the Pensions Ombudsman suggests that some judges do not share my understanding of what Parliament intends ombudsmen to do.

There would have been no need for Parliament to have introduced (and later endorsed) the concept of ombudsmen in this country if all the ombudsman was expected to do was to provide remedies of the same kind and in the same way as the courts. The expectation was that the ombudsman would provide remedies in situations where one party, although acting lawfully had nevertheless acted unfairly or unreasonably.

There are of course areas of overlap between the work of the Ombudsman and the work of the courts: an unlawful act for which the courts may provide a remedy may also be an example of maladministration. The courts have voiced a concern that it is undesirable for a different outcome to result depending on whether a party takes action in the courts or brings a complaint to the Ombudsman and that, to avoid such a result, the Ombudsman should ensure that he exercises his discretion whether to investigate so as to avoid looking at matters for which the courts would not provide remedies were an action based on the same facts to come before them.

I am far from convinced that this is what Parliament intended. I observe that in its most recent dealings with ombudsmen (the Financial Services and Markets Act 2000), Parliament enacted that the Financial Ombudsman Service should determine complaints "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the

circumstances of the case." That is a different test from determining complaints by reference to strict legal precedent.

One example where my understanding of what is fair and reasonable may lead to a different outcome than would result from recourse to the courts lies in the failure of trustees of pension schemes to give reasons for decisions taken in their discretion or for the exercise of their judgments. My understanding is that the courts have taken the view that there is no duty for a trustee to give reasons.

I do not seek to argue that, if trustees do not give reasons, they have acted unlawfully. My understanding is that the courts have decided that no right of action arises as a result of the trustees failing to give reasons and the courts would not enforce disclosure of such reasons. There are I think some signs that the courts themselves are doubtful about maintaining their view on the matter. Certainly the classic position of the courts on this matter looks out of place in a world which generally encourages openness, access to information and the public's "right to know."

I do, however, start from a presumption that it is maladministration for the trustees not to provide reasons for a decision which may adversely affect the person who seeks such reasons. There may well be justification in the particular case for the trustees not to provide reasons - for example in order to preserve rights to privacy of other people - but a straight, blanket "no" is not likely to be seen as an acceptable response. The law may not require the provision of a reasoned decision but acceptable standards of administration do.

Moreover for trustees to provide such a blanket negative response to such a request is not likely to do more than buy time. If a complainant comes to me alleging that there has been maladministration in the way a discretion has been exercised or a judgment taken I will make my own investigations to satisfy myself that there were adequate reasons to support the trustees' actions. Even if they are not convinced that they ought to be more open and responsive as a matter of good administrative practice, I hope they will be convinced that they are in the long run likely to expose themselves to less rather than more hassle by sharing their reasoning with the members concerned.

Just as I am seeking to set up machinery to provide feedback on the way my office is working so I consider that I ought to provide feedback to those involved in the administration of pensions as to what lessons can be learnt from the work of my office. I am conscious that my involvement is with a very unbalanced sample: those who are satisfied with the way pensions are being administered do not have cause to be in touch with me. Nevertheless I believe that the receipt and investigation of individual complaints could and should provide an opportunity for securing more wide ranging improvements. With my staff, therefore, I hope to produce such guidance as can be culled from the issues that we have investigated.

The office of Pensions Ombudsman, unlike that of the ombudsmen who have now been combined into the Financial Ombudsman Service was established by Parliament rather than being conceived and nurtured by the industry itself. The statutory base reflects the proper concern of Government and Legislature in overseeing the administration of pensions to ensure fair treatment for the members of occupational and personal pension schemes. Successive governments have been anxious to encourage people to make

provision for their retirement. For those policies to succeed people need to have confidence that money which has been set aside for that purpose will indeed be available when retirement comes. The Government seeks to provide and maintain a regulatory framework to ensure that this confidence is not mis-placed.

Regrettably there are nevertheless times when trustees do fail to ensure that funds are managed with due prudence so as to be sufficient for their intended purpose. Most occupational pension schemes contain provisions which exonerate the trustees for personal liability for losses which their acts or omissions have caused to trust funds. The extent of these exoneration clauses varies from scheme to scheme but the most common models limit the trustees' personal liability to cases where they have acted fraudulently or acted in wilful default of their duties as trustee. As I understand the history of these clauses, the argument is that unless such exoneration were offered, people would be unwilling to accept the responsibility involved in acting as a trustee.

Without seeking to challenge that argument I observe that one consequence of the present state of the law is that where the trustees do fail to act in accordance with their responsibilities it may well be the ordinary members of the pensions schemes who have to feel the financial effect. I wonder whether it would not be possible to devise some form of indemnity insurance, or perhaps to widen the scope of the Pension Compensation Board scheme, so as to avoid that undesirable effect.

I am conscious that my appointment has coincided with a time of much change in the pensions world. It is already apparent that the move away from defined benefit schemes is likely to lead to some complaints being made: largely as a result of allegedly inaccurate information being given to employees. It remains to be seen whether the pace of change will continue, particularly as a result of the recently completed simplification review. The submission which I made to that review is reproduced as Appendix 3.

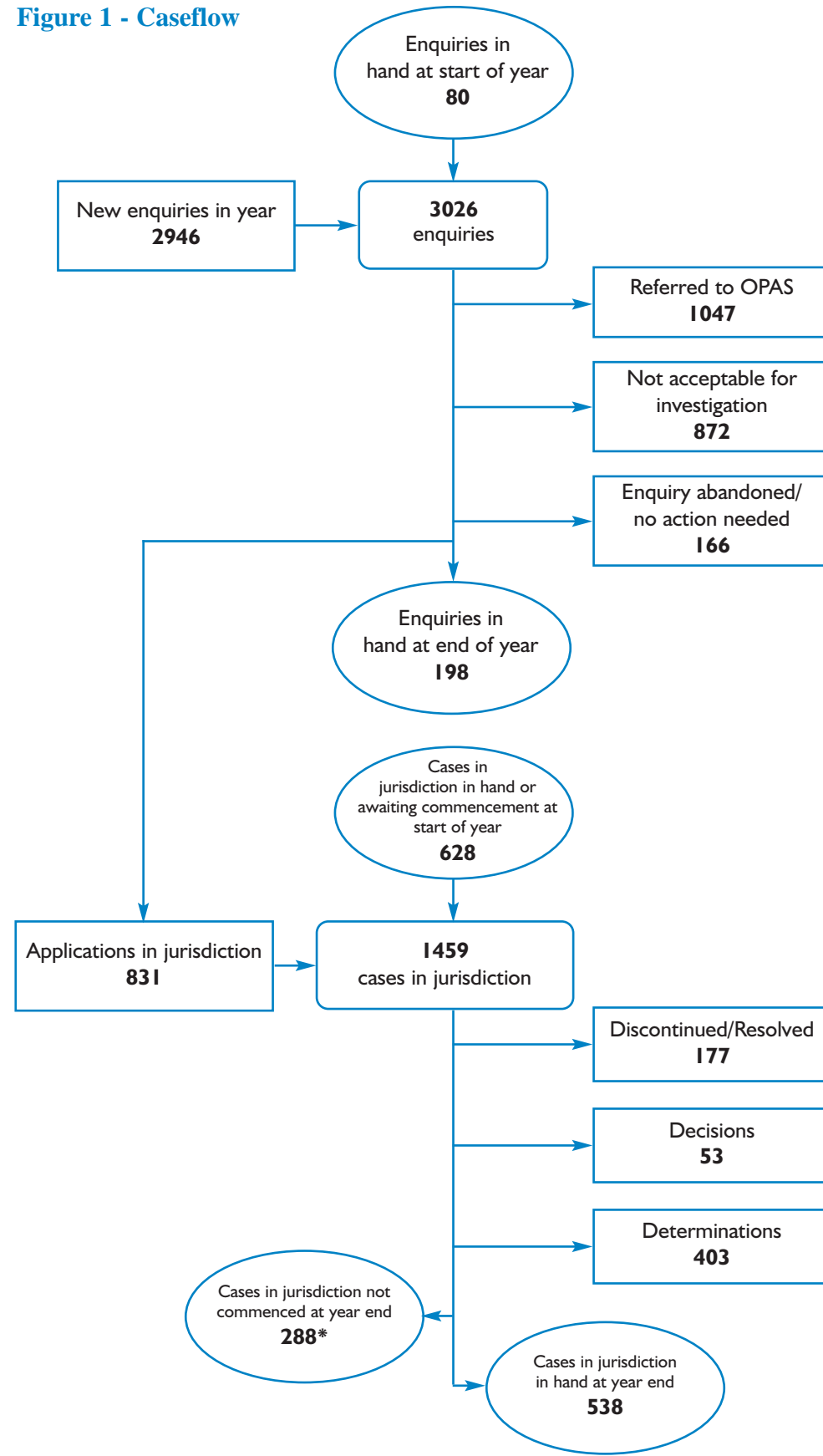
The retirement of Dr Farrand was itself a change which should not be allowed to pass without comment. He has made an enormous contribution to the development of ombudsmen in this country, firstly as the Insurance Ombudsman and then as the Pensions Ombudsman. During his service as the Pensions Ombudsman the number of complaints made to and considered by the Ombudsman dramatically increased, as did the impact of the office upon the pensions industry. Julian told me that when he was appointed, the then Minister asked him to take action to increase the public profile of the Pensions Ombudsman. This was an aim which he undoubtedly achieved.

I have devoted a great deal of the time since my appointment to listening to the various stakeholders in the pensions process. A common refrain in those meetings has been that "Julian will be a hard act to follow." I can vouch for that.

I have, of course, been helped by inheriting the team of staff who supported Julian although there had been some changes to that team in his last year and there have been some retirements and resignations since. I am enormously grateful to the staff for the way they have sought to adjust to my different style and perception of pension issues. I owe a particular debt in that regard to Tony King, the Casework Director who has been a valuable guide to my introduction to pensions law and procedures.

My staff amount only to about two dozen in number, a reflection of an intent to invest in quality rather than quantity. I have ended the first financial year of my stewardship of the office of Pensions Ombudsman by presenting them with the challenge of halving the time we take to deal with many of our complaints. I look forward with confidence to being able to report over the next few years that they have risen to and met that challenge.

Figure 1 - Caseflow



\*Includes 184 awaiting completion of related cases under investigation

## CHAPTER 2: Casework

Inevitably an ombudsman's term of reference only incompletely describes what the ombudsman does. So Part X of the *Pension Schemes Act 1993* (which is the basis of my jurisdiction) begins:

“For the purpose of conducting investigations in accordance with this Part ... there shall be a commissioner to be known as the Pensions Ombudsman.”

But in fact “conducting investigations” is far from the full story.

The business of investigating and determining complaints and disputes brings with it a fair amount of work consisting of **not** investigating or determining. First, my staff have to deal with initial enquiries and complaints, deciding whether they are for us at all, and if not whether there is someone else to whom they should be referred. If so they have then to make that referral with an appropriate explanation. Second, not all of the matters which are within jurisdiction need to be subject to the full investigative process and formal Determination.

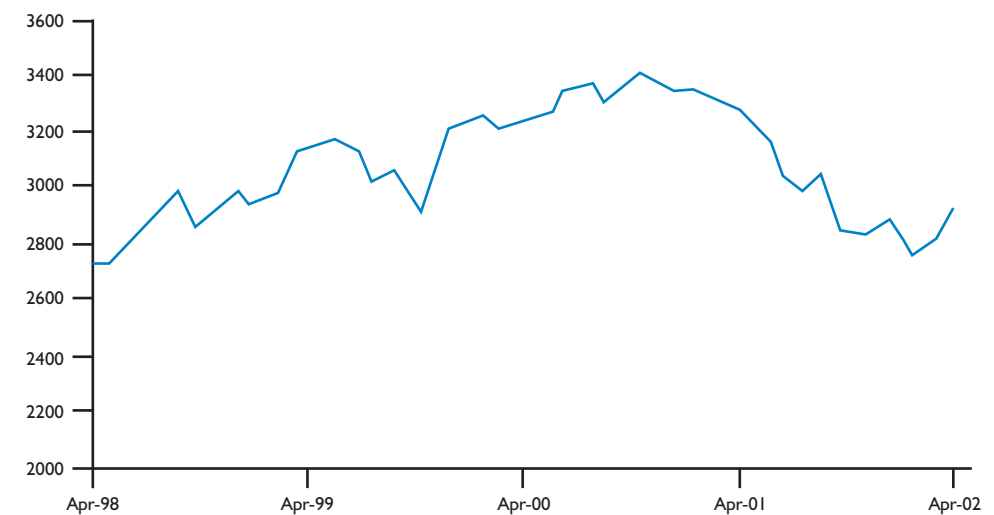


Casework Director, Tony King

### Initial Enquiries and Complaints

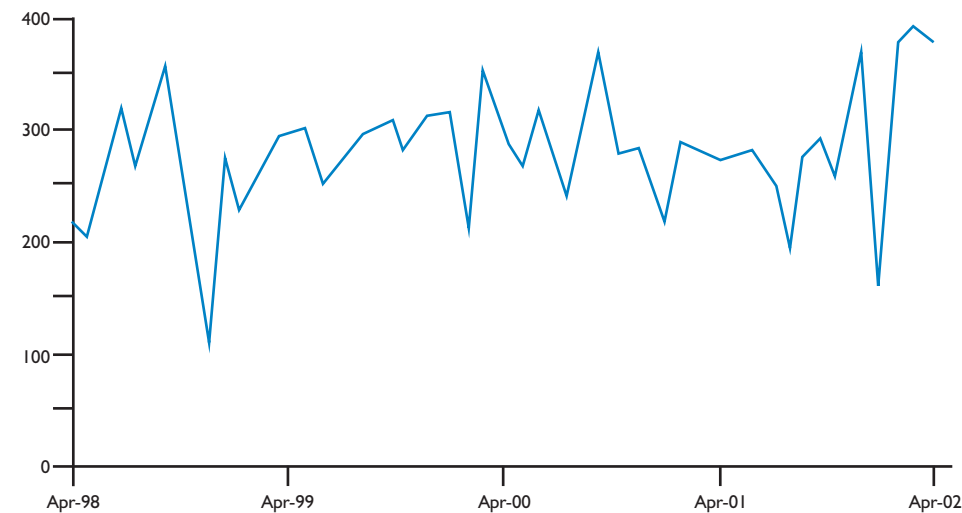
My office received 2,946 enquiries in the year. This was lower than the previous year, when there were 3,215. Over the last seven years the number has always been between about 2,800 and 3,200 so the fall within the year may not of itself have great significance. Figure 2 shows the cumulative enquiries over twelve month periods preceding the end of each month since April 1998. There appears to have been a steady rise to the end of the calendar year 2000, with numbers then falling away until early in 2002 after which they begin to rise again.

Figure 2 - Enquiries received in previous twelve months



However, looking at the number received in each month (Figure 3) gives a more complex picture from which no pattern is readily discernible. It is to be expected that we would receive more correspondence when pensions have a high media profile than when they do not. So just as, in the past, personal pension mis-selling caused an increase, the recent coverage of changes from defined benefit schemes to defined contribution schemes may have had a similar effect. However, the number of complaints which can or should be investigated will not necessarily rise and fall with the tide of general enquiries, since the factors that cause people to write may not be matters within my jurisdiction, even if they are complaints at all.

**Figure 3 - Enquiries received each month**



The office has a fairly tough target of responding to initial enquiries within two working days. We met that in over 96% of cases. One of the reasons for setting such a short period is that we know that many people will have to be referred elsewhere. If that is what we have to do, then we want it done as quickly as possible. It would be infuriating and frustrating if we were to delay before telling a complainant that we cannot deal with the matter, and why.

About half (53%) of the enquiries that we rejected were passed on to OPAS, the pensions advisory service, a body which although separate from my office shares the same building. In many cases the enquiry is just that - it may not be anything which would lead to a complaint. In a smaller number there will be scope for OPAS' network of advisers to prevent, by explanation or mediation, the need for a complaint to the Pensions Ombudsman. However, there are circumstances in which we will deal with a case without it being dealt with by OPAS. Examples are where there have already been advisers involved (solicitors for example), or where it is plain that the parties have reached an impasse and, in particular, where the internal dispute resolution procedure is complete and there would be nothing for OPAS to add.

The next most common reason for not being able to deal with a matter is that it is within the jurisdiction of the Financial Ombudsman Service (FOS) or concerns regulation by the Financial Services Authority (FSA). During the year 14% of rejected enquiries fell into this category. Although consistent with last year's 12%, the quantity of such cases has reduced significantly since a peak of 31% in 1996/97 when pensions mis-selling was much in the public's mind and complaints on the subject were sent to this office and then referred on.

**Figure 4 - Referrals and rejections (showing %age of total referred/rejected)**

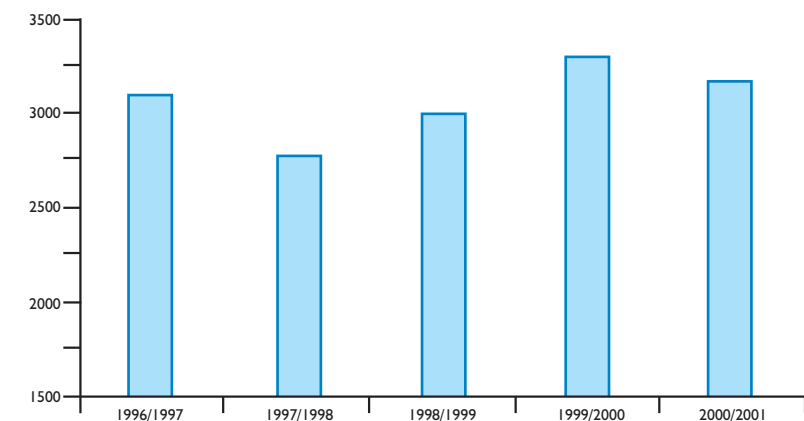
| Reason                                     | 2001-2002    |    | (2000-2001) |
|--|--------------|----|-------------|
|  | Number       | %  | %           |
| State scheme benefits                      | 77           | 4  | (3)         |
| Not relating to pension scheme             | 16           | 1  | (5)         |
| Seeking financial advice                   | 3            | 0  | (0)         |
| Respondent not in remit                    | 22           | 1  | (1)         |
| Not person permitted to complain           | 19           | 1  | (0)         |
| Enquiry not yet put to scheme/IDR not used | 182          | 9  | (12)        |
| Referred to OPAS                           | 1,047        | 52 | (50)        |
| Appropriate for FSA or FOS                 | 272          | 14 | (12)        |
| Appropriate for Pension Schemes Registry   | 49           | 2  | (2)         |
| Appropriate for Insurance Ombudsman        | 5            | 0  | (0)         |
| Appropriate for OPRA                       | 7            | 0  | (0)         |
| Subject to prior court proceedings         | 4            | 0  | (1)         |
| Out of time                                | 116          | 6  | (6)         |
| Discretion not to investigate exercised    | 1            | 0  | (0)         |
| Enquiry abandoned/no action needed         | 177          | 9  | (7)         |
| <b>Total</b>                               | <b>1,997</b> |    |             |

As Figure 4 shows, there is a range of other bodies in addition to OPAS, FOS and FSA to whom we may refer enquirers. We do our best to point people in the direction of a body who can deal with them whenever we cannot. However, there are some people whose enquiry cannot be dealt with and who cannot be referred elsewhere and the most common reason for doing this is that the matter was brought to me outside the time limit of three years (extendible in some circumstances). 6% of rejected enquiries were rejected for this reason.

### Complaints and Disputes in Jurisdiction

At the beginning of the year there were 80 enquiries in hand. Adding those to the enquiries received in the year there were thus 3026 to be dealt with. Of those, 831 (27%) were accepted as within jurisdiction. Though this is a fall from the previous year's 911, that was the highest in the lifetime of the office and almost identical as a percentage of those in hand. As Figure 5 shows, the numbers of cases taken on as within jurisdiction have not fluctuated significantly over the years.

**Figure 5 - Cases accepted as within jurisdiction (last 5 years)**



A case accepted for investigation may reach a formal Determination. In the year under report, 403 such Determinations were issued compared with 605 in the previous year. The lower number may possibly be in part due to some lack of ongoing productivity around the time when Dr Farrand retired and I took over but also reflects a change in emphasis on my part. It has always been a possible outcome that the investigator dealing with the case will write to the complainant giving a view that the complaint cannot be upheld. The complainant may accept this, in which case the case is closed. If they do not they are invited to ask for the Ombudsman's decision. Dr Farrand or I will either have agreed with the investigator, and issued a short, formal Determination, or in a small number of cases the investigation will have continued. Since I took up the post I have encouraged my staff to consider giving such opinions at any stage of an investigation as and when new information appears and, where appropriate, to express a view to respondents that the complaint **will** be upheld and the likely consequences. What this means is that more cases will be closed without a full Determination and that they will be closed sooner. Thus, in the year under report, in 53 cases the complainant accepted the investigator's view that the complaint would not be upheld (36 in 2000/2001) and 177 cases were discontinued or resolved for other reasons (63 in 2000/2001). In total, 633 cases were closed in the year, compared with 704 in the previous year. I am hopeful that changes I am putting in place both as to the structure of the office and to processes will lead to an increased output, and reduced times in the years to come.

## Performance Indicators

On the subject of time scales, the office's target for the year ending in March 2002 was to complete formal Determinations within an average of twelve months from the date that the case was accepted for investigation, and seven months from the date that the investigation actually began.

### Figure 6 - Investigation times against target

|  | Target average | Average 2001-2002 | (Average 2000-2001) |
|--|----------------|-------------------|---------------------|
| From start of investigation to determination | 7 months       | 6.9 months        | (4.7 months)        |
| Waiting time before start of investigation   | 5 months       | 1.6 months        | (1 month)           |

Both targets were met, but I doubt whether such time scales ought to be the primary means by which the performance of the office is judged. From the point of view of the complainant who seeks to use the service it seems to me that the most important time scale is how long we take from receiving a complaint to ending our involvement. The distinctions as to when preliminary work is being done, when cases are accepted for investigation and when investigations actually begin mean more to those within the office than they do to those we are intended to serve.

For the future therefore I intend to report on the percentage of cases closed within six months and twelve months. Figure 7 gives the relevant percentages for the year under report, and a base level from which improvement is to be expected.

### Figure 7 - Closure times

|                   | Number | %  |
|-------------------|--------|----|
| 6 months or less  | 143    | 23 |
| 12 months or less | 453    | 72 |
| Over 12 months    | 180    | 28 |

## Subjects of Complaints

Classifying complaints by subject is not an exact science, since many complaints concern interconnected matters and complainants may identify symptoms (the non-availability of a transfer value, for example) rather than causes (delay in winding up, perhaps). Nevertheless, I attempt to categorise complaints by what seems to be the principal subject. This year, figures are included for all closed cases, whatever the reason, as well as those cases which were formally determined. Unfortunately there are a high number which cannot be clearly classified (32%).

Figure 8 shows the subjects of the cases on which work was completed in the year. The two topics identifiably giving rise to significantly more complaints than others were benefits on ill-health and the calculation of benefits generally. Between them, these two categories accounted for over 20% of the complaints closed in the year.

### Figure 8 - Subject matter

|                                    | 2001-2002              |    | (2000-2001)                 |    |      |
|------------------------------------|------------------------|----|-----------------------------|----|------|
|                                    | All closed cases<br>No | %  | Determined cases only<br>No | %  | %    |
| Contributions refunds and queries  | 39                     | 6  | 30                          | 7  | (4)  |
| Transfers                          | 25                     | 4  | 24                          | 6  | (6)  |
| Leaving service benefits           | 8                      | 1  | 7                           | 2  | (1)  |
| Membership conditions              | 16                     | 3  | 13                          | 3  | (6)  |
| Enhancement of pensions            | 10                     | 2  | 5                           | 1  | (3)  |
| Early retirement                   | 24                     | 4  | 20                          | 5  | (6)  |
| Ill-health benefits                | 59                     | 9  | 49                          | 12 | (13) |
| Spouse's and dependant's benefits  | 24                     | 4  | 18                          | 4  | (3)  |
| Additional Voluntary Contributions | 19                     | 3  | 10                          | 2  | (2)  |
| Incorrect/late or no payment       | 41                     | 6  | 35                          | 9  | (8)  |
| No response from scheme            | 2                      | 0  | 2                           | 0  | (0)  |
| Winding up                         | 42                     | 7  | 28                          | 7  | (6)  |
| Use of surplus                     | 33                     | 5  | 6                           | 1  | (3)  |
| Disclosure of information          | 0                      | 0  | 0                           | 0  | (1)  |
| Calculation of benefits            | 77                     | 12 | 54                          | 13 | (12) |
| Mis-selling                        | 14                     | 2  | 12                          | 3  | (1)  |
| Other                              | 200                    | 32 | 90                          | 22 | (24) |
| <b>Total</b>                       | <b>633</b>             |    | <b>403</b>                  |    |      |

## Ill-health

It should not be surprising that ill-health pensions can be at the root of a complaint. The issue will almost invariably be that the scheme has not provided a pension, whereas the member believes that it should have. The decision often comes down to a difficult

judgment based on medical opinions and advice. There may be different criteria for judging whether, in employment terms, the person is incapable of doing the job and judging whether, for pension purposes, he or she meets the definition of incapacity or ill-health set out in the scheme rules. That definition may vary from scheme to scheme and is not likely to be the same as that used in State schemes which provide incapacity benefits. The payment of a pension may be of tremendous financial significance for someone whose opportunity for future employment is, in that person's view, restricted. All these factors go to make ill-health a naturally contentious area. There are five examples in Chapter 3.

I have already noted that decisions are likely to involve a judgment based upon medical evidence. I commend the practice of allowing the person concerned to see and comment upon the medical advice which is being submitted to assist the trustees make their decision. Mistakes and misunderstandings can arise in the taking of a history or in a doctor's appreciation of what work processes may entail. It is far better for those mistakes to be identified and rectified before decisions are taken than for them to come to light afterwards. Once a decision has been taken to refuse a pension, perhaps on the grounds of mistaken evidence, it is very difficult for the person concerned to have confidence in the fairness of any future reconsideration.

## Calculation of Benefits

The broad heading of "calculation of benefits" will include many cases where a misstatement is at the heart of the matter. In a typical case the complainant may be approaching retirement and is given pension figures which turn out to be wrong. This heading also includes cases where the member believes that he or she has a particular entitlement and the scheme authorities dispute it (for example where the rules say one thing, but the booklet says another, or where there is a dispute over what the scheme's rules actually mean). There are also examples of these in Chapter 3.

Generally a complainant who has been given a mistaken quotation believes that the pension scheme should honour that quotation and provide him or her with a pension at the quoted level. That would, however, result in a pension being paid in excess of that to which the member is entitled under the rules of the scheme and thus lead to an improper loss to the funds of the scheme. I do however expect those responsible for the error to redress any financial injustice caused for example as a result of the member concerned incurring expenditure which he or she would not have done had the true position been made clear.

## Outcomes

168 complaints or disputes were upheld. This represents 42% of the 403 cases which were formally determined (which may be compared with 39% in 2000-2001), or 27% of the 633 cases closed in the year (33% in 2000-2001).

These figures need to be approached with caution. Many complaints are multi-headed and it may be that only one of several heads of complaint is upheld. In other cases I may well have agreed with a complainant that there has been maladministration but disagreed with him or her as to whether any injustice has resulted. Because a complainant needs to establish that injustice has been caused by maladministration such cases would be classified as not having been upheld.

## Source and type

All but 18 of the 633 complaints and disputes closed in the year came from members of schemes (or their spouses, dependants, personal representatives etc). Of the remaining 18, 13 were brought by employers against the scheme's trustees or managers, two came from trustees or managers and were against employers and three were brought by the trustees/managers of one scheme against the trustees/managers of another.

While the bulk of my work is dealing with complaints of maladministration, I also have jurisdiction to entertain and determine disputes of fact or law. 516 of the cases closed in the year were complaints of maladministration, 27 were classified as disputes, and 95 as a combination of the two.

## Affected non-parties

Since 1 December 2000 the Pensions Ombudsman has been able to deal with a range of additional matters - in particular disputes between trustees of the same scheme. None of these has yet been decided, and in fact only one has been accepted to be investigated. The reason is that the amendments to jurisdiction, intended to allow the Ombudsman to join parties to a complaint where they might be affected by its outcome, have not yet come into force. Many disputes between trustees will inevitably affect others, such as employers and/or members and so without the legislation, these cases cannot be dealt with.

The amendments in question (which are contained in Section 54 of the *Child Support, Pensions and Social Security Act 2000* and the corresponding Northern Ireland Legislation) require Regulations before they can be effective. Draft Regulations went out to consultation during the year under report, and I understand from the Department for Work and Pensions that submissions are now being considered.

## Oral hearings

The legislation which governs the office provides for the possibility of oral hearings being held although the practice of both the previous holders of the post has been to hold very few such hearings. I share the view that the kind of oral hearing envisaged by the legislation will not usually be a helpful or efficient way of dealing with complaints. Nevertheless, I recognise that a face to face meeting can in some circumstances be helpful for one or all of the parties and for me. My inclination is to encourage such meetings but in a less formal guise than that of an oral hearing.

In fact, during the year there was only one formal hearing, by Dr Farrand, although in another case I invited the parties to make oral submissions to me.

## Formality

This trend towards less formality is something that I want to encourage within the office generally. My initial impression of the Pensions Ombudsman's Office when compared to other ombudsmen is that it is more formal and paper bound. This is doubtless partly a result of the procedures laid down for it by Parliament, and partly a response to the fact that procedures have to be acceptable to the courts on appeal. Nevertheless I do not want to lose sight of the principles of accessibility and informality which are at the heart of an ombudsman system. Increasingly in the second half of the year under report staff were encouraged to discuss the case with the parties more, and to do so using the telephone.

## CHAPTER 3: Case Summaries

This chapter contains summaries of some of the cases brought to a conclusion during the year under report, whether before or after I took up office. They have been chosen either to typify the work of the Ombudsman or, conversely, to highlight an unusual feature. They are not complete reports and they are anonymised. The summaries should not be taken as authoritative. Where the case reached a full Determination, there will be a copy on the office's website, or a copy can be provided by my office on request.

### Scheme Membership

Complaints from part-time employees have in previous years formed a significant element of the office's work. Applications for back-dated membership (which had their origins in European anti-discrimination law and cases) have now died down. In the case below, membership was always available to the complainants. The basis of their complaint was that they had not been told.

#### I. K00616/K00852

##### *Background*

Mrs C and Ms W were employed part-time as nurses at a hospital in Northern Ireland. Both complained that they were wrongly excluded from the National Health Service pension scheme (known in Northern Ireland as the HPSS Superannuation Scheme).

Both Ms W and Mrs C were given contracts of employment (in 1975 and 1980 respectively) stating that their appointments were superannuable. Both claimed that, despite this, they were told that they were not eligible for the pension scheme. At the time in question, membership of the scheme was voluntary.

The NHS Trust said that Mrs C had been given literature (which she denied) informing her that part-timers could apply in writing to join, but that she had not applied. The literature made clear that, if she did not apply, she would not become a member. The Trust also said that she had altered her story about who had allegedly given her the wrong information, and that she had in fact joined the scheme for a short period in 1979 when doing the same job under a short-term part-time contract. In the case of Ms W, the Trust produced a copy of a certificate which she signed in 1981 confirming that she had been given information about the scheme but did not wish to join. Ms W claimed that this was not a "legal document" because she had since been told by colleagues that she should have been included compulsorily in the scheme.

##### *Decision*

Neither complaint was upheld. Mrs C should have been aware from her 1979 membership that her employment was pensionable, as her employment contract informed her it was. She had not explained why she had not sought enforcement of the contract terms or had not asked

for a fresh contract if this one was wrong. She had also contradicted herself about who had given her the incorrect information. It was clear that Ms W had consciously elected not to join the scheme, probably in 1976 and certainly in 1981 when she certified as much. If it had been her true wish to join the scheme, she would not have stated that she did not wish to join. Membership was voluntary at the time, despite her claim that it was not.

## Contributions

Complaints that members have been mis-advised about voluntary contributions are not uncommon. It is a feature of public service schemes that there is a facility to pay contributions in order to buy additional years of pensionable service. There will also be more traditional insured additional voluntary contribution arrangements and there are complaints that the latter was promoted by the insurer when the former might have been the better option. The first case below does not quite follow that pattern, however, since here the alleged advice was to use free-standing AVCs. In the second AVC related case, the issue was what the terms of the insurance policy were.

### 2. L00059

#### *Background*

The complainant said that she was told by her employer's pensions officer that it would be too costly to make voluntary contributions to the scheme to buy the number of added years she wanted, and that she would be better off investing the contributions in a free-standing additional voluntary contribution arrangement. She claimed that if the pensions officer had not advised her to make her own arrangement, she would have bought added years in the scheme.

The complainant said that the pensions officer started her advice with the words "I shouldn't really say this to you but...", or words to that effect and that the advice was given voluntarily.

The respondent pointed out that the quotation given to the complainant for buying added years contained a reference, at the end, to the option to pay free-standing additional voluntary contributions. The respondent said that the insurance company used by the complainant to make additional voluntary contributions, like all other insurance companies, had a responsibility to provide her with 'best advice'. The respondent stated that all their pensions officers were always told not to give financial advice to individuals as they were not qualified to do so. The respondent commented that the alleged statement by the pensions officer "I shouldn't really say this to you but...", indicated that she did not have the authority to give financial advice.

The complainant had provided a copy of a letter she had received from the insurance company used for her free-standing additional voluntary contributions, which showed that her policy was being reviewed on the grounds that it might have been mis-sold.

#### *Decision*

I concluded that the only interpretation of the pensions officer's words "I shouldn't really say this to you but..." was that in providing advice she was acting contrary to her instructions. The pensions officer had made it sufficiently clear to the complainant that she was acting outside the scope of her authority. As a result the respondent was not liable.

### 3. K00515

#### *Background*

This dispute related to the extent to which a guaranteed annuity option applied to the proceeds of a member's AVC policy. The provider claimed that the guaranteed annuity option applied only to the policy's basic sum assured and reversionary bonuses and not to any terminal bonus. The member believed the option applied to all the policy's proceeds. The member argued that the policy provided for a guaranteed annuity option and there was no apparent justification in the wording of the policy for excluding the terminal bonus from the protection afforded by the guaranteed annuity option.

#### *Decision*

In response to enquiries the provider confirmed that terminal bonus was not excluded. It was unclear why the trustees of the scheme had not supported the member since they had effected the policy. Their lack of support suggested a breach of their fiduciary duty towards him.

## Information

A common thread running through many complaints is that one or more parties feels that they have been misinformed, or not informed at all. The issue of information arises in all three of the preceding cases, for example. Two more information-related complaints follow. In the first, misconceptions had arisen partly as a result of the complainant understandably misconstruing the significance of the information given in the company's accounts about the state of the scheme, under Financial Reporting Standard 17.

### 4. K00824

#### *Background*

This complainant submitted a number of complaints. He had retired on pension in 1989, at the age of 54, having completed 38 years' service with an insurance company. His pension was close to the maximum permitted under an approved pension scheme by the Inland Revenue. He was aged 65 when his complaints were submitted. His employer had been merged with another insurance company, and the merged company had been taken over by a third insurance company.

His complaints related to

- the possible future merger of his own pension scheme with other schemes, which he thought might dilute the surplus under his own scheme,

- advantageous early retirement terms offered to some members of his scheme,
- changes to his scheme, which he believed had disadvantaged him,
- allegedly unfair and unfinanced augmentations for some members of the scheme, and
- a failure to disclose information.

He believed, from information he had read in the new parent company's annual report, that the new parent company had misappropriated £136.2 million from his own scheme and from the scheme of the other merged company for the benefit of the parent company's policyholders. He was later persuaded, however, that there had been no misappropriation of funds, but that the statement in the annual report which had misled him had been inserted in accordance with the new accounting standard FRS17.

The complainant apparently saw himself as a representative of the scheme membership, particularly of the pensioners, and most of the complaints he had raised did not relate to his own circumstances.

#### *Decision*

It was found that, even where there might have been some maladministration, he had not thereby suffered any quantifiable injustice, and none of his complaints were upheld.

### **5. K00773**

#### *Background*

Mr B retired early in January 1988 and took advantage of an arrangement introduced in 1987 (a levelling option), whereby he elected to receive a higher pension from the pension scheme until his 65th birthday, after which his scheme pension would reduce by the amount of the Basic State Pension. When he reached 65 in 1998 he complained that he had not been made aware that the reduction in his scheme pension would be "for life"; he said that he assumed that it would revert to his basic entitlement after the higher amounts paid since 1988 had been "repaid", and that this would be when he was 71. He attracted support for his position by issuing questionnaires to other pensioners, and then claimed that the replies showed that they had been similarly misinformed.

The scheme's trustees said that the levelling option was described in a 1987 newsletter, but Mr B claimed not to have received this. The trustees said that it was intended for issue to everyone and they had no reason to believe that it was not issued to Mr B. Further information was given in three letters sent to Mr B in December 1987 and January 1988. He was informed that his income would remain "roughly the same throughout retirement". Examples of benefits were given which made no mention of any changes after age 65. Even if he had been right in principle, the trustees said that his actual "break even" age would be 77 and not 71.

#### *Decision*

The complaint was not upheld. Mr B could have had no reasonable grounds for believing that "throughout retirement" did not mean "for life", and none of the examples of benefits nor anything else in the descriptive literature had given any support for his view. He had not taken advantage of an invitation to discuss his options with a pensions officer before deciding in 1988 what to do. He could not be allowed to revisit, with the benefit of hindsight, a decision he had reached 13 years earlier.

## **Construction**

In the previous example the complainant argued for a particular understanding of the information he had been given. Such matters can come down to the proper meaning of the scheme's establishing documents, as in the next case.

### **6. L00036**

#### *Background*

There was a dispute over the meaning of the definition of final pensionable salary which was:

"...the highest calculation of a Member's Pensionable Salary averaged over any three consecutive years during the ten years immediately preceding his Normal Retirement Date, retirement, leaving Pensionable Service or death..."

Pensionable salary was fixed on 6 April each year, derived from pay earned in the previous twelve months.

The complainant retired on a 15 April and the scheme's administrator took the definition to mean that final pensionable salary should be based on ten days of the pensionable salary determined on the 6 April before he retired plus the whole of each of the previous two years' pensionable salaries plus 355 days of the year before that, all divided by 3. The complainant said that it should have been the average of each of the pensionable salary figures declared on each of the three 6ths of April preceding his retirement.

Investigation revealed that until 1989 the rules had contained a definition which could only have supported the complainant's view, and that calculations were made on a consistent basis. The new definition appeared in 1989, but the method of calculation continued unchanged (ie as the complainant believed it should have been) until a change of administrator in 1994. The new administrators applied their own reading of the rule without reference to previous definitions or practice.

The trustee submitted that there was no ambiguity in the definition.

### *Decision*

The overall finding was in favour of the complainant, even though he had not been a scheme member whilst earlier definitions or interpretations were in force. The ambiguity of the definition (evident from the fact that the calculation had been made differently at different times under the same definition) meant that matters before he became a member could be and should be taken into account. In particular, the 1989 amendment could not be taken as detrimentally affecting the then members' benefits (as it would have, on the administrator's present construction).

The trustee was directed to recalculate the complainant's benefits, and pay arrears.

## **Records and Calculations**

Whereas the miscalculation in the previous case resulted from a failure to interpret the scheme's rules correctly, in the next the error arose as a result of inadequate records. It is also an example of the usual approach to overstated benefits.

### **7. K00699**

#### *Background*

The complainant was a member of a public service pension scheme from 1966 to 1972. She later applied for a refund of her six years of contributions to the scheme and payment was made in 1974.

The complainant rejoined the scheme in September 1986. In 1992 she was provided with an estimate of benefits which showed her service counting for pension up to 31 March 1992 as 11 years and 112 days. In 1998 an estimate following an enquiry about premature retirement showed her service up to 31 August 1998 as 18 years. In 1999 she again enquired about premature retirement and an estimate of benefits showed her service to 31 August 1999 as 19 years. On this occasion her application for premature retirement was granted and on 23 August 1999 a statement provided by her employer declared that her service for pension purposes of 19 years had been confirmed by the administrator.

Shortly after the complainant retired she received statements of benefits which showed her service as 13 years and that her previously estimated lump sum and pension benefits had been reduced by £5,094.39 and £1,698.13, respectively.

In March 2000 the complainant was informed that her pension had been reduced from December 1999 and that she was required to repay to her employer £94.63 overpaid pension and £911.90 for the reduction in the lump sum benefit.

The administrator said that when employers asked for a record, a print-out was automatically issued with a disclaimer which stated that no

assurance was given to the accuracy of the print out. The complainant's records had not been properly updated and the print-out given to her employer in 1999 had included the six years of service for which a refund of contributions had been paid out in 1974. In view of the disclaimer, and because the complainant was now receiving her correct entitlement under the scheme, it was unable to pay any compensation.

### *Decision*

Whilst the benefit figures given to the complainant were clearly indicated as estimates, she was nevertheless entitled to have expected them to have been calculated on a correct basis. Her requests in 1998 and 1999 had, however, made it clear that she had intended to retire early and she had accepted that the identification of the matter after her retirement had made the reversal of the situation unrealistic. An award of £1,000 was directed to be paid to her by the administrator in order to compensate her for the considerable distress and inconvenience which she suffered in having her expected benefits reduced by over 31% after her retirement and the requirement for her to repay her employer a similar sum because of the maladministration.

In the next case the allegation was that benefits had **deliberately** been overstated.

### **8. K00617**

#### *Background*

The complainant was a member of an insured scheme. The company was both employer and trustee. At the end of August 1997 the complainant purchased the goodwill of the company from the first respondent who, like him, was a member of the scheme. It was a term of the purchase agreement that the first respondent would leave the company, and take an early retirement pension from the scheme. In October 1997 the first respondent started drawing an early retirement pension. The complainant signed all the relevant forms permitting the retirement for and on behalf of the trustee, ie the company. The first respondent signed the documents as a member to whom benefits were to be paid.

Some time in 1998 the complainant (in his capacity as the principal of the company) realised that the scheme was in substantial deficit, and that this deficit at least in part resulted from the strain on the fund caused by the first respondent's early retirement. On investigation the complainant learned that the first respondent's pension had been calculated on the basis of a higher pensionable salary than that provided for by the rules, and had not been reduced for early payment. He also discovered that before the retirement took place the insurer of the scheme had notified the second respondent (which had acted as an intermediary between the company and the insurer) that the early retirement would have a substantial adverse effect on the solvency of the scheme.

In November 2000 the complainant, as a scheme member, brought a complaint against the respondents alleging that they were administrators

and that he had suffered injustice as a result of their maladministration in connection with the early retirement.

#### *Decision*

The complaint raised difficult questions of jurisdiction, and there were conflicts of evidence. However, it emerged that the complainant had signed the forms authorising the retirement without reading them or acquainting himself with the scheme rules, or ascertaining the state of the scheme's fund. It was clear that he was the author of his own misfortunes and the investigation into his complaint was discontinued on the basis that the complainant himself, as the company and the trustee, substantially had caused the very injustice of which he complained.

### **Ill-health**

The grant (or failure to grant) of ill-health early retirement pensions continues to be a significant source of complaint. Often the proper meaning of the relevant scheme provisions is at issue here, as it was in the previous case.

#### **9. K00909**

##### *Background*

The complainant, the head of a school's art department, complained that he had been refused an ill-health early retirement pension. He had suffered increasing deafness in the early 1990s and, although surgery had been carried out in 1994, his hearing had deteriorated and he had become completely deaf in his right ear. Hearing in his left ear, although not perfect, was nearly normal.

On the basis of a medical examination the complainant was refused an ill-health pension. The medical adviser's recommendation to this effect stated that the criteria for the payment of such a pension implied the presence of a condition which, in spite of appropriate and adequate treatment, would render the applicant incapable of any teaching (including limited part-time teaching) until retirement age. The definition of incapacity in the pension scheme's regulations was that "a person is incapacitated in the case of a teacher ... while he is unfit by reason of illness or injury and despite appropriate medical treatment to serve as such and is likely permanently to be so."

The complainant appealed against the decision and was then examined by a further consultant, whose opinion was that the complainant's hearing difficulties would be accentuated when he was teaching in a large room with acoustically reflected surfaces, such as an uncarpeted classroom. The consultant thought that the complainant had suffered a severe loss of confidence in his ability to cope in normal classroom conditions. He believed that the complainant could conduct small group tutorial type teaching to an adequate standard, and suggested that psychological evaluation would be advisable.

The complainant's appeal was turned down, on the grounds that his

incapacity was insufficient to prevent him from serving as a teacher. The medical report on which the decision was reached made no reference to the psychological issue mentioned by the consultant.

The complainant asked for a review of the decision, as his school had concluded that the recommendations of adjustments under the Disability Discrimination Act 1995 were unreasonable and that it would not be possible to comply with them. The recommendations were apparently that the complainant could teach small tutorial groups of around eight pupils in carpeted rooms with non-reflective surfaces. This appeal was also rejected.

#### *Decision*

Reference had been made by two medical advisers to the need to have regard to whether the complainant was capable of undertaking any teaching, yet the scheme regulations cover the incapacity "to serve as a teacher". It was concluded that it would be an unusual school which interpreted "service as a teacher" as being limited to teaching small groups of children in carpeted rooms, and that the complainant would be unlikely to be able to pursue his normal employment in another school.

It was surprising that the second consultant's advice that there might be a need for psychological evaluation of the complainant's condition had apparently been ignored.

Maladministration was found and the directions were that an independent doctor should advise on whether the complainant met the definition of incapacity in the scheme regulations, and that the independent doctor should arrange for a psychological evaluation, or indicate in his advice why this was not seen to be necessary. The complainant's appeal should then be re-determined. The complainant was also awarded £500 for distress and inconvenience.

#### **10. K00658**

##### *Background*

The complainant had applied for an injury allowance under Regulation L3 of the Local Government Pension Scheme Regulations. In November 1996 his employer informed him that it had decided not to award him an injury allowance. The complainant was told that his employer did not think that he was a person to whom Regulation L3 applied, i.e. that he had not sustained an injury nor contracted a disease as a result of anything he was required to do in carrying out his work.

The complainant had retired early on the grounds of ill-health. The medical evidence given to his employer at the time stated that he was suffering from a severe long standing chronic psychological condition, which related entirely to events which had occurred within his working environment. The complainant had been subject to a period of harassment involving unsubstantiated accusations by a colleague.

When the complainant appealed, the Secretary of State accepted that the condition might well have resulted from the harassment and bullying which appeared to have taken place. However, the Secretary of State took the view that a condition which related to the work environment was not the same as an injury resulting from an employee carrying out his duties. The appeal was dismissed.

The Regulation refers to an employee sustaining an injury or contracting a disease *as a result of anything he was required to do in carrying out his work.*

#### *Decision*

In deciding whether to award an injury allowance, the employer was not exercising a discretion but deciding a question of fact albeit one which required the exercise of judgment. If the complainant was required to attend his place of work then an injury or disease which resulted from that attendance satisfied the requirements of Regulation L3. The employer was directed to pay the complainant an injury allowance.

There may not be any question about what the qualifying conditions for an ill-health pension are. The issue may be whether the conditions are fulfilled. In such cases I am of course concerned with whether the decision has been properly reached based on the proper, and full, information.

## **11. K00734**

#### *Background*

The complainant, who suffers from severe depression and anxiety, applied in July 1997 for an ill-health early retirement pension from the scheme. He was sent by his employer to be examined by Dr E. Dr E was asked to report by answering specific questions. In response to the question "In your opinion, is the employee permanently physically unfit to follow his current trade, profession or occupation?" Dr E answered "yes". Dr E's response to the question "In your opinion is the employee physically fit to follow any other trade, profession or occupation albeit of a sedentary nature?" was "no".

The complainant's application was rejected by the trustees of the scheme. In March 1998 the complainant made another application for an ill-health pension which was also rejected.

The complainant appealed against the trustees' decision. The trustees explained that the applications made by the complainant in July 1997 and March 1998 were rejected on the grounds that his condition did not meet the "permanency" test as required by the scheme rules.

The rules of the scheme stated that a full ill-health pension was payable from the scheme provided that the member had completed five years'

qualifying service and was permanently unable to work in any capacity or was suffering from an illness that seriously reduced his life expectancy. The provisions under the rules for a partial ill-health pension required the member to be permanently incapable of performing his normal duties.

In coming to their decision the trustees had also considered reports from Dr A, in January 1998, and Dr C, in March 1998. Dr A's responses to the questions was the same as Dr E's, i.e. "yes" and "no". Dr C's report only included the first question, to which the answer was "yes".

Following further appeals by the complainant's solicitors, the trustees in August 1998 said that additional medical reports had been considered and, based on this additional evidence, it had been decided that the complainant would be granted a partial ill-health pension. The complainant's employment was terminated in December 1998 on grounds of ill-health.

#### *Decision*

In considering the complainant's applications in July 1997 and March 1998 the trustees had failed to ask the correct question. Dr E in his report had stated that the complainant was permanently physically unfit to perform his normal duties and was not physically fit to work in any capacity. Dr A's opinions with regard to the complainant's condition were the same as Dr E. Dr C also agreed that the complainant was permanently unfit to perform his normal duties but had not been asked whether he was unfit to work in any capacity. It was unclear from the reports whether the complainant fulfilled the "permanency" test for a full ill-health pension because question H(i) of the reports simply asked whether he was physically fit, without referring to permanency, to follow any other trade, profession or occupation.

The trustees were directed to write to Dr E and Dr A and ascertain from them whether the complainant, in their opinion, was permanently unfit from following any other trade, profession and occupation at the time they reported on his condition.

## **12. K00678**

#### *Background*

The scheme provided two levels of ill-health early retirement pension: partial (**PIHP**) if the member could not perform his normal job but might be able to perform some other job before age 65, and total (**TIHP**) if he was unlikely to be able to take up any employment before 65.

Mr S suffered from a depressive illness. His doctor was uncertain whether he might be able to do other types of work in the future. His former employer's occupational health adviser felt that his condition should be reviewed in two years' time but, if this was not possible, he would recommend "full, permanent breakdown in health". The trustees

then sought an independent specialist's opinion. The specialist concluded that Mr S would not be able to return to work for at least a year and perhaps never. He recommended retirement on "a full ill-health basis", but with a review in a year's time.

The trustees then decided to award Mr S PIHP. He complained that he should have been awarded TIHP.

The trustees said that the scheme rules did not permit future reviews. After taking legal advice they had decided, on the balance of probabilities, that his present degree of incapacity would not continue until his 65th birthday in 25 years' time.

#### *Decision*

The complaint was upheld and the decision remitted to the trustees for fresh consideration with an instruction that they should seek further medical evidence or clarification of the existing opinions. Both specialists had apparently recommended TIHP but the trustees had decided to award PIHP without reverting to the doctors, for example to ask them for opinions on the basis that future reviews were not permitted.

Finally in this series of health related cases, a complaint concerning the basis on which the member had said that he was in good health.

### **13. L00256**

#### *Background*

The complainant had applied to buy added years of pensionable service. The application form he completed contained the following declaration, which he signed:

"As far as I know, there is no reason why my present state of health should prevent me from completing the contract for buying added years..."

Less than two years later, the complainant sought early retirement on the grounds of ill-health (in the form of depression). His application was granted.

The scheme provided that, subject to the health declaration having been made in good faith, where the member retired due to ill-health (without having completed the contract for buying added years), payments due up to the age of 60 years would be excused and the corresponding number of extra years given.

Before payment of his pension commenced, the complainant was informed that as his retirement had been within two years of his election to purchase added years, the matter had been referred to the scheme's medical adviser who had concluded that the complainant's election had not been made in good faith and that, in consequence, his payments

up to the age of 60 years could not be excused. The complainant would therefore only be credited with the amount of service he had actually purchased.

The respondent said that the complainant had a long history of recurrent depression which had begun in 1977 and contended that it should have been obvious to him, at the time he made his election, that there was a significantly increased risk that his recurrent depressive illness could lead to incapacity before normal retirement age. The complainant denied that he had made his election dishonestly and contended that at the time he believed that he would continue in service until sixty years.

#### *Decision*

The relevant regulation provided that the clause which, in effect, excused the balance (up to age sixty years) of the payments due, did not apply where the health declaration was not made in good faith. The issue was therefore whether the complainant's declaration had been made in good faith.

It was accepted that, at the time he signed the declaration, the complainant had no reason to believe that his previous mental health problems were significant or that he would not continue in service. Aside from depression attributed to two bereavements, it had been over ten years since the complainant had suffered depression requiring treatment. In the circumstances, he viewed previous episodes as unconnected, isolated and not a recurrence of any pre-existing illness. The suggestion that his declaration had not been made in good faith was a serious one with significant implications for the complainant. The key question was whether, at the time he signed the declaration, he genuinely believed he would be able to complete the contract for the purchase of added years. The conclusion reached was that the complainant had made his declaration in good faith and on that basis the complaint was upheld. Directions were made for the complainant's benefits to be paid to him on the basis that he was credited with the balance of the added years he had elected to purchase.

## **Transfers and Assignments**

In the previous case there was an implicit allegation of bad faith on the part of the complainant. In the next, the source of bad faith (if that is how it should be described) lay in a marriage that had ended acrimoniously. It is the first of a number grouped together as relating to transfers and assignments of benefit.

### **14. K00839**

#### *Background*

The complainant and the respondent had been married to each other, but were divorced in the early 1990s. The complainant had been employed by the respondent until April 1994 and an individual pension arrangement had been set up for her with an insurance company in respect of this employment. The complainant and the respondent were the trustees.

In April 1997 the respondent sent the insurer a completed form notifying them that the complainant was to retire early on 1 January 1997. In May 1997 the respondent's solicitors sent the complainant's solicitors a copy of an illustration of her benefits as at 1 January 1997.

In December 1997 the complainant's pension adviser sent the insurer a completed discharge form, signed by the complainant as trustee of the arrangement, stating that it was the trustees' intention that the open market option should be paid to another insurer. The adviser also enclosed a copy of a quotation from the insurer confirming that the benefits to be secured for the complainant were within the Inland Revenue's limits.

The discharge form was rejected by the insurer as the complainant was no longer a trustee of the scheme. The insurer said that they were unable to settle the complainant's benefits without the respondent's signature. The necessary documents had been sent to the respondent for signing but he had refused to do so.

The respondent said that he had been advised by the insurer that the complainant's pension arrangement was in surplus. He understood that the complainant was to have the standard benefit package as specified in the rules of the scheme, and the surplus would be retained within the scheme for future employees. He had sent the necessary forms to the complainant but she had failed to return these or communicated her intentions. Since he had heard no more from the complainant or her representatives he assumed that she would be retiring on her normal retirement date.

In June 1999 the complainant's pension adviser informed the respondent that she wished to have the open market option paid to another insurer and enclosed a copy of a letter from the complainant stating this. The respondent replied stating that he had received an alternative quotation from the insurer which he claimed was better than the quotation sent to him by the adviser. The adviser responded that as the respondent had not enclosed the quotation he had received, it was not possible to determine whether the insurer's quotation was better. The adviser pointed out that the quotation it had sent was on the basis that the annuity for the complainant could be backdated to 1 January 1997, and that the insurer was unable to do this.

The complainant claimed that she had incurred costs amounting to £1,443 in fees in respect of additional work carried out by her pension advisers in an attempt to resolve the matter.

#### *Decision*

The conclusion was that the insurer was rightly unable to accept the instructions it received from the complainant's adviser in December 1997 as she ceased to be a trustee of the scheme at that time. There was no evidence to show that the respondent was aware of the discussions between the complainant's adviser and the insurer, or that the insurer

had kept him apprised of the situation. The first time the respondent was aware that the complainant wished to transfer the open market option to another insurer was in February 1999.

Under the rules of the scheme the respondent had a duty to proceed with the complainant's request to establish her benefits in accordance with her wishes. Clearly the respondent had failed to comply with the complainant's wishes and this was a breach of the provision of the rules.

The respondent was directed to arrange for the benefits quoted in June 1999 by the complainant's adviser to be secured for the complainant. He was also directed to pay interest on the complainant's pension from June 1999 to the date payment is made to her, make up any shortfall between the cost of securing her benefits and the open market option and pay the complainant £1,443 for the fees she had incurred in respect of additional work carried out by her adviser.

## **15. K00895**

### *Background*

The complainant alleged maladministration by the company, as trustee of the pension scheme of which he had been an active member, in that, when he left service, the company refused to assign to him his policies under the scheme without payment by him of legal fees the company had allegedly incurred in considering his request. The company was a family business and the complainant's dispute was with other members of his family, with whom he had had disagreements. Another former employee of the company was also involved, but she did not submit a complaint. Both members had left service in 1995, but had received no details about their benefits under the scheme.

Deeds of assignment were prepared, but the company stated that it would need time to consider the matter before it would sign them and might have to take legal advice. The company asked for £250 per member to cover its expenses.

The company stated that it was concerned that the two members would become trustees of the policies, if they were to be assigned to them, and that they would make unwise investments, then blame the company for their misfortune.

On being pressed the company produced a copy of an invoice from a firm of solicitors for £375 + VAT for "commercial advice". Although the company had asked for reimbursement of legal fees of £250 per member in 1997, the solicitors' invoice was dated 31 August 1999.

### *Decision*

The scheme rules obliged the company, as trustee, to assign the policies, if requested to do so, and did not authorise the company to make a charge for doing so.

The company, as trustee, was found to have acted in breach of trust, and was directed to sign the relevant documents and to pay the complainant £250 as redress for the inconvenience he had suffered.

**16. K00748**

*Background*

The employer against whom the complaint had been brought had replaced its final salary scheme with a money purchase arrangement and asked members if they wanted to transfer their accrued benefits into the new scheme. Both schemes were contracted-out of the State Earnings Related Pension Scheme (**SERPS**); the final salary scheme by way of Guaranteed Minimum Pensions (**GMPs**) and the money purchase scheme by way of Protected Rights. The complainant opted to join the new money purchase scheme and to transfer his accrued benefits from the final salary scheme.

When the complainant reached State retirement age he was informed by the Benefits Agency that his State pension would be reduced by a deduction in respect of his membership of a contracted-out occupational scheme. The amount of the deduction was higher than the annual pension provided by the money purchase scheme.

The complainant said that he had not been warned by his employer or the administrators of the schemes that there was no GMP with the money purchase scheme. The Contracted-out Notice and copies of the announcement to members regarding the new scheme were supplied and reference was made to staff presentations which had been held at the time. The complainant said that he had been unable to attend the staff meetings because of the nature of his job. According to the employer the question of contracting-out had been raised at the staff meeting. The complainant said he knew of one employee who had been told it was not worthwhile for him to join the new scheme because he was over 60. The complainant maintained that, had he been able to attend the staff meeting, he would have been given the same advice and consequently would not have transferred his accrued GMP to the money purchase scheme.

*Decision*

The announcement to members had made it clear that there was no guaranteed pension in the new money purchase scheme. It was, however, felt that it would have been helpful to have been more explicit about the nature of the new contracting-out arrangements.

It was necessary to separate the act of joining the scheme from that of transferring accrued benefits from the former final salary scheme. Had the complainant followed the advice that he said his colleague had received, (that it was not worth his while joining the money purchase scheme at all), he would not have benefited from his employer's

contributions. The complainant's problem arose, not from joining the money purchase scheme, but from transferring his accrued benefits. It had not been suggested that any advice concerning individual transfers had been given at the staff meetings which the complainant had been unable to attend. The complaint was not upheld.

**17. K00920**

*Background*

The employer complained that its money purchase plan provider had reneged on clearly stated contractual terms for the transfer of members' plan assets to alternative arrangements offered by the provider.

The employer had decided to replace its money purchase plan with a group personal pension scheme. It obtained quotations from various providers but these looked unattractive because of the low transfer values offered by the existing provider. The employer held a meeting with the provider to discuss the low transfer values. The provider made clear its wish to retain the employer's business and proposed a second meeting. At the second meeting the employer emphasised the importance of the transfer values and the provider agreed to transfer members' full fund values. After some discussion to clarify what was meant by 'full fund values' the employer was satisfied and asked the provider to confirm its offer in writing. The provider did so, along with other advantageous terms which had been agreed. After receiving further assurances about the meaning of 'full fund values', the employer decided to proceed with the provider.

Following an extended delay the provider advised the employer that for compliance reasons a transfer to section 32A contracts was preferable to transferring to personal pensions. After further delays the provider advised the employer that it had quoted fund values to the employer which were too high. It refused to pay the higher figures but admitted it had made errors through the use of unfortunate terminology. It offered a compensation payment of £25,000 and argued that the members had suffered no financial loss.

*Decision*

The provider had sought to renege on transfer terms it had proposed and confirmed. This was maladministration, the effect of which was to cause injustice to members in the form of greatly reduced transfer values from the plan to each member's section 32A contract. It would also undermine members' confidence in the employer.

The provider was directed to honour the transfer terms it had agreed.

## Transfers of Employment

From transfers of benefit to two cases relating to transfers of employment. The first relates to the meaning of a provision intended to ensure a measure of continuity in discretionary treatment.

### 18. K00865

#### *Background*

As a result of local government reorganisation in 1986, the complainant was transferred to employment with a different local authority. A dispute arose regarding her new employer's interpretation of Regulation 139 of the *Local Government Pension Scheme Regulations 1997*.

Regulation 139 provides for the new employing authority to exercise any discretionary powers *in a way which is not less beneficial than the general character* of the practice of the transferring authority.

The complainant's particular concern was the way her new employer intended to interpret Regulation 139 in respect of the award of additional service as a compensation for premature retirement.

The practice of the transferring authority had apparently been to allow applicants under its early retirement scheme to retire with the maximum added years. Her new employer reserved the right to consider each case on its merits and argued that to do otherwise was to fetter a discretion.

The conclusion was that the new employing authority was bound to follow the general character of the practice of the transferring authority. Regulation 139 says that the new employing authority shall exercise a discretionary power in a way which is no less beneficial than the general character of the practice followed by the transferring authority. The use of the word 'shall' rather than 'may' was taken to mean that the regulation sets out the way in which the employing authority is obliged to exercise its discretion. It was concluded that the only possible intention behind Regulation 139 was to place transferred employees in a special position. To ignore the way in which the transferring authority operated its early retirement scheme would be to frustrate Regulation 139. In addition, to concentrate solely on the wording of the transferring authority's early retirement scheme and not to follow the general character of its practice would not be acting within the spirit of the Regulations.

#### *Decision*

The dispute was decided in favour of the complainant and her employing authority was directed to take full account of the general character of the practice of the transferring authority if she applied for early retirement.

### 19. K00401

#### *Background*

Amongst other things, the complainant said that her employer failed to enhance her pension on redundancy. She asserted that the custom and practice adopted by her former employer was that members who were made redundant aged 50 or more with two years qualifying service received an enhancement; that the benefits formed part of the terms of her contract and as such should have passed under *Transfer of Undertaking (Protection of Employment) Regulations (1981) (TUPE)*; and that the failure by her employer to exercise discretion was maladministration.

The complainant was an employee of her former employer from 1989 to 1995 during which time she was a member of the Local Government Superannuation Scheme. The department in which she was employed was privatised and her membership of that scheme ceased. Pursuant to a TUPE transfer she transferred to her employer and she joined the new scheme.

In March 1997, she received notification of her estimated retirement benefits which did not take account of pension enhancement in respect of service accrued in the new scheme. She accepted an offer to take voluntary redundancy at the end of the month. A compromise agreement (executed on 4 April 1997) stated that she agreed to accept the severance payment in full and final settlement of all claims whatsoever against her employer arising out of or related to her employment or its termination or otherwise except for claims in respect of any industrial injury.

#### *Decision*

Pension benefit disputes with the employer were covered by the compromise agreement. That is, the severance payment sum was accepted in settlement of any claims against the employer and this included pension claims.

Before signing the compromise agreement, the complainant had received an estimate of retirement benefits which did not take account of an enhancement; she had also taken independent legal advice on the agreement; she had expressed a desire to sign the agreement without reopening negotiations; and finally there was no evidence that her employer had agreed that the compromise agreement was not to apply to pension disputes.

However, in case this was wrong, the position was considered anyway, assuming that the complainant could make a claim against her employer and that discretion to investigate was exercised in her favour.

The general rule that pension rights do not themselves transfer pursuant to a TUPE transfer and the *Franklin and Beckmann* cases were

considered; as was suspending the investigation in light of referral of the issue by the High Court to the ECJ. But even assuming that the redundancy provisions did transfer to the scheme, the obligation on the employer was to consider whether to exercise discretion to enhance the pension benefits. The employer was not obliged actually to exercise the discretion. The evidence suggested that the employer considered exercising the discretion at various stages and decided that no enhancement would be made. The decision should not be remitted or overturned.

## Death Benefits

The next complaint arose because an employee was treated as if he had transferred employment when he had not. Death benefits, like ill-health pensions, arise at a stressful time and may significantly affect financial security. They may also involve an exercise of discretion. For these reasons they are a not uncommon source of complaint, as the next five examples show.

### 20. L00125

#### *Background*

The complainant was a widow who complained that she had not been paid death benefits and a widow's pension following the death of her husband.

The complainant's husband had worked for a local authority and had been a member of a scheme for such employees. In April 1998 he resigned from his employment and was re-employed within a matter of days by a company which had been set up in 1986 when the operation of bus services had been transferred from the local authority to the private sector. That company participated in the local authority scheme of which he had previously been a member.

The complainant's husband died in September 1999. For the fifteen month period of his employment prior to his death, contributions had been deducted from his salary and employer's contributions had been paid on the basis that, despite his change in employment, he was eligible for membership of the scheme operated by his previous (local authority) employer.

After the complainant's husband's death, the question arose as to whether in fact he had been entitled to rejoin his previous employer's scheme. An issue arose as to whether, in proceeding on the basis that he was eligible, the previous or current employer had been at fault.

#### *Decision*

The first matter considered was whether in fact the complainant's husband had been eligible to rejoin his previous employer's scheme. Although special provisions had been made in 1986 when a number of employees had transferred from the previous to the new employer, those provisions did not apply to the complainant's husband who had, over ten years later, voluntarily resigned and taken up new employment.

The conclusion was therefore that the special provisions did not apply and the complainant's husband had not been eligible to rejoin the scheme operated by his previous employer.

The new employer was clearly aware that there was some uncertainty surrounding the complainant's husband's membership of his previous employer's scheme. However, despite that, no advice was sought from the previous employer as to eligibility. It was maladministration by the new employer, in proceeding with membership when it knew the complainant's husband might not be eligible, particularly when the new employer ought to have known that the special arrangements only applied to employees who transferred their employment on a specific date in 1986. The new employer also failed to obtain a completed application form from the complainant's husband. Had that form been obtained, the complainant's husband's non-eligibility might have come to light earlier and before he died.

The complaint was upheld. The complainant had claimed the benefits which she would have received had her husband been a bona fide member of his previous employer's scheme. However, the purpose of compensation in such circumstances is to put the complainant in the position in which he or she would have been, had there not been maladministration. In the present case, the complainant's husband ought to have been advised that it was not open to him to rejoin his previous employer's scheme. His new employer had its own scheme and it was accepted that the complainant's husband, after a six month waiting period for new entrants, would have been eligible to have joined that scheme. There was no reason to suppose that if the complainant's husband had been denied membership of his previous employer's scheme, he would not have joined his new employer's scheme. The complainant had therefore suffered a financial loss (after deduction of the contributions her husband would have been required to pay) equivalent to the benefits she would have received under the new employer's scheme as his widow. Appropriate directions were made, together with a direction for the payment of a sum in compensation for inconvenience suffered by the complainant.

### 21. K00587

#### *Background*

On 14 July 1997, a terminally ill member of a public service pension scheme sent a nomination for death grant form to his employer which indicated that he wished the grant to be shared between his two sons. He died on 26 July.

The administrator of the scheme said that when a member was married, the grant was payable to the spouse unless one person had been nominated to receive the grant. The deceased's nomination had been invalid as he had named both of his sons and therefore his estranged wife was entitled to receive the grant.

The executors of the deceased's estate disputed the administrator's decision. The administrator said that under the regulations of the scheme a valid nomination required the nomination of an individual and added that the regulations had been amended in October 1996 to specify that a member could nominate an individual instead of a person. The administrator said that this amendment had been made specifically to clarify that only one individual could be nominated.

#### *Decision*

The dispute was found in the favour of the executors. Section 6 of the *Interpretation Act 1978*, which applies to statutory schemes such as the one in question, states that "Unless the contrary intention appears ... words in the singular include the plural and words in the plural include the singular." Accordingly, in the absence of anything to the contrary, the word individual included "individuals" and the nomination by the deceased was not invalidated by the insertion of the two names of his sons.

## **22. K00759**

#### *Background*

The complainant's late husband had been a minister in a church in Northern Ireland between 1935 and 1952 before moving to the USA, where he was a minister in Kentucky until his retirement in 1976. After her husband's death in 1996, the complainant made enquiries as to any entitlement to pension benefits from the Irish church. She said that her husband had not pursued any claim for benefits in 1976 as he had been given information (which she believed might be wrong) that he had no entitlement to benefits.

The complaint raised questions as to jurisdiction and time limits. As a matter of contract, the complainant's husband, as a minister, had not been an employee of the church, and the church argued that on that basis the scheme was not an occupational pension scheme (as defined in section 1 of the *Pension Schemes (Northern Ireland) Act 1993*) and therefore not within jurisdiction. However, the definition of "employment" within that Act was wide and did not depend on the strict question of whether there was any contract of employment and, on that basis, it was concluded that the complaint was within jurisdiction.

On time limits, the complaint was accepted for investigation outside the usual three year period on the basis that if (wrong) advice had been given in 1976 it was reasonable for neither the complainant nor her husband to have complained about the non payment of benefits until it was known that the advice earlier given was or might be wrong.

In response to the complaint, the church said that, having checked its records, the complainant's husband would have been entitled to a part pension, had he claimed it, but there was no record of any claim having been made. The complainant replied that her husband had not claimed

benefits because the information he had received was that he had no entitlement but, if he had been correctly advised, he would have claimed benefits.

During the course of the investigation, it appeared that the right to apply for benefits had only come into existence in 1980 and therefore any advice given in 1976 that the complainant's husband had no entitlement was, at the time, correct. However, that gave rise to an argument that he should have been informed when the right arose.

In response, the church said that what its earlier statements about an entitlement having arisen in 1980 was in fact wrong and the complainant's husband had, after all, no entitlement. Thus any complaint that the complainant's husband was not informed of an entitlement (which did not exist) could not stand.

#### *Decision*

It was ultimately concluded that what the church latterly said was in fact correct (ie that the complainant's husband, in fact, had no entitlement). I did express the view, however, that the church had emerged from the matter with little credit.

## **23. L00077**

#### *Background*

Miss U's executor complained about the level of benefit paid on Miss U's death. Miss U had worked for an organisation for many years and was a member of its pension scheme. She discovered she was terminally ill with little time left to live. She was in exceptional circumstances of serious ill-health and advised her employer of her intention to retire immediately, and the reasons. Under the scheme rules, a member retiring in such circumstances could with the consent of the trustees elect to receive a cash sum in lieu of all her benefits, subject to Inland Revenue limits.

After a month had passed one of the trustees telephoned Miss U for her permission to obtain medical evidence from her doctor. She died just over two weeks later, having heard nothing from the trustees or her employer about her benefits from the scheme.

The trustees said they had been on the point of writing to Miss U with details of her benefit options, including a cash sum in lieu of all her benefits, when they learnt of her death.

More than a month following Miss U's death the trustees wrote to say that they would pay Miss U's personal representatives the five year guarantee, either as cash or pension. This was less than half what had been discussed before Miss U's death.

The trustees said they were restricted to the five year guarantee because Miss U had not made an election to them for payment of the cash sum in

lieu of all her benefits. Because she had not made an election, the trustees had been unable to give their consent.

#### *Decision*

Miss U had not made an election to the trustees because she had received no information from them. It was decided that the trustees had been unreasonably slow in communicating with Miss U, thereby preventing her from making an election.

The complaint was upheld and trustees were directed to pay a cash sum in lieu of all Miss U's benefits to her estate, plus interest.

## **24. K00603/K00604**

### *Background*

This dispute was referred following the death of Mrs D, a member of a life insurance scheme, on 6 November 1999. It was referred by her former employers and the executors of her estate. The dispute was with the life insurance company which, on Mrs D's death, paid a lump sum death benefit of £100,000, whereas the company had claimed a benefit of £154,000.

The employer obtained a quotation from the insurance company for a life insurance scheme covering death benefits of 4 x salary, "salary" being defined as basic annual salary at the commencement date and at each subsequent renewal date. The free cover limit (below which no evidence of health would be required) was quoted as £154,000, equivalent to a salary of £38,500. Mrs D's salary was shown as £25,000 and her husband's as £35,000.

The employer signed a proposal form for the scheme, which was due to begin on 1 January 1999. The proposal form did not show whether "salary" was to be as defined above, or as salary at the date of death, but the proposal form was signed as being in accordance with the quotation. An announcement was issued by the employer to prospective members, giving the salary definition used for the purposes of the quotation.

The insurance company was informed by letter in March 1999 that cover for Mr and Mrs D should be increased from 1 March 1999 to £154,000, ie 4 x increased salaries of £38,500. It was confirmed that both Mr and Mrs D were actively at work on 1 March 1999, although this information had not been requested by the insurance company. The insurance company replied, to "confirm having noted the salary increased ... following information that they were actively at work".

Mrs D died later in 1999 and the insurance company was informed. It proposed to settle, and later settled, the death claim, based on a salary of £25,000. It stated that, if it had been intended to alter the definition of "salary", the increased benefits for Mr and Mrs D would have been underwritten, and the policy would have been endorsed. The employer

stated that, if it had been aware that the increased cover had not been in place, it would have obtained cover elsewhere. The policy, with the quotation definition, had not been issued until 13 April 1999.

The employer's solicitors contended that Mrs D's cover had been increased by means of an informal agreement between the employer and the insurance company. They suggested that the insurance company, by the action it took in March 1999, was stopped from denying that the increased cover was in force. They provided quotations from another insurance company, to indicate that Mrs D could have been covered for death benefits of £170,000 or (including the cost of a spouse's pension) £280,000, even if extra cover had been declined or accepted on special terms. The only stipulation was that Mrs D should have been able to meet the "actively at work" requirement.

### *Decision*

The dispute was found in favour of the insurance company. It ought to have indicated that increased cover was not available, instead of merely noting the salary increases for Mr and Mrs D and the fact that they were actively at work on 1 March 1999. The broker who arranged the scheme ought also to have informed the insurance company that immediate increased cover was required. To offer increased cover for Mr and Mrs D the insurance company would have required confirmation that the increases were part of an overall salary increase exercise, which was apparently not the case. The other insurance company would have covered increases in salary of 10% pa, but Mrs D's increase had been 54%. If Mrs D had been underpaid on a salary of £25,000, as her husband had stated, it was surprising that her salary had only been significantly increased on 1 March 1999, and that cover had originally only been requested based on the lower salary. The policy had been issued in April 1999, and it had been known since then that increased cover under the scheme was only available from the next renewal date. Increased cover could have been sought elsewhere in the six months before Mrs D died. It was not accepted that increased cover had been agreed between the employer and the insurance company on an informal basis.

## **Winding up**

When schemes wind up in deficit, members may understandably be distressed to discover that their pensions are to be cut back. In the following case the complainant sought to argue that there had been an agreement that his would not be.

## **25. K00571**

### *Background*

The complainant maintained that a binding agreement had been reached whereby the trustee promised to provide the complainant with early retirement benefits which would not take into account any reduction as a consequence of the scheme's under-funding and that the non-payment of the pension by the trustee amounted to maladministration.

Shortly after the administrators provided information to the complainant about early retirement benefits, the trustee resolved to wind-up the scheme. As a result of under-funding in the scheme, some benefits had to be reduced on winding-up. The effect of the statutory priority order under section 73 of the *Pensions Act 1995* meant that benefits in payment before the winding-up date were unaffected but benefits coming into payment after that date would be substantially reduced.

Largely because the complainant was deemed to have insufficient time to consider his options before the winding-up was triggered the trustee resolved to put the complainant in the same position as if he had opted to become a deferred pensioner just before the scheme went into winding-up and then elected to receive his pension early. When it realised he was making a claim against his employer about the transfer of his employment the trustee said that the level of the pension payable might be affected by the result of that claim. The complainant purported to accept, without prejudice, being treated as having taken early retirement with effect before the winding-up date.

#### *Decision*

There was no binding contract between the trustee and the complainant. Acceptance was not unconditional in respect of all the terms of the offer, or expressed with certainty. Nor was it found that consideration had been given for the trustee's promise. Before any decision by the complainant was made there had been no reliance by him on the promise. After a decision was made he was clearly advised that his pension would be withheld and might be adjusted pending the outcome of his transfer claim. Accordingly, any expenditure could not reasonably have been incurred by him in reliance on any promise that the pension would soon be payable to him. The basis on which the parties had proceeded appeared to be fundamentally different. The complainant asserted that when accepting the offer he did not realise that to receive early retirement benefits he would also have had to be treated as if he had then left his employer's service. He thought that the pension would be immediately payable. But the trustee asserted that in making the offer it had regard to the scheme provisions (known to the complainant from the booklet) which provided that a member must leave service for the pension to be paid and considered that the complainant would have left his employer's service before the winding-up date.

It was inconsistent for the complainant to assert that he was entitled to early retirement benefits under the scheme (which necessitated the voluntary leaving of service) and simultaneously to dispute with his employer whether his service was terminated fairly. A dismissal dispute would not have arisen in circumstances relevant to retirement.

In the alternative, it was found that even if a contract had been formed, there was no breach as asserted because the terms provided that payment was to be withheld pending the transfer claim.

There was no clear indication that the proposal was to effect an augmentation in the complainant's favour or that it effectively amounted to an augmentation. It was considered that had the trustee agreed to augment the benefits, this would not be contractual and there was no satisfactory evidence that the complainant incurred expenditure in reliance on the communication sent to him to form the basis of any other claim, for example misstatement. Finally, any determination to exercise an augmentation in the complainant's favour would not have been a valid exercise of the trustee's powers. On winding-up, the scheme rules provided that the trustee could make augmentations after members' benefits have been met; and section 73(2) of the *Pensions Act 1995* provides that the trustee must first apply the assets to meet liabilities in the order set out in section 73 before the priority order set out in the scheme rules can be applied. At the time the trustee determined the complainant's benefits, the statutory and rule priority orders had not been exhausted.

The next two cases, which are connected, also related, in part, to the winding-up priorities. One of the allegations was that senior employees had taken early retirement before the scheme was wound up in order to ensure that they received preferential treatment as pensioners.

## **26. H00342**

### *Background*

The principal employer was in financial difficulties. Nevertheless the four original trustees, who were also scheme members and directors and owners of the principal employer and/or of other companies in the same group, voted three of their number substantial increases in pensionable emoluments. A very short time before receivers were appointed to the principal employer, the chairman and one other trustee (the personnel director) began drawing early retirement pensions although both continued working for the principal employer.

The independent trustee appointed by the receivers discovered that the scheme was in deficit and that on wind-up there would probably be insufficient assets to secure the benefits of deferred members in full.

Members were notified and a number complained to the independent trustee about the early retirements, the contributions holiday, and about other possible misdoing by the original trustees, by the principal employer, and by the administrators. The independent trustee made some investigations and took counsel's advice. It then effected a settlement with the chairman and, after a period of time, stopped pension payments to the personnel director. The members who had complained to the independent trustee were dissatisfied with its explanations as to what was going on. They involved OPAS and lodged complaints to the Pensions Ombudsman.

### *Decision*

After lengthy investigation into the complainant's application, it was concluded that the complaint relating to the contributions holiday was not made within the required time, and that the administrators had not committed any acts of maladministration. A complaint that three of the trustees' emoluments had been improperly enhanced was upheld.

There was a complaint that the early retirement of the personnel director was intended to advance him in the priorities on winding up. This was dismissed on the basis that his retirement had been planned long in advance and did not infringe Inland Revenue requirements or the scheme rules. He had been re-employed on a short term basis and with a reduced status and responsibilities.

This contrasted with the position of the chairman who had continued to work in exactly the same way before and after his retirement. The only difference was that instead of merely drawing a full salary, he was also enjoying a pension. An oral hearing was held principally in relation to the complaint about the chairman's early retirement. It was concluded that the chairman and one of the other trustees had committed maladministration in relation to the early retirement. It was found that the chairman had been dishonest, and had been guilty of wilful neglect and wilful default. The loss to the scheme by his maladministration (and that of another trustee) was in the region of £185,000.

The settlement that the independent trustee had effected with the chairman was of a very much lower amount. It was found that the independent trustee had committed maladministration in relation to the settlement. It had not properly considered the merits, and had miscalculated the sums at stake. Further it had misled members and OPAS about what investigations had been made, what recovery had been effected, and what steps were being taken to put things right. It was also at fault in the way it dealt with the personnel director. Its actions had delayed winding up of the scheme and accordingly the complaint against it was upheld.

### **27. H00321**

The complaint was substantially identical to that of the complainant in H00342 above, except that it included a further complaint that the independent trustee had wrongly reduced the complainant's pension when it came into payment. Another difference was that the complainant had not alleged that any actions of the respondents had caused him distress.

Following my office's normal procedure, the complaint was not investigated pending determination of H00342. Determination of that complaint remedied the principal injustice which the complainant sustained, since the directions required those who had committed maladministration to reimburse the scheme.

The further complaint against the independent trustee was dismissed as the reduction in the complainant's pension was made in accordance with the scheme's rules. His request for compensation for distress was also not upheld. It did not form part of his original complaint and was only articulated after the complainant learned that the complainant in H00342 had been awarded such compensation. Compensation for distress is not automatic. A complainant must establish he has been distressed and that there is a causal connection between the distress and the maladministration.

In the last two cases, and in the next, allegations of wrong-doing by the trustees arose after the scheme went into wind-up and as an indirect result of it.

### **28. J00107**

#### *Background*

The scheme went into wind-up following the insolvency of the company and had a non-preferential claim against the company for £536,364. The complainant said that the trustees had made loans that were not in the members' best interests; that no appropriate action was taken by the trustees to ensure that the loans were repaid when the company was in financial difficulty or that interest was paid; and that the trustees had allowed there to be unpaid member contributions.

#### *Decision*

It was found that even if the trustees had failed properly to discharge their duties in not ensuring that the interest on the loans or the contributions were paid, and if, further, that they could not rely on the exoneration provisions in the scheme, they would not be liable for any losses. The basis for this was that the losses would have occurred in spite of any such failure since they occurred primarily because of the company's breach; the trustees' breach being incidental.

An oral hearing was held relating to the making of the loans and failure to recall them. It was considered likely that any request for the loans to be repaid by the company would not have been met and that there was insufficient evidence to find that the trustees were guilty of wilful default in respect of making the loans - except for the last loan that was made.

It was found that the last loan was made in breach of trust. In summary this was because there were outstanding scheme payments at the time it was made, there was lack of security, the interest rate had been capped, there were no terms to the loan and the trustees did not seek any advice - eg actuarial, investment or legal.

The last loan was made before the company went into receivership and, more particularly, at the time of making it, the trustees were acting with the benefit of knowledge in connection with the other loans. On the facts it was found that the trustees fell within the objective test for wilful

default. They were individuals who were experienced directors, holding the most senior positions in the company and they had continuous knowledge of the company's financial circumstances. The transaction in question was a familiar one to them and they were aware of the key issues and considerations that should be taken into account when making such a transaction. The responsibility of trusteeship had been taken on over some years and the trustees stated that they appreciated their fiduciary position.

The trustees were only able to sustain the belief that the last loan was in the members' interests because they turned a blind eye and refrained from asking obvious questions; they closed their eyes and ears for fear of learning information they would rather not know. Their belief that they were acting in the members' interests was not based on information and understanding having sought advice, but on the simplistic notion that if the company continued trading this had to be in the members' interests. A reasonable and honest trustee in the trustees' position would have raised questions to assure himself that the last loan was a proper transaction in the members' interests. The failure to ask questions was dishonest, not because it was negligent not to ask, but because any honest reasonable trustee would have asked. The trustees used their position to protect the financial interests of the company by deliberately sacrificing the financial interests of the scheme members.

Having found wilful default it was directed that the trustees (who were jointly and severally liable) should pay £83,579.53 plus interest to the scheme.

## Costs

The next two cases related to costs incurred, first by the trustees of the scheme in dealing with a complaint to this office, and second by the employer in pursuing a complaint against the scheme's manager.

### 29. K00255

#### *Background*

The complainant disputed that a former trustee of the scheme could assert his right to seek reimbursement from the scheme of professional legal costs he had incurred.

During another investigation, the former trustee claimed he was entitled to recoup costs incurred as a result of the investigation and notified the independent trustee that he considered that he had a right to payment of his professional costs from the fund.

#### *Decision*

The general legal position is that a trustee is entitled to receive, from the fund, proper costs incident to the execution of the trust including the costs of litigation - this right lapsing only through misconduct. The other investigation resulted in no criticism being applied to the former trustee.

There are circumstances where it is not inappropriate to incur costs in connection with an ombudsman's investigation and there had been no argument that the costs incurred by the former trustee were excessive. The costs were concerned with the administration and management of the scheme; and further that the general legal position provides that a trustee has a first charge upon a scheme's assets in respect of costs covered by his right of indemnity - the trustee's charge takes priority over the claims of the beneficiaries.

The dispute was determined in favour of the former trustee - all reasonable legal costs incurred could be recovered from the scheme before members' benefits were secured.

### 30. K00653

#### *Background*

This complaint was brought by an employer against the insurance company which managed its pension scheme. The scheme had been poorly administered in a number of respects, and the insurance company had admitted this and had paid compensation to the trustees of the scheme (some £860,000), but had refused to pay for the expenses the employer had incurred in proving the maladministration and in having it rectified. The expenses the employer now claimed related to actuarial fees, accountancy fees, legal fees, its own lost management time and the cost of submitting the complaint. The costs claimed ran to some £250,000.

#### *Decision*

The employer's complaint was upheld with a conclusion that the insurance company ought to pay the employer's costs.

## Inland Revenue Requirements

The next examples are all related in one way or another to the Inland Revenue's requirements for the tax approval of schemes.

### 31. K00749

#### *Background*

The complainant had been a member of a centralised pension scheme for non-associated employers which were charities or voluntary organisations. His employer was a college situated on the Isle of Man. The scheme had been in existence since 1973 and the complainant had joined it in 1975.

In 1999 the Inland Revenue advised the scheme managers that no concession appeared to have been granted allowing Isle of Man resident employers to participate in the scheme. It was agreed that Isle of Man employees of the college who were members of the scheme would have to leave it, but that they could retain deferred benefits under it.

The college asked the scheme's managers to meet the loss of benefits which would result due to the start-up costs incurred in setting up a new scheme, but the managers refused.

The managers had apparently been unaware in 1973 of the need to advise the Inland Revenue of the admission of "overseas" employees, or had overlooked the requirement, with the result that the complainant had benefited from membership of the scheme since 1975.

*Decision*

There had been maladministration by both the managers and the trustees of the scheme, but the complainant was not found to have suffered any quantifiable injustice, so his complaint was not upheld.

**32. L00012**

*Background*

Mr J complained that he was being prevented from drawing his retirement benefits from the scheme, which was a small self-administered arrangement. Mr J founded the company in 1967 but it went into receivership in 2000 shortly after receiving loans from the scheme. Mr J planned to buy the assets from the receiver in partnership with Mr D, another former director and fellow trustee of the scheme but, instead, Mr D did this with another director. Mr J (who was already nearly 65) claimed that Mr D then did not wish him to obtain his retirement lump sum in case he used it "to start up again as a competitor".

Early retirement and payment of a retirement lump sum required the consent of all the trustees. Mr J and Mr D were the only members. Mr D was reluctant to consent unconditionally because, if Mr J took his benefits, any tax charge the Inland Revenue might subsequently levy on the fund would reduce the amount remaining to provide his own benefits. No-one explained why they seemed to fear a Revenue investigation. Nevertheless, Mr D's concerns were felt not to be unreasonable and so the pensioner (independent) trustee proposed to Mr J that 40% of his retirement cash should be withheld against a potential future tax charge, until the scheme could be wound up, and that prior Inland Revenue consent to his retirement on benefits should be obtained. Mr J did not respond to this proposal. A number of other proposals were then made, each of which was rejected either by Mr J or by Mr D.

*Decision*

The complaint was not upheld. Mr D's concerns were reasonable. Long before Mr J's complaint to the Pensions Ombudsman, the pensioner trustee had offered to resolve the matter by writing to the Inland Revenue, but felt unable to do so because Mr J had not given his consent. Mr J had also avoided direct questions about why he would not consent, claiming only that such a letter would be "superfluous".

## CHAPTER 4: The Courts

The following are summaries of court decisions in nine appeals heard in the year against Pensions Ombudsman's Determinations and two Judicial Reviews. In all cases but one (*de Silva*) the original matter had been decided by Dr Farrand. In one case (*Britannic*), which was a continuing matter, being a Judicial Review of a jurisdictional question, it was necessary for me to actively decide whether I agreed with Dr Farrand's view. I did, and the case proceeded.

**4 April 2001**

***National Grid Co Plc v Mayes and Ors***

**[2001] 2 All ER 417**

**House of Lords - Lords Slynn, Steyn, Hoffman, Clyde and Scott**

This case was heard just within this reporting year but was covered in the Annual Report of the Pensions Ombudsman for 2000-2001 at pages 66-67.

**5 July 2001**

***Glossop v Copnall***

**Unreported**

**High Court, England - Sir Andrew Morritt, Vice-Chancellor**

Mrs Copnall had alleged maladministration causing injustice including financial loss in that her employer, Henry Boot, and the trustees had not recognised that her service before 1 April 1995 was pensionable and that this was indirect sex discrimination. Mrs Copnall also alleged procrastination on their part.

Mrs Copnall was a part-time employee of Henry Boot. Until 1990 she was not eligible to be a member of Henry Boot Staff Pension & Life Assurance Scheme (**the Scheme**). After that date the European Court of Justice ruled that it could amount to sex discrimination to exclude part-timers from eligibility to membership.

The Scheme amended its rules accordingly. Mrs Copnall applied in March 1995 to join on the basis that her membership was back-dated to the earliest she was able to join. She left service on 31 July 1995. She agreed with the trustees to await clarification of her options regarding the retrospective membership.

My predecessor found that Mrs Copnall's exclusion from the Scheme amounted to indirect discrimination under Article 119. Failure to comply with Article 119 amounted to maladministration as a consequence of which Mrs Copnall suffered injustice. Maladministration was found on the part of Henry Boot, who were entitled under the terms of the Scheme to determine eligibility, and the trustees who, together with Henry Boot, had the power to amend the Scheme to allow for the entry of part-timers. Therefore this aspect of Mrs Copnall's complaint was upheld for the period from the 30th July 1993 to the 1st April 1995. However, Mrs Copnall's allegation of procrastination by Henry Boot and the trustees was not upheld. In Dr Farrand's judgment it was reasonable for them to await settlement of the legal issues concerning retrospection before offering terms to her.

Dr Farrand concluded that Mrs Copnall was entitled to a deferred pension and that even if this was not the case the trustees should pay her interest on the contributions currently held in a zero interest account. The position Mrs Copnall found herself in arose through

no fault of her own and it was maladministration by the trustees not to have held her contributions in an interest bearing account until the situation was resolved.

An appeal against that decision was allowed. The Vice-Chancellor, Sir Andrew Morritt, referred to the history of Mrs Copnall's application. A protective complaint had been made in 1996 in which Mrs Copnall stated that her entitlement to retrospective service was acknowledged but that there appeared to be procrastination and she wished to ensure that her complaint was not prejudiced. In 1997 Mrs Copnall confirmed to the then Ombudsman that she thought that her exclusion amounted to sex discrimination; accordingly she was sent a further complaint form which she completed in the same form as previously; and she subsequently confirmed that she was happy to await the outcome of the ECJ judgment in Preston No 2.

The Vice-Chancellor concluded that what could constitute maladministration depended on the proper construction of that word in Part X of the *Pension Schemes Act 1993*, that being a matter of law. If none of the matters found by the Ombudsman could have amounted to maladministration as so construed, then that would be an error of law. It was held that the finding that "Failure to comply with Article 119 amounts to maladministration as a consequence of which Mrs Copnall suffered injustice" was wrong, since a mere error of law could not amount to maladministration. The trustees had not contested Mrs Copnall's entitlement to membership or benefits. The problem which was being considered by the courts was to ascertain exactly what the benefits were.

The Vice-Chancellor also said that the jurisdiction of the Ombudsman existed only in respect of the complaint made to him. The finding of a tribunal of limited jurisdiction in excess of that jurisdiction was not a finding made in accordance with law and therefore gave rise to a question of law susceptible to appeal. He held that Mrs Copnall had not complained of the matter which the Ombudsman found to constitute maladministration. She never complained that she was denied membership of the Scheme at any time after her entitlement had been established in the European Court. She did not complain until 1997 and agreed to await the outcome of the Preston No2 judgment. She never complained, it was of no interest to her and it made no difference whether or not the premiums were put in an interest bearing account or not. Accordingly, no injustice could have been sustained by her even if it had constituted maladministration; and without consequential injustice, the Ombudsman had no jurisdiction to investigate or determine anything.

Additionally, the Ombudsman was exercising a statutory jurisdiction of a judicial nature. As such he was bound to afford to the person against whom the complaint was made a sufficient opportunity to deal with both the complaint and any prospective criticism arising from it. No notice of the issue of interest being held in an interest bearing account had been given to the appellants before the final Determination was issued and communicated to the parties.

### **30 August 2001**

***The Queen on the application of Legal & General Assurance Limited v***

***Pensions Ombudsman***

**Unreported**

**High Court, England - Silber J**

The complaint relates to the discontinuance in 1992 of an insurance contract underlying the CCA Stationery Limited Pension and Life Assurance Scheme. In January 1999 the

Ombudsman issued a determination of preliminary issues on a complaint from CCA Stationery Limited. It was subject to Judicial Review which was heard by Lightman J on 3rd November 1999. An investigation of the merits followed culminating in the issue of preliminary conclusions on 26 July 2001.

Responses to the preliminary conclusions were requested by 17 August 2001. L&G wrote to the office asking for an extension of time to 26th October 2001. Time was extended to 27 August 2001 this being the last date possible to allow the Ombudsman the opportunity to produce a Determination by 31 August 2001. L&G then asked for an extension to 17 September 2001. It was refused by Dr Farrand on grounds of the practical convenience resulting from his completing the investigation. He was seized of the matter - if his successor required a fresh investigation he might not have wished to adopt his predecessor's conclusions; and Dr Farrand was not satisfied that the issue was one that could not be satisfactorily responded to by 27 August - the points in issue having previously being extensively debated in correspondence prior to the issue of the preliminary conclusions.

L&G applied for Judicial Review. It was heard by Silber J who quashed Dr Farrand's decision. Silber J said that the courts would intervene in cases of unfairness even where Wednesbury unreasonableness had not been shown. The consultation exercise had been started and therefore there should be proper consultation. L&G were expressly invited to make submissions on both facts and law. The Ombudsman's procedure envisaged that L&G would have two opportunities for challenge - first in respect of the preliminary conclusions and then a right of appeal.

Silber J noted that L&G's team of counsel had been involved since the beginning of the complaint. He took account of the difficulty of appointing specialist counsel particularly during the vacation period, the timing available to any new counsel to assimilate the information and the complexity of the issues raised. He considered that L&G would normally be expected to be entitled to have the assistance of its advisers who had been instructed throughout. He thought that there were substantial issues on which L&G would be entitled to and wish to have advice. He concluded that L&G would be prejudiced by not having the views of their advisers especially as pension law was a specialist area and it would be unfair to them if they could not have the opportunity to deal with the matter after their advisers' return from leave. He considered that this outweighed any detriment to the functioning of the Pensions Ombudsman's Office as I would definitely have to consider CCA's complaint whereas if the decision was not quashed it was possible that I might still have to do so.

### **2 October 2001**

***Kent and Medway Towns Fire Authority v Pensions Ombudsman and Robert***

***Anthony Hopper***

**Unreported**

**High Court, England - Blackburne J**

In April 1997 Mr Hopper took ill-health retirement. Following retirement he received a payment in lieu of eight days' leave amounting to £643.64, from which a pension deduction of £70.80 had been made. Shortly thereafter, Mr Hopper was advised that there was a shortfall in his pension benefits equivalent to £643.64 in the salary figure used to calculate those benefits. On being informed of this, the authority sent Mr Hopper a

cheque for £70.80, which it said had been deducted in error. Mr Hopper complained to this office that the authority had wrongfully failed to include the amount of £643.64 in the salary figure used to calculate his retirement benefits.

The central issue was whether the term 'pensionable pay' in the Firemen's Pension Scheme Order 1992 (which governed the scheme) included payments in lieu of leave. The complaint was upheld on the basis that pensionable pay was "pay as determined in relation to his rank" as per rule G1(1) of the Order and that in substance this was a payment for work done in the course of his employment and was "pay" as opposed to an ex gratia amount.

The authority successfully appealed against this decision. Blackburne J stated that it did not follow that merely because the payment is determined in relation to rank that it amounted to pensionable pay. The payment had to be "pay", i.e. payment for work done (or to be done) under the contract of employment and that a payment in lieu of untaken leave was not of that nature. Blackburne J said that this decision was not inconsistent with *Delaney v Staples* (where holiday pay was considered part of wages) as it was important to analyse how the entitlement to pay arises when attempting to classify it as "pay". In this case on a construction of the rules it arose after the termination of employment and was not "pay". Blackburne J continued however by saying that if he was wrong on this he was in any event persuaded that to constitute "pensionable pay" the pay must be regular in nature, in contrast to a payment of a "one-off" nature. He pointed to the fact that rule G1 was concerned to disregard reductions in pay resulting from sick leave or stoppage by way of punishment in calculating pensionable pay. He added that the conclusion, which he had arrived at, avoided the anomaly (noted in the Determination) where two fire-fighters of equal rank, pay, age and circumstances could receive different pension payments if one received payment in lieu of leave.

### **31 October 2001**

***Trustees of the NUS Officials and Employees Superannuation Fund v Pensions Ombudsman and Bryan Allen***

**Unreported**

**High Court, England - Lightman J**

Mr Allen was a member of the scheme, which was of the final salary pension type. Employer's contributions were payable at a rate of 150% of members' contributions, the latter being calculated by reference to the members' basic wages or salary. Mr Allen was a senior branch secretary and his salary was fixed in accordance with national pay scales. In 1996 he was offered a second period of secondment to the International Transport Workers' Federation (ITF). The letter offering this secondment stated that his salary would be fixed at the next pay scale above his current pay but that his pension contributions and the employer's contributions would continue to be calculated by reference to his current pay scale. In reply Mr Allen sought clarification of this letter. He pointed out that on his first secondment to the ITF, his pension contributions were paid on his higher (seconded) salary. Mr Allen also stated that using the lower pay scale would create an anomaly as under the scheme rules, his pension entitlement was to be based on his highest year's earnings over the five years prior to retirement. There followed inconclusive discussions; nevertheless Mr Allen took the secondment. Mr Allen complained to this office that since his basic salary had been increased, his pensions contributions should have been increased accordingly. The complaint was upheld on the basis that the letter writer had no authority to change the practice from the first

secondment and that there had been maladministration by the trustees in that they allowed the RMT to breach the scheme rules. It was directed that Mr Allen should (in agreement with the trustees) pay to the fund whatever additional contributions he could afford to pay in respect of the period from 1 April 1996 to the date of the Determination and that his prospective pension be increased accordingly.

Lightman J held that it had not been open to Mr Allen to pick and choose between those parts of the offer letter which were acceptable to him and those which were not. The offer letter contained a single offer made up of two non-severable elements. By his conduct in accepting the secondment Mr Allen had to be taken as having accepted that the pension contributions would not be enhanced during the period of secondment. Further, Lightman J held that a direction of the Ombudsman was enforceable as if it were an order of the county court and as such it could not require the parties to agree anything. The direction was consequently void.

### **9 November 2001**

***Moore's (Wallisdown) Ltd v Pensions Ombudsman, Albert Edward Garwood and Royal and Sun Alliance Life and Pensions Ltd***

**[2002] 1 All ER 737**

**High Court, England - Ferris J**

In April 1990 Mr Garwood joined the company's existing pension scheme (PLAS). In December that year the company offered its employees, including Mr Garwood, a new scheme (the PlusPlan). A letter sent to Mr Garwood together with the PlusPlan's explanatory booklet stated that the aim of the scheme was to provide the same level of pension as under PLAS and stated "your employer will contribute the balance of the costs of the benefits" over and above the employee's contributions. In 1997 the company set up another scheme to which Mr Garwood transferred his benefits under the PlusPlan. Mr Garwood was told that the new scheme would "provide at least the same benefits to members as [PlusPlan] for the future". In 1999 Mr Garwood complained to my predecessor that the pension payable to him on his early retirement was substantially lower than if he had remained with the PLAS and was insufficient to provide him with the benefits promised to him.

Mr Garwood's complaint was upheld. The reference to the employer paying "the balance of the cost of the benefits" amounted to a promise to pay whatever contribution was required to provide the same level of benefits as under the PLAS. Further that promise was contained in a letter which it was held amounted to a notification of the employer's contributions under the scheme rules which was enforceable as a trust obligation. It was further held that this promise continued into the new scheme established in 1997.

The employer/trustee and insurer (Royal and Sun Alliance) appealed. Ferris J upheld the appeal. He held that the letter did not contain a promise, instead it was expressed in language indicative of a statement of intention which recognised that the aim may not be achievable and expressly stated that the aim was not guaranteed. He further rejected my predecessor's conclusion that the letter amounted to a notification and therefore was enforceable as a trust obligation. However, he did state that had there been a promise it was possible that it may have been enforceable in contract in the context of a continuing employment relationship.

Ferris J also expressed the view, without deciding the point, that he had great difficulty with the view that failure to implement an unenforceable obligation amounted to maladministration. His view was that such a failure could be redressed only in accordance with established principles of trust and employment law.

Ferris J also gave general guidance on Pensions Ombudsman appeals. He stated that pursuant to Part 52 of the Civil Procedure Rules the Ombudsman was not a respondent to an appeal from his Determination and did not have a right to be heard. Nevertheless, the court recognised the help that the Ombudsman's participation in appeals provided and stated that it was obviously desirable that this practice continued in appropriate cases. As such the Ombudsman would usually be heard when application was made by him to do so. As the Ombudsman is not a respondent to an appeal, he was held not to be bound by the strict time limits when responding to an appeal. Nevertheless, Ferris J stated that he should make parties aware of his intention to participate a reasonable time in advance of the appeal (being no later than two months after receipt of the appellant's notice) and should make reasonable proposals with regard to service of his skeleton argument.

### **23 November 2001**

***The Chief Constable of Hertfordshire v Pensions Ombudsman and Diana Rosemary Iwi***  
**Unreported**  
**High Court, England - Blackburne J**

Dr Iwi had been employed between January 1990 and June 1996 by Westminster City Council, from then until September 1997 by the Metropolitan Police and from then until being made voluntarily redundant on 31 December 1999, by the Hertfordshire Police Authority. On joining the Hertfordshire Police Authority Dr Iwi became a member of the Local Government Pension Scheme and transferred her pensionable service rights accrued with the Metropolitan Police (which included rights accrued whilst working for Westminster City Council). Dr Iwi applied to the Chief Constable of Hertfordshire for him to consider the exercise in her favour of a discretion to credit her with further years' membership of the scheme as provided for in certain circumstances by the Local Government (Discretionary Payments) Regulations 1996 (**the regulations**). Dr Iwi's application was turned down on the basis that she failed to meet the criterion of at least five years' continuous service provided for by a policy statement which was issued in compliance with the regulations. Dr Iwi complained to this office. There were two parts to the complaint. One was whether the Chief Constable misinterpreted the meaning of continuous service by failing to include Dr Iwi's service with the Metropolitan Police and Westminster City Council. The other was whether by confining the exercise of his discretion under the regulations to an applicant who had five or more years' continuous service the Chief Constable might have unlawfully fettered his discretion. Dr Iwi's complaint was upheld in respect of the misinterpretation of the meaning of continuous service and as such part two of the complaint was not considered.

The Chief Constable appealed against this decision and both parts of the complaint were considered on appeal. The appeal considered in detail the provisions of a handbook that defined continuous service and to which the policy statement referred. The handbook stated that previous employment with organisations covered by the *Redundancy Payments (Local Government) (Modification) Order 1983* would be continuous service. This Order included police authorities but not the Secretary of State (thereby excluding the

Metropolitan Police). Blackburne J upheld the appeal. He held that the Ombudsman had misconstrued the relevant provisions of the handbook and the Order when determining continuous service. He held that Dr Iwi was only entitled to aggregate periods of employment with a police authority and this did not include the Metropolitan Police (at that time). With regard to whether the Chief Constable had fettered his discretion, Blackburne J stated that he was not willing to short-circuit the proper consideration of the issue and simply dismiss the appeal. In his view it was the very kind of issue where it was entirely appropriate that the matter should be first considered by the Ombudsman. He therefore remitted this issue, which has as yet not been determined.

### **21 December 2001**

***Moore's (Wallisdown) Ltd v Pensions Ombudsman, Albert Edward Garwood and Royal and Sun Alliance Life and Pensions Ltd***  
**[2002] 1 All ER 737**  
**High Court, England - Ferris J**

This was the decision on costs in relation to the above appeal. Until this case was heard the position on costs was that if the Ombudsman participated in an appeal and lost he should pay the costs of that appeal but only to the extent that they had been increased by the Ombudsman's participation at the hearing of the appeal (*Elliot v Pensions Ombudsman* [1998] OPLR 21). Ferris J did not consider himself bound to follow this and held that the Ombudsman should be treated as would any other party to an appeal, namely that the unsuccessful party pays the costs of the successful party which was the general position with appeals from other tribunals as affirmed in the case of *Touche* [2001] 3WLR 161, which was heard shortly before this appeal.

### **1 February 2002**

***Tameside Metropolitan Borough Council v Pensions Ombudsman***  
**[2002] EWHC 17 (CH)**  
**High Court, England - Rimer J**

Mr Barlow had been employed by Tameside Metropolitan Borough Council (**Tameside**) and was made redundant in 1986. He referred a dispute to the Ombudsman on 29 July 2000 about the calculation of a 'clawback' from his severance pay.

He was entitled to a lump sum termination payment of £22,418.52, an added years lump sum compensation payment of £3,212.43 and an added years annual compensation payment of £1,070.81. The lump sum and annual compensation was payable under regulation 6 of the *Local Government (Compensation for Premature Retirement) Regulations 1982*.

Mr Barlow's termination payment exceeded his lump sum compensation by £19,206.09. He received the benefit of that excess in 1986, when he was made redundant. Regulation 14(4) of the 1982 Regulations provides:

"Where a beneficiary receives a termination payment which exceeds his lump sum compensation, his annual compensation shall be reduced by the amount of the excess, so that no instalment of annual compensation becomes payable to him until the aggregate of reductions equals the amount of the excess."

The issue was whether in calculating the “annual compensation” which is each year so “reduced” by regulation 14(4), it was necessary to apply to that compensation the index-linked increases which are statutorily applicable to local government pensions.

Dr Farrand determined that in performing the regulation 14(4) exercise, it was necessary to take account of the increases to the annual compensation which would, but for regulation 14(4), have been payable to Mr Barlow. The annual compensation which was “reduced” by the provisions of the regulation must still be regarded as part of the compensation “payable” to Mr Barlow so that the Pensions (Increase) Act 1971 applied to it.

Tameside’s appeal was allowed. Rimer J held that the reference to “annual compensation” in regulation 14(4) was to the basic, unindexed rate of such compensation and that the key to the issue lay in the sense of the words “reduced by the amount of the excess”. In his view, that sense was “extinguished to the extent of the excess”, with the consequence that the overall effect was that Mr Barlow’s entitlement to his annual compensation at the basic rate was deferred until the reduction process was concluded.

He considered that the compensation so reduced could not even be regarded as being notionally payable to him but subject to a set off against the excess - that during the period of deferment, Mr Barlow was simply not entitled to any compensation at all. There was no scope for indexing any of it. Regulation 14(4) required no more than the division of the amount of the basic, unindexed annual compensation into the amount of the excess, an exercise which would produce the number of years for which the payment to Mr Barlow of the first instalment of annual compensation would be deferred.

#### **15 February 2002**

##### ***De Silva v Pensions Ombudsman***

##### **Unreported**

##### **High Court, England - Lloyd J**

The trustees of a pension scheme paid a lump sum death in service benefit to the daughter of a deceased member of a pension scheme. Mrs De Silva had lived with the deceased and was financially dependent on him. She received a pension equivalent to that of a widow from the scheme. She however complained of maladministration by the trustees of the scheme in not paying to her the lump sum death in service benefit. Her complaint was dismissed by myself on the basis that under the scheme rules the death in service benefit was properly paid to the daughter of the deceased as personal representative. Mrs De Silva appealed to the High Court. Lloyd J held that there was nothing on the facts of the case qualifying or overriding the rule under which the death in service benefit had to be paid to the personal representative of the estate and accordingly that I was right to reject the complaint.

#### **21 March 2002**

##### ***The Queen on the application of Britannic Asset Management Limited, Britannic Unit Linked Assurance Limited and Britannic Investment Managers Limited v The Pensions Ombudsman***

##### **[2002] EWHC 441 Admin**

##### **High Court, England - Lightman J**

Mr Brian Smith, aged 59, made a complaint of maladministration against various companies of the Britannic group (**Britannic**) in connection with the Cheney Pension

Scheme (**the Scheme**) in April 2001. The sole assets of the Scheme were two managed fund pension policies issued to the trustees of the Scheme by Britannic. Between April and October 2000 divestments from one policy totalling £2,980,165 were requested by or on behalf of the trustees and paid by Britannic.

Broadly, Mr Smith alleged that those divestments were tortious and made in breach of the trust to the Scheme.

My predecessor decided that although the jurisdiction and merits of the complaint overlapped somewhat, Britannic were administrators. Britannic applied for a declaration that the Ombudsman had no jurisdiction to investigate the complaint on the basis that they were not administrators. Lightman J held that the Ombudsman had no jurisdiction to investigate.

Lightman J considered that there were two issues - (1) whether as a matter of law Britannic acted as administrators; and (2) assuming that Britannic acted as administrators, whether the Ombudsman had jurisdiction to investigate a complaint against them though they had not themselves committed any act of maladministration in their role as administrators and whether it was sufficient that Britannic had a role as administrators when acts of maladministration were committed by others ie the former trustees.

He found that Britannic were not persons concerned with the administration of the Scheme and that even if they were, they were not guilty of maladministration in the acts about which complaint had been made.

He considered the following. (1) Acts of a person may be acts of administration concerned with the scheme but that it did not necessarily follow that the person was an administrator - the test being whether in so acting the person was concerned with the administration of the scheme. (2) That this involved looking at the person’s role in carrying out the acts and what and whose affairs they were administering. (3) That a person involved with an act of administration for the trustees may be concerned with the administration of the scheme - the touchstone being whether the person is engaged to act, or advise in or about the trustees’ affairs in running the scheme. (4) That the essence is for a person to have assumed an administrative role “on the trustees” side in the administration of the scheme affairs. (5) That administering the scheme meant in whole or part running the scheme, for example, inviting employees to join, keeping member records, communicating with members, calculating benefits, providing benefit statements, dealing with regulatory authorities. (6) That in the case of a funded scheme it could also involve running the fund, investing and managing the scheme’s assets.

More particularly, Lightman J found that in processing the disinvestments Britannic were not so engaged - they were simply complying with their contractual obligations under the policy. Britannic had no right or obligation to inquire into the propriety of the trustees’ decision. In complying with the trustees’ instructions, Britannic were not acting for them or acting on their side: they were acting as the counter party with whom the trustees had contracted and were on the other side of the fence and they were accordingly not acting as administrators of the scheme.

He further held that even if Britannic had assumed the role of administrators or were administrators there was no question of any maladministration by Britannic in so acting. The adventitious fact that there was maladministration by the trustees and Britannic were

at the time administrators or acting as administrators, could not vest jurisdiction in the Ombudsman in respect of Britannic. It was not possible to “decouple” the status of administrator of a subject of a complaint, for example, as administrator and the maladministration causing injustice and investigate a complaint against an administrator where the only maladministration was by the former trustees.

Permission has been given for a further appeal to the Court of Appeal.

**19 April 2002 (heard 25/26 February 2002)**

***The Trustees of Uppingham School Retirement Benefits Scheme for Non-Teaching Staff and the Trustees of Uppingham School v Mrs Shillcock***

**[2002] 52 PBLR**

**High Court, England - Neuberger J**

Mrs Shillcock was employed by the school as a member of its non-teaching staff from 2 June 1984 until 2 November 1996, during which time she worked part time for roughly 20 hours each week. Mrs Shillcock was never invited to join the school’s pension scheme. As such on 7 June 1996 she complained to the Ombudsman that her exclusion from the scheme amounted to indirect sex discrimination. The scheme was a final salary, contracted in scheme. The rules provided that membership was discretionary, but in any event an employee had to meet certain criteria prior to applying to join the scheme one of which was that they earned in excess of the Lower Earnings Limit (“LEL”). For the majority of her employment with the school, Mrs Shillcock earned less than the LEL.

Mrs Shillcock’s complaint was upheld. 94% of the non-teaching staff earning below the LEL were women, all of whom were excluded from the scheme. As a result none of these women were entitled to the death in service benefit. It was therefore determined that this contravened section 118 of the *Pension Schemes Act 1993* and Article 119 (now Article 141) of the EC Treaty and amounted to indirect discrimination. The Determination also held that the scheme excluded more women than men and its requirements could not be objectively justified on economic grounds, further that if Mrs Shillcock had been admitted to the scheme it would have been unlawful to disallow contributions and pension entitlements for the whole of her earnings below the LEL. It was directed that the trustees should arrange for Mrs Shillcock to be admitted to the scheme from 7 June 1993, being the date three years before her complaint; that the trustees should arrange for Mrs Shillcock to be provided with pension accrual that did not discriminate against her because of her low earnings, but that this duty was conditional upon Mrs Shillcock, at the trustees’ request, paying to the scheme contributions at a level consistent with her having been a member of the scheme since 7 June 1993.

The trustees and employers appealed on a number of grounds. They argued that my predecessor was wrong to proceed under section 118 and Article 141 as the relevant provision was section 62 of the *Pensions Act 1995*; that the Ombudsman had no jurisdiction over death in service benefits; that the complaint should have been rejected because no male comparator performing equal work had been identified who had been more favourably treated; that the terms of the scheme did not treat any group of employees less favourably than any other group as the LEL criteria applied to all groups of employees equally and finally that Dr Farrand was not entitled to reject the appellants’ justification of the basis upon which benefits were calculated under the scheme.

Neuberger J held that Dr Farrand was entitled to rely on section 118 of the *Pension Schemes Act 1993* (as amended) in respect of much of the period of Mrs Shillcock’s employment, although by the same token section 62 of the *Pensions Act 1995* was in force for the last months of her employment. However, he stated that the conclusion was of no particular significance as it is common ground that whichever is the correct provision the outcome is the same. In any event the purpose of these provisions was to implement Article 141 and to the extent that they did not do so Article 141 was capable of direct effect. Neuberger J went on to find that the Ombudsman had no jurisdiction over death in service benefits. He held that an ‘authorised complainant’ (a person that can complain to the Ombudsman) by definition within the *Pension Schemes Act 1993* was a class of persons limited to those enjoying or claiming long service benefits. (It should be noted that there were legislative changes after this decision which changed the definition of who can complain to the Ombudsman). Neuberger J as a result solely had regard to the benefits under the scheme. He held that the proper approach to cases of indirect sex discrimination was first to consider whether, taking account of the purpose of the payment, there is a difference in treatment. He stated that there was not a difference in treatment between those earning more and those earning less, than the LEL. As such he held there was no unlawful discrimination. The issue of whether it was necessary for there to be a male comparator, which Neuberger J felt was not *acte clair* (and if a live issue would have had to be referred to the ECJ), did not need to be determined. Whilst that concluded the case in favour of the appellants, Neuberger J continued to find that the trustees’ justification for any alleged difference in treatment between male and female employees (being the desire to achieve a broad integration with the State pension scheme) was a legitimate justification and that a court should not be over-ready to substitute its own view of what was legitimate justification.

As a final point it was submitted on my behalf that the direction that Mrs Shillcock be afforded membership of the scheme (on terms) by reference to a date three years before her complaint, was (in terms of the temporal limitation) inappropriate in light of what was subsequently held in *Preston v Wolverhampton Health Care* [2000] ICR 961. Whilst it was ultimately irrelevant as the appeal had been upheld, Neuberger J accepted that this view was right.

## CHAPTER 5: Management

### Costs

The office receives its funding from the Department for Work and Pensions. Total expenditure for the year was £1.536m (£1.403m in 2000-2001) against budgeted expenditure of £1.683m. A breakdown is given at Appendix 2.

### Staff

As a small office, we are naturally vulnerable to staff changes. At the beginning of the year a management post became available in circumstances which had not been planned. This was filled by an internal promotion. This left a gap which was also filled internally, in turn creating another vacancy for which an external appointment was made. It is pleasing that the office was able to promote from within in this way, but the unfortunate side effect was that the office was one person short through three recruitment processes. During the year six members of staff left as well as Dr Farrand. Not all were replaced.



Administrator, Mike Lydon

### Structure

One reason for delaying recruitment was that I wanted to review working methods and the supporting structure. Towards the end of the year the Management Team spent two days away with the aid of a facilitator reviewing goals and processes, one outcome of which was a proposal for a revised structure which will be implemented in 2002-2003.

### Investors in People

During the early part of the year the office underwent a reassessment to establish whether the Investors in People (IIP) standard was continuing to be met (the Pensions Ombudsman originally received IIP accreditation in July 1999). The assessor reported that the standard was not being met, though accreditation was not withdrawn. Both Dr Farrand, who was the Ombudsman at the time the report was delivered, and I felt that the report was fundamentally flawed although I accepted that, whilst not well expressed, it did legitimately reveal some weaknesses. An action plan was drawn up soon after I took over as the Ombudsman. On advice from the Department for Work and Pensions, the office is now working with a different assessment organisation and will be reassessed during 2002-2003.

### IT

On the initiative of the Minister for Pensions, senior staff of the Department for Work and Pensions were asked to respond to my concerns about the adequacy of the existing IT systems and to advise me in moving to a less paper-based environment. Their initial review confirmed that there was an urgent need to replace some PCs whose speed of operation was and is hindering the efficient and effective processing of work. Although new machines were purchased it has not yet been possible to bring them into operation because of difficulties in running the existing software on a more up to date platform. I am reluctant to spend the £10,000 quoted by the DWP's out-sourced suppliers for the cost of conversion bearing in mind that there is likely to be a need to commission a new software system in the fairly near future.

The office website ([www.pensions-ombudsman.org.uk](http://www.pensions-ombudsman.org.uk)) which went live in April 2001 has proved successful. It now receives on average about 100 visits a day. Many visitors are from pensions professionals looking through past Determinations, but there are plenty of visits to the parts of the site which describe powers and procedures, and an increasing number of people use the forms available from the website on which to complain. The next stage in developing the site is to enable these forms (which presently have to be printed and returned manually) to be completed and transmitted electronically.

## Appendix 1: Staff in post at year end

|                                       |  |  |   |
|---------------------------------------|--|--|---|
|                                       | <b>Pensions Ombudsman</b>  | David Laverick                                   |   |
|                                       | <b>Personal Assistant</b>  | Suzannah Little                                  |   |
|                                       | <b>Casework Director</b>   | Tony King  |   |
| <b>Legal Adviser and Investigator</b> | Beverly Crossland  | <b>Special Legal Adviser</b>                     | Sarah Jacobs  |
| <b>Legal Adviser and Investigator</b> | Claire Ryan  |  |   |
| <b>Team Leader, Investigations</b>    | Lesley Stead   | <b>Team Leader, Applications &amp; Enquiries</b> | Peter O'Brien   |
| <b>Investigators</b>                  | Tom Bick<br>Michaela Brown<br>Marc Coe<br>Rod Joyce<br>Tony Krishna<br>Caroline Leal<br>Patrick Mills<br>Geoff Naldrett<br>Terry Stevens | <b>Applications &amp; Enquiries Team</b>         | Jennie Aldridge<br>Carl Monk<br>Paul Strachan<br>Vasanthy Vijayaratna |
|                                       | <b>Administrator</b>   | Mike Lydon                                       |   |
|                                       | <b>Office Supervisor</b>   | Peter Watkins                                    |   |
|                                       | <b>Administrative Officers</b>   | Leroy Hanson<br>Kai Lau                          |   |



*The Management Team - Tony King, David Laverick, Peter O'Brien, Lesley Stead and Mike Lydon*

## Appendix 2: Expenditure

|                             | 2001-2002 | (2000-2001) |
|-----------------------------|-----------|-------------|
|                             | £'000     | £'000       |
| Staff                       | 977       | (952)       |
| Accommodation               | 168       | (132)       |
| Telecoms/Computers          | 55        | (20)        |
| Printing/Stationery/Postage | 52        | (48)        |
| Legal Costs                 | 195       | (117)       |
| Other                       | 85        | (110)       |
| Total Running Costs         | 1,532     | (1,379)     |
| Capital Expenses            | 4         | (24)        |
| Total Expenditure           | 1,536     | (1,403)     |

£12,600 of legal costs were recovered in the year (2000-2001, £0)

## Appendix 3:

### Response from the Pensions Ombudsman to the Simplification Review

#### I. Introduction

1.1. Having been in post only for four and a half months I am reticent about expressing views about how pensions legislation should be simplified. I have, of course, been able to draw upon the experience which the Pensions Ombudsman's office has gained over the last ten years but essentially my submissions should be seen more as the offerings of an interested newcomer than an expert on the scene. My submissions are primarily in relation to occupational pension scheme rather than private pension provision.

1.2. I have sought to respond to the consultation using the "input from industry and consumer" headings as they appear in the invitation to comment.

1.3. The invitation to respond to the announced review tends to focus on reviewing the regulatory framework and the costs of administration. Without seeking to downplay the importance of those factors I would suggest that there is scope for simplification of the whole concept of occupational pensions and not simply its regulatory regime. The concept of an occupational pension seems to me to be essentially simple: the employee agrees to receive part of his emoluments in the form of a deferred payment, the payment actually taking place after retirement. Regulation is needed primarily to ensure that the funds involved in that deferred payment are available for delivery of the pension when required.

1.4. The primary method by which the law seeks to ensure that money which has been set aside for the payment of a pension is available when required is by the use of a Trust. The law has in effect used a vehicle originally designed for another purpose. I doubt whether, if starting from a clean sheet, one would seek to use a vehicle designed for the transport of individuals two hundred years ago to provide mass transit in the 21st century.

1.5. Taxation policy and practices are a complicating factor and may be outside the scope of the DWP review. The starting point seems to be to provide tax incentives toward encouraging participation in occupational pensions schemes. Tax incentives perhaps carry with them a temptation for some people to exploit them and this in turn leads to detailed provisions designed to limit such abuse. I would be interested to know what the net effect is of the interplay between the tax regime as it applies to pensions and the extent to which income support needs to be provided to the retired population. On the one hand the Government agrees not to collect tax on some earnings (or deferred earnings) during the taxpayer's working life. Tax is not ever collected at all on some of those earnings (paid as a tax-free lump sum subject to Inland Revenue limits). Tax is collected on the payment of pensions but this may be at a lower rate than would have applied during the taxpayer's working life. In exchange for receiving lesser tax revenue the Government presumably expects that the pension provision built up by the taxpayer will lessen the need for income support from the Government during the taxpayer's retirement: such support has in effect been provided at an earlier stage. Both my general knowledge and my limited experience as the Pensions Ombudsman suggests that this analysis of the tax provisions affecting pensions is not well understood by the population at large. That lack of understanding manifests itself particularly at the point where the taxpayer finds there are limits on the amount of the pension fund which can be taken as a lump sum.

1.6. Many complaints made to the Pensions Ombudsman's Office can be seen as resulting, though sometimes indirectly, from the complexity of pension schemes and their administration. For example, the more convoluted is a calculation, the greater the risk of it being performed wrongly. Not all complexity has its roots in legislation and regulation. Often, however, complex practices emerge to accommodate difficult or elaborate legislation. As a generalisation it must be true that simpler legislation and regulation tends to lead to more straightforward pension schemes - about which there should be fewer complaints to the Pensions Ombudsman.

1.7. An Ombudsman is a different institution from a Regulator, the latter term having acquired a particular connotation in recent years. The Regulator tends to be concerned with the administration of the scheme in general and is likely to have a proactive policing role. The Ombudsman tends to be concerned with looking at the way an individual has been treated and his involvement is triggered by a reference to him of the particular complaint. Nevertheless the Ombudsman might be seen as part of the process of regulation if that term is given a fairly wide definition.

## **2. Unnecessary Areas of Regulation**

2.1. Even where regulation is accepted to be necessary, it may be over-prescriptive. Examples can readily be found in the areas of member nominated trustees, internal dispute resolution and contracting-out procedures. Whilst there may be legitimate reason to place the onus on trustees or employers to take particular steps, it should not be assumed that the precise way in which they do so needs to be prescribed. For example, where it is necessary to inform employees, an official notice using prescribed and convoluted terminology is likely to be ignored. It may be of less value than a more informal process of notification would have been.

2.2. There may be a tendency for interested parties to argue in favour of prescription during the regulation making process, since it makes obligations clear and certain and (in theory at least) leaves less to chance. Just as there may be a tendency for Regulatory measures to be over-prescriptive so there may also be a tendency for those drafting Trust Deeds and scheme rules to be over-prescriptive. In the end, however, prescription can be counter-productive.

## **3. Duplication**

3.1. Whilst OPRA might be seen as the primary regulator of pension schemes others involved in the aspects of regulation are the Inland Revenue, Ombudsmen and the courts.

3.2. From my point of view as the Pensions Ombudsman there is a relatively small area of overlap with the work of OPRA and administrative arrangements are in place to ensure that no undue delay or inconvenience is caused as a result.

3.3. There is some overlap between the jurisdiction of the Pensions Ombudsman service and that of what is now the Financial Ombudsman Service. The two offices have reached agreement on how to deal with matters within that shared area in a way which avoids duplication and which does not cause any inconvenience for complainants or respondents.

3.4. I am not aware of any duplication between my work and that of the Inland Revenue although there may be times when the interpretation given by the Inland Revenue may not be upheld either by the Pensions Ombudsman or the courts. Those involved with pensions schemes, whether as providers or consumers may find it confusing if a particular issue is interpreted differently by different regulatory bodies.

3.5. Similarly I recognise that there can be confusion if the same issue is interpreted differently by the Ombudsman and the courts.

3.6. It might be helpful to remove the possibility for disputants to use the courts as an alternative to using the Pensions Ombudsman in matters relating to the administration or management of pensions. In making that suggestion I am proposing the retention of the present provisions whereby there is an appeal on a point of law against a finding of the Pensions Ombudsman.

## **4. Over-prescriptive and time-consuming regulations**

4.1. Coming afresh to the Pensions World I have been particularly struck by the detailed prescriptive nature of the IDR procedure. In my view it would be sufficient to preclude an ombudsman (or court) from dealing with a complaint or claim unless the respondent had themselves had a reasonable opportunity for investigating and responding.

4.2. The Regulations governing the procedures to be followed by the Pensions Ombudsman also seem to me to be unnecessarily prescriptive and serve to prevent some direct and common sense ways of obtaining information more quickly and more cheaply.

4.3. I am struck by the extent to which lawyers are involved in making and responding to complaints dealt with by the Pensions Ombudsman. It seems to me that there could be a significant number of complaints which might be resolved to the satisfaction of all parties (except perhaps the lawyers who would be drawing their fees) if less formal procedures could be adopted along the lines of those used by the Parliamentary and Local Government Ombudsmen.

## **5. Consumer Interests not adequately addressed**

5.1. I am not convinced that the current Regulatory regime necessarily secures what I regard as the primary aim of Regulation, namely securing that funds are available to meet the promised payments of pensions.

5.1.1. The Pensions Compensation Board will step in where there appears to have been fraud which has led to the loss of Pension Funds. My doubts arise in the context of cases where there have been administrative failings on the part of Trustees. Exoneration clauses may preclude losses incurring as a result of those failings being recovered from the Trustees.

5.1.2. The protection afforded to Trustees seems to me to have its roots in the choice of private trust deeds as the model for Pensions Schemes. Courts seem to have been concerned not to make too onerous the liability of those private individuals who agreed to give of their time and effort to administer trusts for the benefits of others. While that

may not be unreasonable in the context of the private trust I am doubtful whether it is an appropriate starting point for the administration of a Trust involving several million pounds and the future well being of several thousands of scheme members.

5.1.3. Possible ways to overcome this might be to extend the terms of reference of the Pensions Compensation Board or alternatively to require Pension Funds to carry indemnity insurance.

5.2. Consumer interests are also adversely affected by the complexity and extent of Pension Scheme Documentation.

5.2.1. The individual member of a pension scheme has very great difficulty in distinguishing between the roles played in the provision of his pension by the employer, the scheme trustees, the scheme manager and others.

5.2.2. Some other Ombudsmen are effectively concerned with dealing with complaints about alleged transgressions of an industry-wide code of conduct. I am faced not by such an industry-wide standard but with the somewhat anarchical situation which obtains in the world of occupational pensions where myriad schemes each have their own provisions many of which are entirely inconsistent with each other. This must be particularly confusing to employees who in the course of their lifetime are subject to several different schemes.

5.2.3. I wonder whether it would not be possible for a Regulatory Authority (presumably OPRA) to produce and keep under review a Model Pension scheme (or possibly three or four to meet broad categorizations). Existing schemes could then be given a limited period in which to adopt one or other of the Model schemes. If such a proposal were adopted I would make it a requirement for the consent of the Regulator to be obtained if a scheme wished to vary a Model scheme. Although this may sound a radical proposal, it is not a long way removed from requirements for schemes to keep within the rules laid down by the Revenue in order to obtain tax relief.

5.3 Pensions regulations are to be found in a range of enactments, practice notes and other official guidance. It would be helpful if these could be consolidated.

5.4. Consumer interests are not well safeguarded when transferring from one scheme to another. My impression is that the "Club transfer" rules which apply in the Public Sector are a great deal fairer to scheme members than the transfer values offered in the private sector. The move away from final salary to money purchase schemes may make it easier to set up a system which, from the employees' point of view would offer fairer transfer values without imposing an unfair burden on the "receiving" employer.

## **6. Areas of Complaint**

6.1. The Pensions Ombudsman's Office publishes each year a breakdown of the kind of issues involved in each complaint. The two largest categories are complaints about the denial of (or delay in approving) applications for ill-health or incapacity benefits, followed by complaints about the calculation of benefits. Other significant categories of complaint relate to winding-up administration, enhancement of pensions, late payments, and transfer arrangements.

6.2. In addition to the main categorisation on which the Annual Report's statistics are based a number of complaints may also raise issues falling under other categories. A large proportion of complaints include as a subsidiary issue a reference to the length of time taken by and difficulties encountered in the IDR processes or stages before that process is formally engaged.

## Appendix 4: Charter

Our role is to provide an impartial, efficient and effective method of resolving complaints and disputes concerning pension arrangements referred to our office under our governing legislation. We will write to you wherever possible in plain English although sometimes we may need to refer to legislation or to court judgments. We will deal courteously and constructively with all people having contact with the office.

If you are making an initial enquiry or complaint, we will

- acknowledge it within two working days of receipt
- advise you what to do if we cannot deal with the matter

If a complaint or dispute is accepted for investigation, we will

- process it as quickly as possible (our target is that the average time of all investigations from application to final decision will not be more than twelve months)
- review the file at least monthly to minimise delays
- keep all parties informed of progress and, if delays cannot be avoided, tell you and indicate the likely timescale

You can telephone us

- on normal working days between 9 am and 5 pm, and outside these hours you may leave a message on our answer phone which we will deal with on the next working day
- we will answer the telephone promptly, usually within five rings

If you are unhappy with our service

- please let the person you are dealing with know

If you wish to complain formally about our service (but not about decisions reached), please write to:-

**The Casework Director,  
Office of the Pensions Ombudsman,  
11 Belgrave Road,  
London,  
SW1V 1RB**

We will acknowledge your letter within two working days unless we can provide a full reply within four working days. We will normally reply in full within seven working days. If we cannot do so, we will explain why, and when we expect to be able to issue a full reply.

If you remain unhappy about our service you can ask a Member of Parliament to refer the matter to the Parliamentary Ombudsman. He may review the way that the case was handled but will not consider formal decisions made by the Pensions Ombudsman or his staff.

