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The Pensions Ombudsman David Laverick

To: The Right Hon David Blunkett, Secretary of State for Work and Pensions

I have pleasure in submitting the Annual Report of the Pensions Ombudsman for the year 1 April 2004 to 31 March 2005.

DAVID LAVERICK
Pensions Ombudsman - July 2005

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Introduction

For the second year in succession, I can report that I have completed work on more investigations than at any time since the Pensions Ombudsman's office was established. The number of completed investigations has increased by a little over 20% by comparison with the previous year. More complaints than ever before were received by my office.

But, I have still ended the year, as envisaged in my business plan, with far too many investigations in hand. This gives rise to unavoidable delays. There is some truth in the adage that Justice delayed is Justice denied and I am particularly embarrassed by making findings from time to time of unreasonable delay on the part of those managing and administering pension schemes, when the time I have myself taken has been so long.

The business plan for the year on which I am reporting indicated an intention to maintain, rather than increase, staff numbers even though a consequence would be to delay making inroads on the aim of reducing the amount of work in hand. There were three reasons underlying that approach:

- I had no spare accommodation in which to house additional staff;
- until an adequate IT system was provided I could not envisage making further use of home-based staff;
- even if more staff were employed, there would be a bottleneck created by the need for all determinations to be dealt with personally by a single Ombudsman.

The first two of those issues required action from the Department for Work and Pensions which directly provides the accommodation and IT resources for my office. The third required a change to the legislation.

By 31 March 2005, only the third problem had been overcome. Following provision in the Pensions Act 2004, a Deputy Ombudsman, Charlie Gordon, has been appointed and took up his post the following week. I am delighted that such an appointment has been made. He comes with a wealth of experience as the Head of the Office of the Independent Adjudicator for the Inland Revenue and Customs and Excise and thus is well used to the handling and determination of complaints.

In discussing with officials from the Department the job description and person specification for that post, I was anxious that the Deputy Ombudsman should play a major part in the management of the office as well as sharing with me, responsibility for the determination of the casework. In order to cope with the increased amount of casework, I had switched resources from management and administration more directly into the investigation of complaints. While that was justified in the short-term, there are longer-term disadvantages and the management capability of the office needs to be strengthened.

The Deputy Ombudsman and I have agreed a broad division of our duties: he will take responsibility for the internal management of the office while I will look after external relations. I take responsibility for the determination of the casework which is the subject of full investigation and for which determinations are published on my website. The Deputy Ombudsman will take responsibility for

those references which are determined less formally. This is not a rigid division: we will, for example, each be covering the other's work during periods when leave from the office is being taken and we will also be accepting cases from each other to overcome potential conflicts of interest.

Welcome as is the arrival of the Deputy Ombudsman, who will I am sure make a significant impact, that impact will to some extent be diminished by the failure to overcome the other two problems which were identified. I end the year with no different accommodation than when I began; and nor has there been any improvement to the IT system. The latter is particularly disappointing. At my first meeting with the then Minister for Pensions after my appointment, I raised my concern about the inadequacy of the system I had inherited and particularly about the lack of management information available to me. Despite a willingness in principle on the part of that Minister, and his successor, for a solution to be provided, and despite an indication that the finance could be made available, there has not been any progress.

Thus, as I move into the next financial year, I have had to reformulate my business planning. A year ago I had anticipated having additional staff in post as from 1 April and thus being in a position to make inroads into the amount of work in hand. The lack of accommodation means that such plans have had to be postponed. The inefficient working which is caused by simply having more work on hand than I am staffed to cope with, is compounded, as it has been for the year under review, by the inadequacies of the IT system.

As in previous years, I have sought to maintain contact with a wide variety of groups with an interest in the provision and effective administration of pensions. Thus I have met with the National Association of Pension Funds, the Pensions Management Institute and the Society of Pension Consultants.

During the course of the year, I accepted an invitation to establish the office of the Pension Protection Fund Ombudsman and have held preliminary discussions with the Chairman and Chief Executive of that Fund as well as civil servants who have been drafting the Regulations which will govern that office.

Opportunities have been taken during the course of the year to talk with various parts of the Trades Union movement, and I have spoken at several events which they have organised. I have been surprised that the trades unions representing workers in the public sector, have not been pressing Ministers to amend the public sector schemes to overcome the effects of the decision of the High Court in *Minister for the Civil Service v Oakes.* Mr Oakes is a prison officer who hurt his neck while restraining and controlling a violent prisoner. I find it hard to believe that, in framing the Injury Benefit Scheme, Ministers intended to deny a benefit to someone where, in the words of the Scheme's medical adviser, there is "little evidence to suggest (he) had significant... problems prior to the index event." It seems to me to be a denial of justice to deprive the officer of a benefit on the basis that the significant effects may have been partly, however minutely, caused by some pre-existing condition.

Other decisions of the High Court have also caused me some concern. In *Secretary of State for Education and Skills v Farley*, the Judge expressed concern in his judgement because I did not avail myself of what he termed my "right to be heard on the appeal." I note that he had not himself adjourned the case before him and directly made contact with me to request my attendance.

In my first Annual Report (for the year ending 31 March 2002), I indicated that I would be participating in an appeal only if that appeal raised an issue which would involve the Court determining a point which would represent a significant threat to the future effectiveness of my office. I have not been asked to review that policy.

I note that, in the particular case, the Judge felt that I should have followed a House of Lords case and declined to resolve a dispute of fact on the basis that there was insufficient evidence so to do. The facts in the House of Lords case were that a shipowner alleged that the total loss of his ship had been caused by perils of the sea. The Judge at first instance found that, of two theories put forward as the proximate cause of the loss, one was virtually impossible and the other was extremely improbable. The House of Lords determined that, having regard to that finding, neither the Judge nor the Court of Appeal were justified in drawing the inference that there had been a loss by perils of the sea. The House of Lords also stressed that, in the particular case, it was for the shipowner to discharge the burden of proof.

I am rarely faced by scenarios which are virtually impossible or extremely improbable but am frequently hampered by seeking, many years after a particular event, to obtain relevant evidence.

To suggest that there is a burden of proof on an applicant is to misunderstand the way an Ombudsman should work. An Ombudsman does not expect an applicant to bear a burden of proof in the same way as the Court does of a claimant. The applicant to an Ombudsman makes a complaint or a reference. It is then for the Ombudsman, using his statutory powers if necessary, to investigate the matter and obtain such evidence as is necessary and obtainable. Unless the Ombudsman can be satisfied, on the balance of probabilities, of a particular fact which is key to making a finding against a respondent, then such a finding cannot be made: in that sense alone the burden of proof can be seen as falling on the Ombudsman.

I have contributed several articles to various publications, primarily to explain the way my office works, but also to highlight some particular current issues.

Chapter 3 of this report sets out some of the more significant cases which have been determined in the course of the year.

As in previous years, I have been faced with a number of complaints about the denial of ill-health benefits.

I am pleased to note that most schemes have taken note of my previous criticisms and now ensure that the member is aware of (and thus has a chance to contest) the medical evidence on which a decision is made as to whether an ill-health pension should be awarded.

But I continue to be concerned by the failure of some trustees to recognise that the decision is usually one for them, and not for their medical adviser to take. Too often, trustees are failing to receive (and to recognise the omission) the advice needed for them to take the decision required under the wording of their specific rules.

The issue as to whether a person qualifies for such a pension is usually a question of fact and not a matter for the trustees' discretion. As such, it is open to me to direct that a pension should be provided where the question of fact has been wrongly determined by the trustees. I have done this where appropriate in the course of the year. Very often, however, there is a need to obtain more relevant medical advice than has so far been obtained, and in those cases I have remitted the matter back to the scheme with a direction to obtain appropriate advice and then to reconsider the application.

At a time when fund values have been volatile (and often falling) the date when a transfer takes place, or when the value of the transfer is fixed, can be particularly important. I have been critical of one insurance company who sought to argue that, although they did not give effect to the switch until much later, they based their valuation on the value of the fund at the date that they had first received the instruction, but before they had received all of the documentation which they required in order to give effect to the transfer.

I was also critical of a different insurance company who eventually carried out the switch and backdated it to the time when they had first received all the necessary documentation but who had then delayed for a very long time in confirming that such instructions had been acted upon; indeed they had sent out several statements of the fund's value as though no such switch had taken place.

I have also been critical of two other companies who, in effect, held up a transfer because of a dispute as to whether the form used to convey an indemnity should be that used by the transferring company or the receiving company. That was to give far too much emphasis (literally) to the form rather than the substance. I raised this with the Association of British Insurers (ABI) and have been encouraged by their willingness to explore the possibility of having their members agree a common form, in order to prevent a repetition of such problems.

I have also raised with the ABI and with the Financial Services Authority (FSA) a concern that there should be greater transparency in the process by which market value adjustments are made when calculating the value for transfer purposes of investments in with-profits funds. Policies tend to be written in a way which allows the insurance company to make such adjustments, without having to account for the calculations which presumably lie behind them.

Indeed, the need for clarity and accountability can also be seen to apply when charges are imposed on the early surrender of a policy.

The National Association of Pension Funds (NAPF) have been considering whether a trust remains the appropriate basis for an occupational pension scheme and asked me to provide evidence to them about this. The underlying concept of a trust (that money is held by one person for the benefit of another) does seem to me to be appropriate, although my preference would be for the law to create and recognise a pension trust, which would be seen as having characteristics distinct from those which have evolved through the common law. The common law concept of a trust arises from family settlements where the beneficiary has not usually played any part in the build-up of the trust fund. By contrast, beneficiaries may well have directly contributed to the modern day pension fund, and even where the contributions have come solely from an employer, this can be seen as in agreement with the employee who might be regarded as accepting part of his salary as a deferred arrangement.

My evidence to the NAPF had two other main thrusts. The first is that the modern day pension scheme ought to be written in terms which provide for benefits to be paid largely as a matter of right rather than at the discretion of trustees. Trustees should still have a part to play in determining whether the conditions for entitlement are met, but that requires the exercise of judgement, rather than the exercise of discretion.

I understand that historically, schemes have been set up with reference to benefits being discretionary, in order to minimise the likelihood of the value of benefits forming part of a deceased's estate and thus attracting inheritance tax. I am not convinced that is a sound argument in today's world.

The other principal comment I made, was about the difficulty inherent in trustees managing conflicts of interest in acting as trustees of schemes, of which they are themselves members or where they hold key management positions in the company which is the principal funder of the scheme. Those conflicts are particularly difficult to manage at a time when the scheme's funding may be strained. It seems to me that a case could be made out for requiring each pension trust to have at least one trustee who is truly independent and for that trustee to hold a right of veto over some actions. There would, of course, need to be some right of appeal or reference to another body against the allegedly unreasonable use of such a veto.

The casework chapter (Chapter 3) includes some examples of issues where trustees have been, or are alleged to have been, compromised by conflicts of interest.

Cases in that chapter also illustrate my approach to providing redress when things have gone wrong: I seek to put the parties back into the position which would have obtained had the errors not been made. I do not start from a position that, where there has been such an error, injustice is automatically assumed to have occurred. Nor is my aim to punish the erring party.

I do often need to form a view on what the parties would actually have done, had a particular erroneous act not taken place. If my view is that no different outcome would have ensued then, despite the error, I am unlikely to make any direction.

Where I do make a direction, I make up my own mind on the facts before me as to what the appropriate remedy should be. This may not always be for as large a compensatory sum as may have been previously discussed in negotiations between the parties, which have been conducted on a without prejudice basis.

I usually take the view, however, that where a justified complaint has been made then this ought to have been recognised and redressed at an earlier stage. The need to bring the matter to me can itself be seen as a source of distress and inconvenience for which some modest redress should be provided.

In the casework chapter, I mention the number of complaints which I have been receiving about the sale of AVCs to members of the Teachers' Pension Scheme. The key to most of these complaints is to establish whether the teacher concerned was made aware at the time that, as an alternative to the AVC arrangement being offered to them by Prudential, the Scheme's AVC provider, there was the possibility for the teacher to pay additional contributions in order to buy added years service within the Scheme. If that has not been made clear, then I have usually taken the view that the teacher has been denied the opportunity to make an informed choice, and have made a direction to restore the teacher to the position that would have obtained had such a choice been offered. But I do take

account of all the circumstances of the individual case, including for example what happened when the teacher did become aware of such a choice.

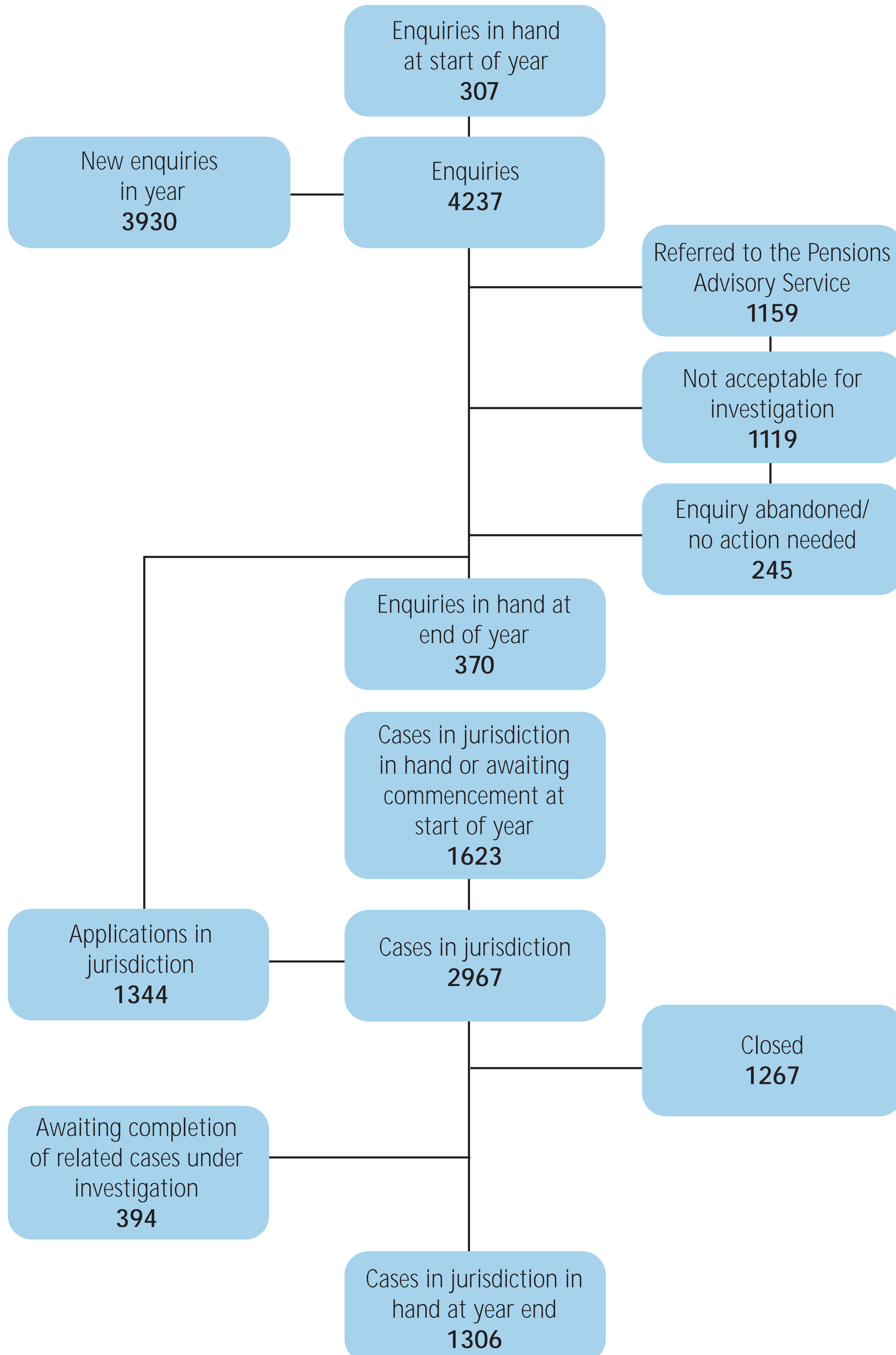
In view of the number of complaints which I was receiving, I have had discussions with Prudential and encouraged the company themselves to identify those cases where, on the basis of my past decisions, they can anticipate that I would be critical, and then themselves to settle the matter by providing, without my involvement, the remedy that I would otherwise direct.

This indeed is a process I would commend to all those who find themselves responding to complaints.

To assist that process I have been working on a Guide as to how those involved with pension schemes can recognise when I am likely to be critical. The ideal situation would of course be to avoid such criticism in the first place, and I hope the Guide will be a contribution towards this. But if things do go wrong, then I do urge upon pension schemes the value of recognising the problem and sorting it out, without the need to involve my office. My impression is that occupational pension schemes are less good at doing this than are providers of personal pension schemes, possibly because the latter take a commercial decision that it is in their financial interest to settle the matter and avoid further expense. The public sector tends to straddle both camps.

I end this introduction by expressing my thanks to the relatively small team of staff who support me. This is the second year running when I have reported record outputs for the office. They, rather than I, should take the credit for this.

Caseflow Chart



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Casework Review

Overall more people contacted my office this year than in any other since it has been in existence. The year followed a similar pattern as previous years in that a considerable number of people made an enquiry here before eliminating all other possible relevant avenues. This resulted in them being directed to the Pensions Advisory Service in about a third of cases and back to the scheme authorities in almost a quarter. A high proportion of initial telephone calls was transferred to the Pensions Advisory Service, as in previous years.

It seems that people with any problem about pensions, including mis-selling and state pensions, do sometimes use my office as a first port of call. Enquiries about state pensions are referred to the Department for Work and Pensions and those about mis-selling to the Financial Ombudsman Office. People also make telephone enquiries about tracing pension schemes. These were passed onto the Pension Schemes Registry this year but are now referred to the Pensions Regulator.

Enquiries

In 2004-05 I received 3930 new enquiries and dealt with 3867. There was a particularly high number of enquiries made in the first month of the financial year, but the remainder of the year followed a similar pattern as the last few years. The overall figures for both enquiries received and closures have been at a record level for my office.

Figure 1 - New enquiries received during the existence of my office

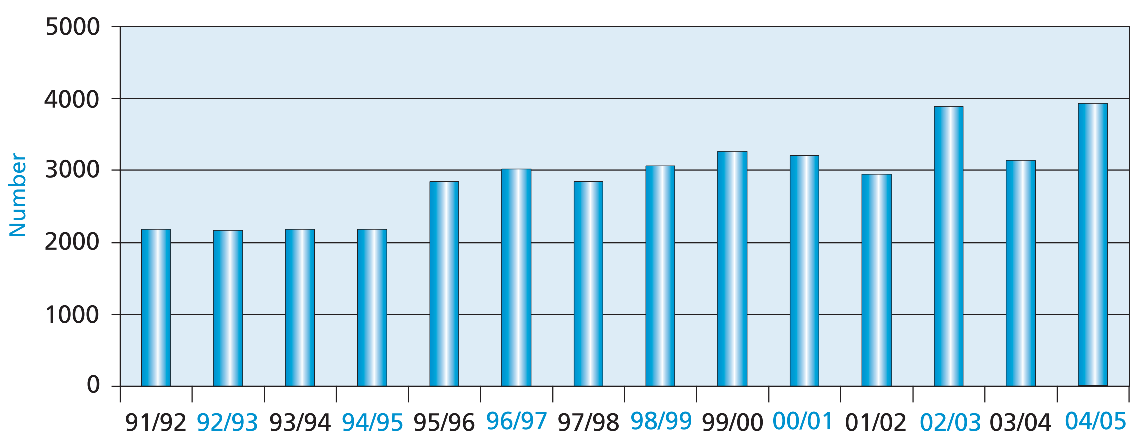


Figure 1 above shows the total number of enquires received each year since my office came into existence in 1991/1992 (I am the third Ombudsman since the office first opened). It can be seen that generally enquiries have steadily increased over the years, with a few exceptions, and are now approaching 4000.

Figure 2 below shows the number of enquiries received over the last 12 months. April saw a high influx of 557 enquiries with the remainder of the year averaging around 280 per month.

Figure 2 – Enquiries per month (last 12 months)

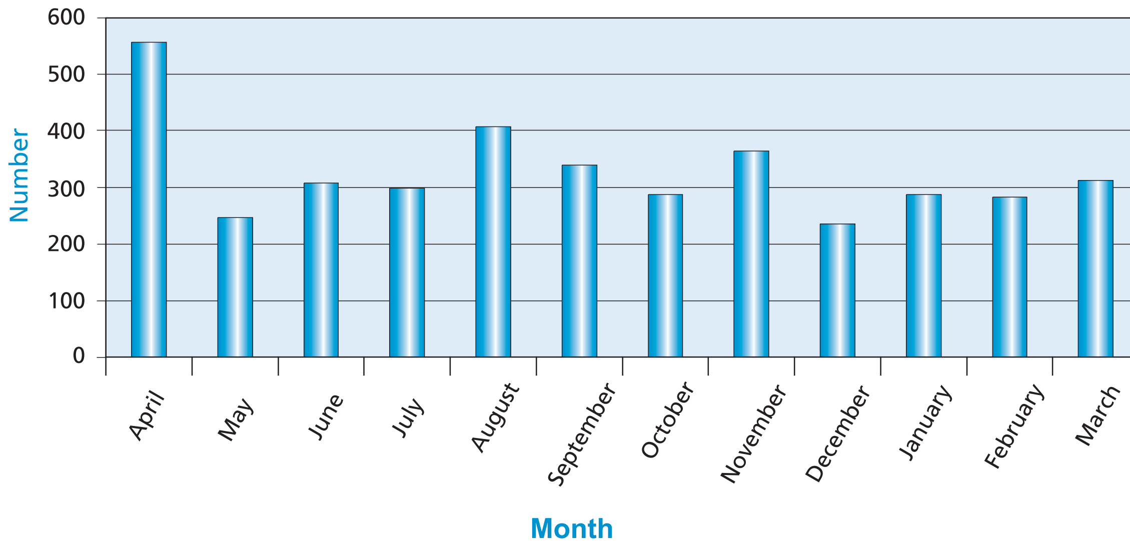


Figure 3 on the next page provides a breakdown of the reasons why more than half of written enquiries were not accepted for investigation. Generally it follows a similar pattern as in previous years with one exception. A significantly higher number of cases were not accepted as they either had not been put first to the scheme or Internal Dispute Resolution (IDR) procedures had not been followed.

Enquiries that are clearly about matters which are outside our jurisdiction, or where some preliminary steps need to be undertaken, are identified as such, and the complainant informed within 48 hours. Complainants may also be pointed in the direction of a more suitable office who can deal with their enquiries where applicable, such as the Parliamentary Ombudsman. Sometimes the matter complained about lies within my jurisdiction, but the issues have not progressed to a suitable stage at which my involvement can commence. Almost 30% of the 3930 enquiries received this year fell into this category and were referred to the Pensions Advisory Service.

Figure 3 - Referrals and rejections (showing percentages of total referred/rejected)

Reason	2004–2005	%	2003–2004	%
Appropriate for financial adviser	1	0	1	0
Appropriate for FSA or FOS	181	7	190	11
Appropriate for OPRA	4	0	6	0
Appropriate for Pension Schemes Registry	24	1	51	3
Enquiry not yet put to scheme/ IDR not used	564	22	134	7
Complainant outside jurisdiction	25	1	26	1
Discretion not to investigate exercised	9	0	9	0
Enquiry abandoned/ no action needed	245	10	208	12
Not relating to pension scheme/plan	14	1	15	1
Outside time limit	138	5	90	5
Protective Complaint	11	0	0	0
Referred to the Pensions Advisory Service	1159	46	907	50
Respondent not in remit	17	1	19	1
State scheme benefits	123	5	151	8
Subject to prior court proceedings	8	0	12	1
Total	**2523**	**–**	**1819**	**–**

Investigations

A slightly lower figure of 1344 cases was accepted for investigation by comparison with 1394 in the previous year. Currently, around 17% of cases being accepted for investigation are complaints about personal pension plans. These also tend to have fewer jurisdictional complications than complaints about occupational pensions. Complaints about personal pensions are more likely to be within time limits and it is also easier to identify respondents.

Figure 4 – Cases accepted for investigation (last five years)

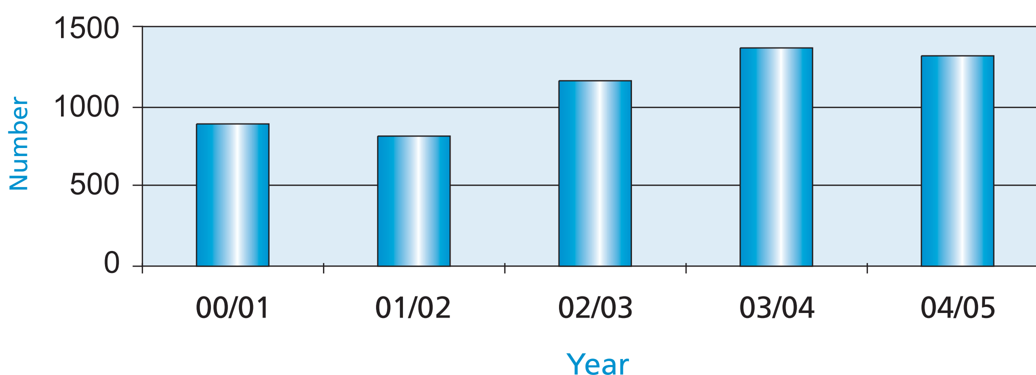


Figure 4 above shows the investigations accepted by my office over the last five years. They have tended generally to increase in a similar proportion to enquiries received. Each of the last three years has seen over 1000 enquiries accepted for investigation.

Figure 5 below shows the total number of investigations closed during the existence of the office. 1623 ongoing investigations were carried over from the previous year and an additional 1344 new cases were accepted for investigation this year. This resulted in 2967 investigations altogether of which we managed to close a record 1267. This marks a significant improvement of 20% over the previous year.

Figure 5 – Investigations closed during the existence of the office

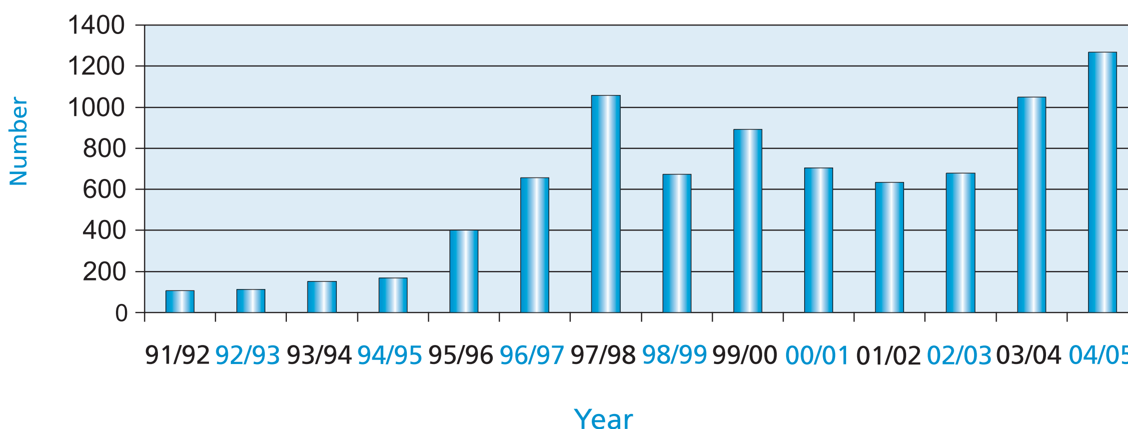


Figure 6 – Closures

	2004–2005	%	2003–2004	%
Discontinued	136	11	89	8.5
Resolved	288	23	140	13.3
Caseworkers' decision letter accepted	268	21	288	27.4
Determination following caseworkers' decision	251	20	215	20.5
Full investigation and determination	324	26	318	30.3
Total	**1267**	**–**	**1050**	**–**

Cases that fall within jurisdiction are dealt with in various manners. Figure 6 above provides a breakdown of how cases were closed this year.

136 cases (11%) were discontinued. Evidence may emerge during the investigation that the case cannot be or should not be investigated further. The discovery of new evidence such as a document can change the whole picture and lead to this scenario. All parties involved are given an opportunity to express their views before the matter is concluded.

288 cases (23%) were resolved satisfactorily. Caseworkers may believe on inspecting a file that a telephone call or a letter may bring the parties concerned to a settlement. In such a scenario a caseworker is likely to believe that the complainant is only at best likely to win a small award for distress and inconvenience rather than financial loss. Subject to both parties accepting the caseworker's opinion, the case is deemed to be resolved.

268 cases (21%) were closed as a result of caseworkers' decision letters being accepted. The complainant receives a letter from the caseworker saying that in his/her opinion, the complaint is unlikely to be upheld and provides reasons behind that opinion. The letter does offer the complainant, should he or she be unhappy, an option to ask for the papers to be reviewed by me or my Deputy. If the caseworker's opinion is accepted, the file is closed. On the other hand, if it is not, then the papers are reviewed by me or my Deputy. Generally we support the caseworkers' view, but sometimes have to ask them to carry out further investigations and a later determination. 251 cases (20%) were determined in this fashion.

324 cases (26%) were closed formally and by the longest possible route. Caseworkers obtain submissions from all parties concerned and then invite the complainants' comments. Other enquires are made along with clarification of any other facts or issues. This results in a formal decision being drafted and sent to the parties as "Notification of Preliminary Conclusion" (NPC) for final comments. Finally, the determination is issued, taking account of any further views received following the NPC.

Performance Indicators

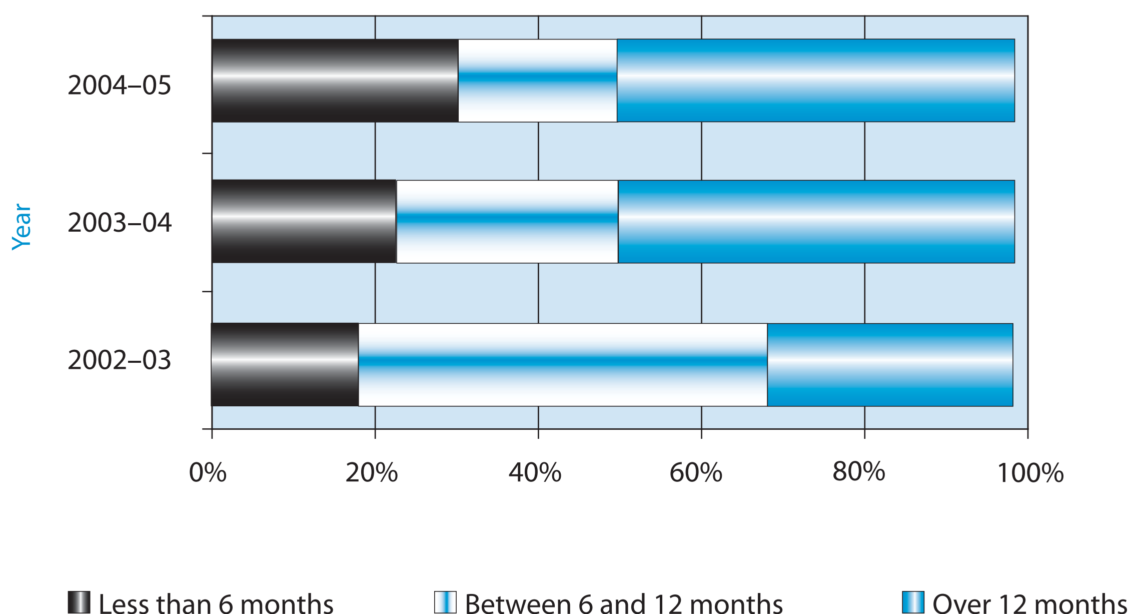
Figure 7 shows the time taken to close investigations. It is the time taken from the initial date of the application being received by the office to the date of conclusion. All cases, whether formal determinations, early resolutions or discontinuations are included.

Figure 7 – Closure times

	Number	%	% (last year)
6 months or less	442	35	(27)
Between 6 and 12 months	253	20	(26)
Over 12 months	572	45	(47)

It can be seen that there has been good progress in closing cases within 6 months by comparison with the previous year. There has also been an improvement in closing older cases over 12 months in absolute terms. 572 such cases were closed this year compared with 492 in 2003-2004.

Figure 8 – Closure times (last three years)



Subject Matter

Often a complainant may be asking me to investigate several interconnected matters. In addressing these potential problems I aim to categorise each complaint according to one main issue.

Figure 9 – Closed cases by subject matter

		2004-2005	2003-2004
	Number	**%**	**%**
Additional Voluntary Contributions	46	3.6	5
Calculation of benefits	155	12.2	11
Contributions refunds and queries	65	5.1	5
Spouses and dependants benefits	28	2.2	4
Disclosure of information	6	0.5	1
Early retirement pension	73	5.8	4
Enhancement of pension	8	0.6	0.5
Equal treatment	3	0.2	–
Ill-health pension	102	8.1	9
Incorrect/late or no payment	30	2.4	5
Membership conditions	20	1.6	4
Mis-selling	138	10.9	5
No response from scheme	3	0.2	1
Other	291	23	27
Preservation requirements	3	0.2	0.5
Transfer	158	12.5	11
Use of surplus	5	0.4	1.5
Winding-up	133	10.5	5
Total	**1267**	–	–

As figure 9 shows, the year generally followed a similar pattern to the previous year with a few notable exceptions. Complaints about mis-selling and winding-up doubled compared with last year.

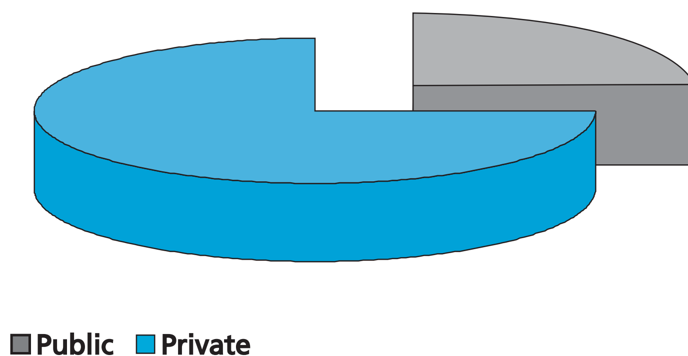
Outcomes

A case is recorded as upheld, when a determination is issued on grounds of maladministration which has caused unredressed injustice, or an error of fact or law, which requires a remedy. Almost a quarter of complaints or disputes were upheld last year. Around 16% of total complaints made were fully upheld. A smaller proportion was partially upheld.

Sources

Analysis carried out during the year revealed that a quarter of cases came from the public sector with the remainder deriving from the private.

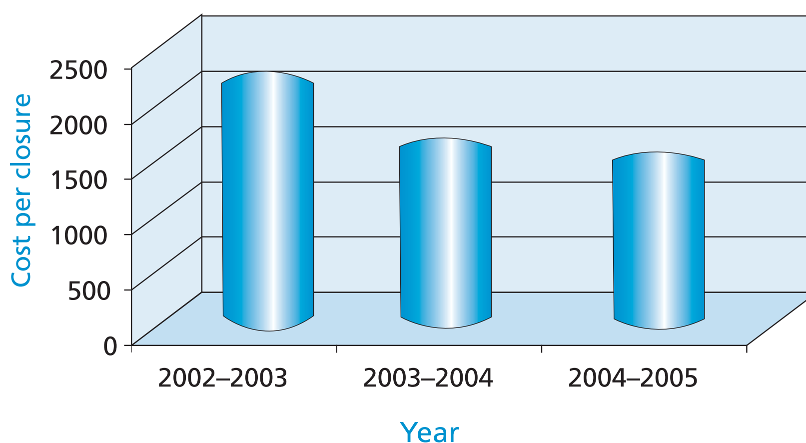
Figure 10 – Source of complaints



Expenditure

Figure 11 – Expenditure/Total investigations closed

Figure 11 below shows the average cost per closed investigation in the last three years.



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Case Summaries

This chapter aims to draw attention to some of the noteworthy cases determined during the year. A handful of cases have also been included which did not reach a formal determination but were instead resolved by other means.

The full determinations, where applicable, are available on my web-site (www.pensions-ombudsman.org.uk) and the formal document should be treated as authoritative, rather than the summarised version in this publication.

P00964: Early retirement not taken despite being allowed to do so

Background

Mr M claimed that he was told during a telephone conversation with his pension provider just before his 60th birthday in 2000, that he could not take his retirement benefits until age 65. He said he discovered later that he could have taken them at 60.

The provider accepted that there had been conversations with him, but could find no confirmation that he had been told this at any time. Mr M was not able to say exactly when this particular conversation was, nor did he know the name of the person to whom he spoke.

The provider said letters were sent to Mr M in 1998 and 1999 informing him that he could take his pension at any time after age 60, and wondered why, if he had been told something different afterwards, he had not questioned this. Mr M said that he assumed that what he had been told was correct.

Outcome

It was not reasonable for Mr M to have disregarded the letters he received which provided him with the correct information. Indeed, he had told the provider early in 1999 (possibly in response to the 1998 letter) that he intended to take benefits at 60, and there was no evidence of his being told that this would not be possible. His complaint was not upheld.

P00589: Contractual right to retire early not exercised

Background

Mr S claimed, when he was 64, that he had a contractual right to receive his pension from age 60 in 1999, and complained that the provider had not paid it.

His policy permitted benefits to be taken at any time between ages 60 and 75. The provider said that it wrote to Mr S three months before his 60th birthday, asking if he wished to take his pension, but he did not reply and continued to pay contributions by direct debit. It was therefore assumed that he had decided to defer his retirement.

On investigation, Mr S stated openly that he had never said that he wanted to take his pension at 60 and, because of trading difficulties, any hope he had of retiring at 60 had gone. The document which he now claimed confirmed his contractual right to a pension at 60 was, in fact, in his possession when he was 60. He said that he did not discover this until later. He denied receiving the provider's letter and blamed the provider for continuing to collect contributions.

Outcome

The policy provided a contractual right to elect to receive a pension at 60, but also a contractual right to defer, during which deferment contributions could continue.

Mr S had not replied to the provider's letter asking him if he wished to take his pension at 60, and he had continued to pay contributions. The provider was therefore entitled to assume that he had elected to defer taking his pension. Even if he had replied, in view of his subsequent statements to this effect, there was no reason to conclude that he would have chosen to take his pension at 60. It would be inequitable in the circumstances to allow him to assert rights retrospectively. His complaint was not upheld.

N00670: Date for calculation of transfer value

Background

Mr P decided to take retirement benefits with provider S. His existing provider, W, informed him beforehand of its requirements, which would include the completion of a transfer declaration. By completing this declaration, Mr P authorised the payment of the transfer value to S, and discharged W from all liability.

Mr P's completed transfer declaration was sent directly by S to W on 6 March 2003. At that time it was not possible for the transfer to proceed, because other required documentation was still outstanding. Full and final instructions to transfer were received by W on 23 April 2003, and the transfer value was paid on 30 April. However, W calculated the transfer value on the basis of the lower unit price in force on 10 March, the day after the transfer declaration was received. Mr P complained that his transfer value was some £1,000 less than it would have been based on the unit price at date of settlement.

W said that it regarded its liability as discharged when it received the transfer declaration (which stated as much) even if it was not possible to pay the transfer value then. W did not add any interest over the period until the transfer value was paid. W accepted that this practice was not described in the contract literature, nor had Mr P been informed about it.

Outcome

It was inequitable for W to calculate a transfer value based on a unit price in force before it was possible for the transfer to proceed. In Mr P's case, it was pure chance that the transfer declaration was one of the first documents to be returned. Presumably, S believed that it was being helpful in sending the transfer declaration direct, but Mr P was left facing a financial injustice.

Mr P's transfer value should have been calculated on the basis of the unit price in force at the date of settlement, and his complaint was upheld. W was directed to pay him £1,000.

M01055: Delay in allowing employer to contribute to stakeholder pension

Background

Mr D had an existing stakeholder pension with Legal & General (L&G), to which he wished his new employer to contribute. On 10 June 2002, Mr D wrote to L&G providing contact name and address details for his employer and his salary details. Mr D told L&G that he and his employer would each contribute 5% of his salary. Mr D received no response and re-sent his letter on 25 June 2002. Mr D complained about the delay in August 2002. Nothing further occurred until 9 September 2002, when L&G wrote to the employer and Mr D enclosing documentation for completion. This was returned promptly by the employer and Mr D, the direct debit was set up and the first contribution was taken on 5 November 2002.

Outcome

The employer agreed to pay backdated employer contributions and so the only injustice suffered by Mr D was the lost investment return on his and the employer's contributions. L&G agreed to allow Mr D to choose the best result between investing all of the contributions at the relevant dates had the direct debit been set up on time, or investing them as a lump sum at the current date. L&G also offered Mr D £100 for his distress and inconvenience. The complaint of maladministration was upheld as to the delay in setting up the payment method and the directions put L&G's offer into effect.

N00367: Delay in transfer

Background

Mr C had a heart attack in January 2002 and was advised to cease working as a teacher. In April 2002, he applied to the Northern Ireland Teachers' Superannuation Scheme (NITSS) for ill-health retirement. At the same time, he also applied to the Teachers' Pension Scheme (TPS) for England and Wales for payment of benefits on the grounds of ill-health. Mr C had accrued benefits in both schemes. NITSS drafted a reply to Mr C's letter saying he had insufficient service within the NITSS for payment of benefits but, if he transferred his benefits from the TPS, he would then satisfy that criterion. However, this letter was never sent.

In the meantime, Mr C entered into correspondence with the TPS about applying for and being assessed for ill-health retirement. However, in July 2002, the TPS told Mr C he had insufficient service for benefits from the TPS, but that he could transfer his accrued service to the NITSS.

In August 2002, Mr C wrote to the NITSS requesting that it arrange for the transfer of his benefits from the TPS. The TPS commenced doing so. Mr C's transfer request was initially refused in error by the TPS, due to a misunderstanding about whether Mr C's service was of a kind which could be transferred. The TPS advised the NITSS in October 2002 that a transfer was possible.

In the meantime, Mr C had forwarded his TPS application form for ill-health benefits together with his doctor's report, to the NITSS. The NITSS sent its own application form for Mr C to complete – initially sending the wrong form, but sending the correct form shortly after, in late October 2002. The form and further medical information were returned correctly completed in early November 2002 and Mr C's application was approved shortly thereafter.

Mr C was advised his benefits would be calculated with effect from 1 May 2002, being six months before the date of the doctor's report upon which his application was based (in accordance with the Rules). Mr C complained that it was the decision by the TPS not to allow the transfer, which meant his application was late, otherwise his benefits would have been payable from the first day after his employment ceased.

Outcome

Once the transfer was agreed, there was largely no delay on the part of the NITSS in assessing and approving Mr C's application.

However, there was maladministration in the oversight of the NITSS in failing to send its draft response to Mr C's initial letter of April 2002. That letter would more than likely have prompted Mr C into requesting the transfer of service at the earlier stage. While it may have been that the incorrect refusal still may have occurred, by taking into account the time lapse before Mr C applied for the transfer, this would have allowed his benefits to be payable from a significantly earlier date. The medical evidence was such that the extra time which passed, was unlikely to have made any difference to the success of Mr C's application.

Furthermore, the incorrect refusal of the transfer application also caused an additional delay. Had there been no delay by either scheme, Mr C's benefits would have been payable from the day after his last day of employment. A direction was made accordingly with the costs being borne by each scheme, proportionate to the effect of their respective maladministration.

N00916: Trustees' failure to pay Cash Equivalent Transfer Value (CETV) within guaranteed period

Background

Mr C complained that the Trustees failed to pay his CETV within the guarantee period stipulated on the CETV quotation.

Mr C was a Director of the company and a Trustee and member of the Scheme. Mr C had given three months' notice to leave the company in December 2002, to finish on 28 February 2003. In January 2003, the Trustees discussed a draft actuarial valuation of the Scheme which showed the Scheme was funded to 120% on the statutory Minimum Funding Requirement (MFR) basis, or to 93% on an ongoing basis. The Trustees considered ways of reducing costs to the Scheme.

After that meeting, Mr C asked the Scheme's financial adviser to prepare withdrawal benefits for him as he had resigned. The financial adviser obtained a quotation from Scottish Widows dated 10 February 2003 and forwarded it to Mr C on 11 February 2003. The quotation set out a transfer value as at 28 February 2003 and said that the transfer value was guaranteed for three months "from the date of this quotation provided that pensionable service stopped before that date".

On or around 19 February 2003, Mr C wrote to the Trustees accepting the quotation and providing details of where to pay the CETV. However, before the Trustees had completed all the relevant documentation, they received a letter from the Actuary raising a number of issues about the Scheme. The Trustees asked the Actuary to estimate the effect on the Scheme of Mr C transferring his benefits. The Actuary said that to retain the same funding, a special contribution of about £65,000 would be

required. The company was not prepared to make this contribution. The Trustees took legal advice and then told Mr C that the quotation given to him was not a guaranteed statement of entitlement to a CETV and that, in accordance with the Pension Schemes Act 1993 (the Act), his request for a payment of the CETV would be treated as a request for a statement of entitlement. The Trustees were not in a position to issue such a statement as the Department for Work and Pensions was currently working on new guidance for the calculation of CETVs.

Outcome

The quotation purported to be guaranteed for three months "from the date of this quotation provided that pensionable service stopped before that date". The quotation was dated 10 February 2003 and, as Mr C's service did not cease until 28 February 2003, in the strict terms of the quotation, the guarantee was invalid.

Nevertheless, under the Act, a member can request a statement of entitlement to a CETV which must be guaranteed for three months. The language of section 93 of the Act only covered members whose service had terminated and who had accrued rights to benefits. When the quotation was issued, Mr C's service had not terminated, nor had his rights ceased accruing. Despite the language of the quotation, suggesting that there was a guarantee in the form which would otherwise be provided by the Act, Mr C did not have an entitlement to a guaranteed CETV at that time. Until he left service, Mr C only had the right to request an estimate of his CETV (regulation 11 and schedule 1 to the Occupational Pension Schemes (Transfer Values) Regulations 1996 (the Regulations)).

Furthermore, a CETV cannot become a guaranteed CETV until the guarantee date has passed (sections 93A(2)(b) and 94(1)(a) of the Act and regulation 6(2) of the Regulations). The guarantee date is the date at which the CETV is calculated – i.e. 28 February 2003. Mr C applied for the CETV before the guarantee date.

Therefore, the Trustees did not act in breach of the Act or the Regulations by not paying the CETV within the purported guarantee period.

N01027: Resolution on basis that Council offered compensatory payment of £250

Background

Mrs C had applied for early payment of her preserved benefits under the Local Government Pension Scheme on the grounds of ill-health, which was eventually accepted. However, before this had occurred, her application had been considered, rejected and then accepted on appeal. She then asked for her benefits to be backdated, which also resulted in a further appeal. Mrs C complained about the delay and, in particular, the actions of specific Council employees.

Outcome

The Council had paid Mrs C's correct entitlement and interest for the full period of delay. It was apparent that there were periods of unreasonable delay during the processing of her application and subsequent appeals. However, there was no financial loss caused to Mrs C. Also, because she had received a redundancy payment when she left service, which was eventually offset against her

pension benefits following the last appeal, she did have available funds during the period under consideration. Nevertheless, it was accepted that Mrs C suffered distress and inconvenience as a result of the delays. Once this was explained to the Council, it agreed to offer Mrs C £250 in compensation. This was accepted by Mrs C and the complaint was resolved without the need for a determination.

P00546: Incorrect quotation

Background

In late 1996, at age 38, Mr C obtained a quotation from the Scheme's administrator for taking his deferred pension at age 50, assuming he left service in 1996. This showed a pension of £1,300 p.a. increasing to his GMP of £6,553.30 p.a. at age 65. In early 1998, Mr C obtained another quotation for taking benefits at age 50, assuming he left service at that time. This showed a pension of £4,236.27. Mr C said he queried the difference between the two, but was advised it related to a change in calculation basis. Mr C said he made a number of decisions on the basis of the quotation, including giving up his job, choosing not to buy another house in Greater London where he had been living (he was already in the process of selling his house) and instead, moving to Thailand where he purchased an apartment with the intention of living off his savings and house equity until he could draw his pension at age 50. In mid-2003, following rumours relating to the pension Scheme, Mr C obtained a further quotation for drawing his pension at age 50 and was told it would commence at £2,125.20 p.a. The quotation in 1998 had been wrong, because his deferred pension had been revalued to his normal retirement date (NRD) before being reduced for early payment, rather than to the date of his actual retirement. Mr C complained, saying he had made irreversible decisions based on the earlier, incorrect quotation.

Outcome

Because Mr C had checked the discrepancy in the figures quoted to him in 1998, with those quoted in 1996, it was not unreasonable for him to consider they were correct. Nevertheless, the Rules required the Trustees to grant consent to the early payment of deferred benefits. The members' booklet did not deal specifically with early payment of deferred benefits, but it did state that Trustees' consent was needed to take early retirement. This should have alerted Mr C to the possibility that some type of consent would be needed. At no time had Mr C actually asked for consent to be given, or made any application for his benefits. Without such action, it was not reasonable for him to act on the expectation that he would receive the benefits quoted in 1998, in 2008.

N00297: Charging policy on personal pension

Background

Mr H's complaint was that Prudential agreed in writing in 1998 that his policy would be free from all future charges, but that charges were still being made to his policy due to changes in their administration.

Prudential had confirmed in writing to Mr H, on more than one occasion, that there would be no future charges deducted from his policy. The fact that Prudential had decided to change its charging policy was not sufficient reason not to honour their agreement that his policy would be free from all future charges.

Outcome

Although the new Annual Management Charge (AMC) was not being taken directly from Mr H's policy, but from the total bonus amount before being allocated to individual pensions, it was considered that this was still a charge that adversely affected his policy. Prudential had made no distinction in any of their letters to Mr H, between explicit and implicit charges, and no indication was ever given to Mr H that Prudential intended to remove only the explicit charges from his policy. It was therefore reasonable that he should assume that his policy would be free from all future charges.

Prudential were therefore directed to arrange for:

(i) The 1% AMC, which commenced in April 2001, that had been deducted from Mr H's pension fund, plus interest, to be repaid to his policy.

(ii) The cessation of deduction of all future AMC's from Mr H's policy.

Interest referred to in (i) to be calculated on the base rate for the time being quoted by the UK reference banks, covering the period from April 2001 to the date of the determination.

Also, Prudential were directed to make a payment of £150 to reflect the time and trouble which Mr H had incurred.

N00981: Failure to send annual benefit statements

Background

Mr C's complaint was that Scottish Equitable failed to send him yearly benefit statements in 2001 and 2002. As a result, he was unable to take any action regarding the falling value of his personal pension fund and consequently suffered financial loss.

However, it was found that he could have requested a statement from them at any time during this period, which would have showed that his funds were falling, and he would have then been able to switch funds if he wanted to do so. Also, he had previously switched funds on the 31 August 2000, after receiving the last statement provided by Scottish Equitable, and was therefore familiar with the procedure and the nature of the funds that his policy was invested in.

Mr C could also have discussed the issue of the falling stock market with his independent financial adviser. The value of the units in his policy could also be monitored daily in the financial press, and he should have been aware of this.

Outcome

It was therefore decided that, even without the annual benefit statements being sent, there was sufficient information available about the prevalent stock market. Scottish Equitable had agreed that their failure to issue Mr C with the annual statements did fall below their normal service and administration standards. In recognition of their failings they offered £100 by way of compensation. It was agreed that this was sufficient compensation for the distress and inconvenience caused.

N01352: Delay in transfer due to neither insurance company accepting warranty forms issued by the other

Background

Mr C's complaint was that, as a result of an undue delay in transferring his personal pension fund from Prudential to Halifax, he suffered a loss of over £11,000 on his transfer value because of the changes in Prudential's bonus rates.

Halifax received Prudential's letter of the 13 August 2002, requesting the return of the transfer documents including their warranty form. Prudential said that they could not accept any other company's declarations unless an agreement had been made between the two companies.

However, Prudential also said that the warranty on the Halifax form did contain the information required by Prudential's own warranty form. Prudential admitted that their call centre made an error on 28 August 2002, when the Halifax was advised that Prudential's transfer requirements had been met.

Prudential said that they did not check the documents correctly during the call, which is why they were not alerted at the time.

Halifax also admitted that Prudential's warranty form was similar in content to its own and, as such, could have been completed when it was first issued. Halifax should have checked with Prudential before sending them their own warranty form that this would have been acceptable to Prudential. However, Halifax failed to do so.

Outcome

Mr C's complaint against both Prudential and the Halifax was upheld. Prudential could not reasonably insist on only their own form being used, as the documentation that was supplied by the Halifax provided Prudential with the warranty they sought. Further, there was no contractual liability on the policyholder arising from the wording of the policy, to use Prudential's own warranty forms. It was a nonsense that a customer of each company should suffer because neither would accept the validity of a form issued by the other, despite both forms containing the information which the other needed.

Prudential was directed to pay to the Halifax £7,524.35, being one half of the amount by which Mr C's funds were reduced as a result of Prudential's Market Value Reduction being applied on 5 September 2002. That sum, together with a matching sum from Halifax, was to be treated by the Halifax as though it had been invested in Mr C's policy as at 29 October 2002, the date they received Mr C's confirmation to proceed with the transfer.

N00945: Consideration of ill-health pension

Background

Mr A's complaint was that the Trustees did not consider his application for an ill-health pension fairly and that PML, the administrators to the Scheme, took too long in coming to a decision.

Mr A claimed that the Trustees followed the wrong procedure and held back medical information in dealing with his application. However, the evidence submitted showed that the Trustees did follow the correct procedures, in that the Rules had been properly applied and the necessary information obtained. There was no evidence to show that the Trustees had held back any medical information in dealing with Mr A's application.

Mr A also claimed that no consideration was given to the fact that he had needed to cease taking some medication because of the side-effects which affected his breathing. The Trustees had received a copy of the letter from his doctor confirming that Mr A had been prescribed the medication, but were not aware that he had ceased taking this medication, although was not seen as significant. They had, however, received advice about the extent of Mr A's breathlessness and did not therefore need specific confirmation of the kind provided by evidence of his reaction to the drugs.

Outcome

Mr A had been awarded Incapacity Benefit, but this needed to be viewed with caution, as the criteria used for such an award were not the same as the requirements in the Scheme Rules. The main relevant difference in the criteria, was that the award of State Incapacity Benefit was not dependent on the condition being permanent, whereas incapacity was defined within the Scheme Rules as: "...bodily or mental incapacity or physical infirmity which, in the opinion of the Trustee on such evidence as it may require, shall prevent, otherwise than temporarily, the Member carrying out his duties, or any other duties which in the opinion of the Trustee are suitable for him".

Mr A's complaint against the Trustees was not upheld.

N00802: Failure to provide Information

Background

Mrs C was a police officer and a member of the Police Pension Scheme. She claimed that she had not been notified, in 1994, that she had the option to pay higher pension contributions based on her service prior to 1990, in return for increased widower's pension benefits. The disclosure regulations applicable at the time required Trustees to take reasonable steps to draw such information to the attention of members. Details of the option had been advertised in the Police Federation's weekly publication which, at the time, was the recognised means of communication, and records indicated that internal reminders were sent individually to female officers who had not taken up the option.

Outcome

The complaint was not upheld as, reasonable steps had, on the evidence seen, been taken by the respondent. There was no requirement that notice be given personally to Mrs C and the respondent did not need an acknowledgement of receipt, even if this was now recommended by the Home Office.

N00927: Failure to publicise changes to early retirement scheme

Background

Mrs H complained that the Council had failed to publicise changes to its Early Retirement Scheme, with the result that she lost the opportunity of retiring early with enhanced benefits.

Following changes in the Regulations, the Council agreed to changes in its Early Retirement Scheme (reducing the benefits available), to take effect 6 months' later. It was obliged to publish "a statement" of the amended policy, within one month of the date of the decision. Prior to the decision, there had been extensive consultations with the unions, and details of the changes were published (after the decision) in Mrs H's union's newsletter.

Outcome

The complaint was not upheld as, although the Council may have failed technically to comply with its obligation to publish "a statement", the failure was not material and did not make any difference in Mrs H's case. Even when the statement was, belatedly, published she did not see it.

P00040: Ill-health early retirement - Conflicting medical opinion

Background

Mrs S complained that her application for ill-health early retirement had been refused. She was a member of the Local Government Pension Scheme and, to qualify for an ill-health pension, she had to be permanently incapable of discharging her duties or any other comparable employment with the employer. The Regulations required a certificate to be issued by an independent registered medical practitioner as to whether these criteria had been met.

A number of doctors had provided an opinion on the permanence of Mrs S's incapacity, and two of those whose opinions were properly sought, concluded that her incapacity was not permanent. The application was declined on the basis of the reports.

Outcome

It was by no means unusual for decision-makers to be faced with conflicting opinions. They needed to weigh the issues and reach a view. In this case it was found that their decision was not perverse.

P00235: Ill-health early retirement - Failure to consider all relevant facts

Background

Mr M complained that his application for early payment of his deferred pension on the grounds of ill-health was not properly considered. Under the Rules of the Scheme, an incapacity pension would be paid if, in the opinion of the principal employer, incapacity prevented the member from continuing his normal employment or any other employment for which he was reasonably suited.

The company Occupational Health Physician (OHP) obtained a report from Mr M's GP. This report revealed that Mr M had Parkinson's disease, and that the GP considered that he was permanently incapable of carrying out any paid employment.

The application was turned down by the principal employer on the advice of the OHP, who had concluded, on the basis of the GP's report, that Mr M was not permanently incapable of paid employment because he had 'not yet exhausted all treatment options for his condition'.

Mr M's GP wrote to the OHP reminding him that a particular kind of treatment for Parkinson's was effective only for a limited time and that, following consultation with Mr M's specialist, it had been decided that it would be in his best interests to defer treatment.

Outcome

The advice offered by the company's OHP was based on the fact that there were treatments available which, if followed, relieved some of the symptoms for a limited period. However, if used to relieve symptoms earlier in the course of the disease, the treatment could not be used again in the later stages of the disease. The OHP was saying that, had Mr M opted to undergo the relevant treatment, this might have allowed him to continue his normal employment, meaning that he did not fall within the Scheme's definition of 'incapacity'.

The OHP did not seem to address the question of whether Mr M's health had deteriorated to the point where, whether or not the treatment was undertaken, he could no longer be expected to continue his normal employment, but rather he seemed to have assumed that, because the treatment had not been tried, it automatically followed that the criteria in the Rules had not been met.

This seemed to be an unfounded assumption and the employer should have recognised this when considering the OHP's advice. It was found that the failure to make such an appraisal was maladministration which led to a decision being taken without consideration of all relevant facts.
The case was remitted to the employer for further consideration.

K00516: Closure of defined benefit scheme and establishment of a money purchase plan within the same scheme fund. Failure to award more generous discretionary increases to pensions in payment

Background

A number of complaints were received which were consolidated into a single determination.
The complaints primarily arose out of a decision to close a defined benefit scheme to new members and offer instead membership of a money purchase plan established within the same Scheme fund. There were also complaints about the failure to award more generous discretionary increases to pensions in payment.

Establishment of a money purchase plan within the overall scheme

It was claimed that the establishment of such a plan was contrary to the main purpose of the Scheme as set out in the Interim Trust Deed.

Decision

The Interim Trust Deed clearly envisaged that the proposals were not set in stone. That the parties to the deed may not, at the time, have had money purchase sections of the Scheme in mind as a possibility, did not mean that the establishment of such sections should, on that account, be seen as precluded.

A complaint that the effect of the amendments was to allow a new class of member to benefit from the defined benefit fund, was based on a false premise, as members of the money purchase arrangement (the new class of members) benefited only from the contributions made by themselves or their employer.

The establishment of that plan did not bring with it any diminution of the accrued benefit entitlement of those in the defined benefit scheme. Had the changes not been made, the defined benefit scheme could have continued to receive new members, as new employees joined, each of whom could be said to benefit from the existing fund to which they had not been contributing.

Use of monies in the fund to obviate the need for the employer to make cash contributions in respect of members in the money purchase plan

The complainants argued that money in the fund, which had accrued at a time when the Scheme had provided defined benefits, originally on a non-contributory (so far as employees were concerned) basis, and later on a contributory basis, should have been ring-fenced and not made available to fund the contributions due from the employer under the money purchase plan.

Decision

On the construction of the particular documents, the employer's contributions to the money purchase plan could be funded in that way. Even if the contrary view were taken, the net effect would not have been different. If contributions had not been taken, the surplus in the fund would have been larger with a high probability of the employer's existing contribution holiday being extended. The evidence did not suggest that any increased surplus would instead have been used to increase pensions in payment. Allowing the employer to make contributions in that way was not the same as returning money to an employer.

Communication with members

Decision

The initial announcement did not make clear that there was an intention to fund the employer's contributions to the money purchase plan by using a surplus in the existing fund, but that information was revealed in the accounts which followed implementation of the changes. There was no need for an earlier announcement about that intention to the membership as a whole.

Failure to use monies in the fund for the benefit of members, acting for the benefit of the employer and failure to honour expectations

Trustees, or Directors of a Corporate Trustee, including member-elected Trustee-Directors, frequently have vested interests and potential conflicts. The Trustee-Directors saw themselves as independent from the principal employer and acting in the interests of the members of the Scheme, rather than for the purposes of the employer's balance sheet. The evidence belied the suggestion that undue influence exerted by some of the Trustee-Directors, stifled other Trustee-Directors. Because a decision made by the Trustee, accorded with a proposal made by the employer, did not mean that it should thereby be criticised as having been improperly made. Such an argument overlooked the possibility that the economic well-being of the employer might have been in the interests of members of the Scheme.

There was no reason to doubt the integrity of the Trustee-Directors, or to support a suggestion that they were unduly motivated by the need to promote the interests of the employer.

The perception that existing Scheme members gained no benefit from the amendments made at the time the money purchase plan was established was incorrect.

In agreeing to the amendments, the Trustees acted properly, taking appropriate advice, taking into account proper factors, without taking account of improper factors. The decision to which they came was not perverse.

There was nothing to suggest a breach of any fiduciary duty on the part of the principal employer.

No implied commitment had ever been made to increase pensions on a 100% index-linked basis, even if such an increase were affordable.

Various submissions were considered which had, as their starting point, the assumption that members were entitled to have a share in (and implicitly have distributed to them) any surplus built up by the fund. That assumption seemed to rest upon a belief that it was from the contributions of the members that the surplus had been built. But, over the longer term, contributions came more from the employer than from members. Indeed, at one stage, some of the members interested in this determination, were not directly making any contribution to the fund, although the pension might be seen as deferred salary, and thus indirectly a contribution from the employee. The link between members' contributions and any assumed surplus was far from clear-cut.

Despite repeated requests from the Trustee, the principal employer had consistently refused to issue a guarantee that it would tie itself to exercising its discretion in line with any index of inflation. Whilst resisting such a guarantee, the principal employer had given various assurances that it did not envisage changing the practice whereby discretionary increases were made to pensions in payment. The evidence did not suggest that such assurances had not been honoured.

Over recent years, the Trustees had been active in pressing the case for discretionary increases. There was less certainty as to whether the same could be said about the Trustees' performance in earlier times. In practical terms, the power to decide what level of increase to provide rested with the principal employer, and the practice at the time reflected where that economic power lay. The complainants might well have taken a different view had they been Trustee-Directors, but that did not mean that the latter acted unlawfully or with maladministration.

There was no legally enforceable promise for the employer to continue to make discretionary increases at the rate which had applied in the past.

There was no evidence that the decisions that had been taken about increasing pensions in payment, were in breach of an employer's duty of good faith. An employer's power to give or withhold consent to pension increases, was not a fiduciary power. The principal employer, whilst setting its face against giving a guarantee, has never set its face against considering whether or what increase to provide. Nor was there any loss of any accrued benefits to members of the defined benefits scheme.

N01226: Incorrect quotation

Background

Ms E's deferred pension had been incorrectly calculated in 1991 (approximately 88 other members were in the same position). She received incorrect benefit statements between 1991 and 2001. Ms E argued that she had relied on the statements in her retirement planning and there was little time left for her to make up the difference.

Ms E had been provided with a leaving service statement in 1991, and benefit statements in 1992 and 1994. She wrote to the pensions department in 1996, saying that she was reviewing her pension provision and asking them to complete a questionnaire. Ms E requested illustrations again in 1999 and, although the quoted pension at normal retirement date (NRD) was some £8,600 less than previously quoted, she did not query the figures. She requested further illustrations in 2001, and was quoted a pension at NRD which was some £6,700 less. Ms E queried these figures and was told that an error had been discovered in the calculation of some deferred pensions.

The Trustees accepted that there had been maladministration. They had offered approximately £1,600 compensation, which Ms E had turned down. This offer was withdrawn when she complained to the Pensions Ombudsman. The Trustees were asked if they would re-open the offer but declined. Ms E's financial adviser calculated that it would cost her £84,000 over six years to provide the higher pension.

Outcome

There was nothing to indicate that Ms E would have sought to provide funds for a higher pension if a lower figure had been quoted. Ms E referred to a previous determination but the fact that Ms E had not queried an earlier drop in projected pension, indicated that she would have been comfortable with a lower pension, at NRD. Nevertheless, it was decided that Ms E would have started paying AVCs two years earlier than she did. She had started paying at a rate of 3% of her income in 2002, and had confirmed that there was scope for her to pay a higher percentage. The 'loss' to Ms E was therefore two years' worth of AVC provision. It was decided that she was able to make up this 'loss' between now and NRD. A payment of £250 for distress and inconvenience was directed.

The Trustees, in the meantime, had re-opened their offer of compensation to one of the other members affected by the error. Ms E suggested that the Trustees should be directed to re-open their offer to her. It was decided that agreements arrived at by the parties, during the course of an investigation, were a matter for them. It had been open to Ms E during the course of the investigation to negotiate with the Trustees, if she so wished. Former offers would not be taken into account in coming to a decision as to what was considered appropriate redress in the circumstances.

N00659: Trustees' reconsideration of application for incapacity pension

Background

This was a second complaint by Mr M. Following the previous determination issued in May 2002, the Trustees had been required to reconsider Mr M's application for an incapacity pension. Mr M asserted that they had failed to reconsider his application properly.

The Rules provided that a member, whose pensionable service ended because of incapacity in circumstances which the principal employer deemed to be retirement, and who requested an early retirement pension, should be paid an immediate pension. Incapacity was defined as 'infirmity or ill-health which, in the opinion of the Trustee, will destroy or seriously impair his earning capacity'. The Trustees could call for such medical evidence as they felt appropriate.

The previous determination required the Trustees to reconsider Mr M's application, "having first sought further medical advice from a medical adviser who has not previously been involved". The Trustees requested an opinion from a consultant psychiatrist, who was provided with copies of the

previous medical advice and the determination. Mr M also gave his permission for the consultant to speak to his consultant psychiatrist and to see his medical records. The consultant suggested that, where there was a medical dispute, it was often wise to rely more heavily on the opinion of those doctors who were actively treating the patient. He said that it was 'ill-judged' for the Trustees' medical adviser to criticise the other doctors for 'speculating' that the outcome for Mr M would be poor. The consultant said, "All prognoses are, by definition, speculative i.e. clinical guesses as to what is going to happen in the future".

The Trustees met to reconsider Mr M's application. They decided that the key issue was the interpretation of 'incapacity' and, in particular, the phrase 'destroy or seriously impair his earning capacity'. Previously, the Trustees had taken this to mean that the member was unable to work again, because this is what they believed retirement entailed. The Trustees decided that they had to establish if Mr M met the incapacity criteria in June 2000. They noted that the Social Security Agency had assessed Mr M as being 25% disabled between June 1997 and June 2000. The Trustees also noted that there had been an expectation that Mr M's condition would improve, once the prospect of returning to work for the company had been removed.

The Trustees upheld their earlier decision to refuse an incapacity pension.

Outcome

The decision should, as the Trustees had identified, have been based on all the available evidence and not just the latest report. The question to be decided was whether Mr M met the requirements in the Rules. The Trustees had to give proper consideration to the definition of incapacity and to form an opinion as to whether Mr M's ill-health, "destroyed or seriously impaired" his earning capacity. This was a finding of fact.

The Trustees suggested that incapacity meant that the member was unable to work again. However if this was what the Rule intended, it would only have been necessary to say that earning capacity had been destroyed. 'Seriously impaired' meant something less than the complete inability to earn.

The Trustees had disregarded the fact that the Social Security Agency had revised their assessment of Mr M, to 35% disabled in June 2000. They had relied upon the view expressed by their own medical adviser, that Mr M's condition would improve. That the Trustees preferred the opinion of their own medical adviser, did not necessarily mean that their decision should be considered perverse. This could be the result of a careful weighing of the evidence. However, that was not the case here, where the Trustees had rejected three medical opinions in favour of one lone voice. They had given no reasoned explanation as to why the advice of the doctors more closely involved with Mr M, was not preferred. This, plus the earlier criticism of their interpretation of the Rule, led to the decision that the Trustees had not given proper consideration to Mr M's application.

It was decided that no purpose would be served by remitting the decision again, because the Trustees' previous decisions had been "irrational, against the weight of medical evidence and not supported by any reasons". It was decided that, if the matter were remitted, the evidence suggested that the Trustees would not act fairly or without bias. The Trustees were directed to pay the incapacity pension.

L00390: Delays due to scheme winding-up

Background

Mr P complained (inter alia) that he could not move house before knowing his pension prospects as he could not assess the implications of making this move, and that there were various delays in respect of winding-up the Scheme.

Mr P's guaranteed minimum pension (GMP) was secured back into the state scheme. On 9 July 1998, he was incorrectly advised of his excess entitlement, with correct figures being provided in April 2000.

The investigation revealed that there were delays during the winding-up, when producing a buy-out quote for the excess benefits. Further, other calculations in connection with pre-existing litigation performed during the winding-up, were carried out without the Manager and Independent Trustee first agreeing the most appropriate basis, resulting in improper costs being incurred by the Scheme.

Outcome

Although the Independent Trustee and the Manager delayed in finalising Mr P's excess entitlement, Mr P did not suffer financial injustice in consequence. The substantial part of Mr P's pension comprised his GMP entitlement, which was known to him at retirement and paid shortly thereafter. The amount of excess benefit quoted was modest and, when paid, arrears were granted. Not knowing the exact sum did not impede any potential house move. Nor was the Scheme in a position to pay excess benefits during the time before the proposed property transactions and, of those benefits paid, only a trivial lump sum if anything could have been paid.

The Manager thought it was extremely difficult to say what loss, if any, Mr P may have suffered had the quote been made earlier, and establishing such loss would have involved a reworking of the solvency of the Scheme as a whole. It explained that a major influence was the buy-out rate, but that this had not altered during the period and the assets were in a fixed interest fund, the unit price increasing over the period with no significant loss. The Manager was not aware of any reason why the benefits should be significantly better if they had been purchased earlier. No directions were made, bearing in mind the Manager's comments, and to protect the members' interests by avoiding further delays in the winding-up that would inevitably arise should further calculations be performed.

Both respondents had incurred substantial unpaid fees and, were fees to be paid in the future, the Scheme had had the benefit of late payment. Accordingly no directions were made.

A small sum was paid to Mr P reflecting the distress and inconvenience incurred as a result of delays.

H00537 & others: Continuous service benefits (CSB)

Background

The complainants were members of a Scheme who sought a declaration that they were entitled to a pension based on CSB.

The complainants were members of an original Scheme, which wound up. They had been invited

to join the former Scheme, which was subsequently replaced by the current Scheme. An agreement between the employers (not entered into by any Trustee) provided for a transfer payment on a "share of the fund" from the former Scheme to the current Scheme to be effected. In return for the transfer value, the intention was to provide benefits equivalent in value to those expected had the complainants' pension membership remained unchanged. The employers went into liquidation.

Benefit statements issued thereafter showed pensionable service under the current Scheme as starting from entry into the original Scheme. But a transfer payment from the former Scheme to the current Scheme was never effected, and benefit statements were subsequently changed showing pensionable service beginning from entry date to the current Scheme. The Scheme Trustees were concerned that any transfer payment from the former Scheme would be insufficient, because of the CSB requirement, and would reduce the solvency of the current Scheme and the security of members' benefits.

The Scheme's Rules provided that the Trustees may, at their discretion, accept a transfer of assets in respect of a person from another occupational scheme, but pensionable service was defined as including, in the case of a member for whom a transfer value had been accepted from the former Scheme, the last or only period of pensionable service while a member of the former Scheme or the original Scheme.

As an alternative to refusing to accept any transfer value, the Scheme Trustees decided to amend the Scheme Rules so that benefits purchased by the transfer value would be equal in value to the assets transferred across.

Outcome

The complainants were not entitled to CSB. The evidence was such that the current Scheme was not obliged to provide CSB. The transfer payment offered by the former Scheme was on terms that would not cover CSB. Accepting transfers was a matter for the Scheme Trustees' discretion, and the Trustees had acted properly when refusing to accept the offered transfer value which would not cover CSB. Furthermore, the Rule amendment was valid. No transfer payment had been made, so accrued benefits were not adversely affected. Even if the amendment had not been valid, the Scheme Trustees had acted properly in refusing to accept a transfer payment which would not have been sufficient to cover CSB.

N00564: Complainant not being given a chance to pay her arrears of contributions from her lump sum award

Background

Mrs C was a member of the Local Government Pension Scheme, until she retired on ill-health grounds in July 2001. She had been paying additional contributions into an arrangement to backdate her service - it transpired that (for all sorts of reasons), she should not in fact have been given this opportunity to backdate. However, she was allowed to continue paying into this arrangement. When she retired, she believed (on the strength of an illustration sent to her a few months before) that she was (because of ill-health) going to receive substantial benefits and have her outstanding contributions written-off. She was not, however, contributing to the right arrangement to enable this to happen and so received reduced benefits.

Mrs C went through the internal dispute resolution process for the Local Government Pension Scheme. At the first stage she was told that, while it was clear that she had suffered distress and inconvenience, it was not within the remit of the appointed person to consider whether maladministration had taken place. The main part of her complaint was dismissed.

At the second stage (Office of the Deputy Prime Minister), the decision was made that the Secretary of State (SoS) for Local Government could not consider any aspect of her appeal. She was also informed that the SoS had no powers to award compensation, even if it were shown conclusively that maladministration had caused financial loss or inconvenience.

Outcome

The main part of Mrs C's complaint, about which arrangement she should have been contributing to, was not upheld. Maladmistration had occurred, in that Mrs C had not been given a chance to pay her arrears of contributions from her lump sum award. When this was pointed out to the administering authority, they were happy to go along with the suggested solution and also to pay her an award for distress and inconvenience.

M00787: Failure to keep member properly informed

Background

Mr and Mrs D jointly purchased a property equally in their two Self Invested Personal Pension Schemes (SIPPS) with an insurance company provider who was the Trustee and the Administrator of the insured element of the SIPPS. Another company was appointed as the administrator of the self-invested element which included the property.

Mr and Mrs D leased the property from the Scheme as joint tenants and ran their business from the property. Towards the end of 1999, there were accumulating rent arrears and the Trustee was considering selling the property. In October 1999 a letter was sent to Mrs D's solicitors, seeking payment of the rent arrears for which she was jointly and severally liable.

In June 2000, Mr D notified the Trustee that a purchaser had been found. In the event, he did not proceed and the property was subsequently placed on the market with an estate agent selected by Mr D. Aside from the October 1999 letter, and one or two other letters sent to an Independent Financial Adviser who had been nominated jointly in 1996 by Mr and Mrs D to deal with the rent arrears, all correspondence regarding the sale of the property was sent to Mr D. No valuation of the property was obtained by the Trustee or the Administrator.

At the start of September 2001, Mr and Mrs D separated. Mrs D informed the Trustee of her new address but she did not write separately to the administrator who was not informed by the Trustee of Mrs D's new address for six months.

In March 2002, the property (which had been purchased for £70,000) was sold for just under £130,000. It was resold later that month for £235,000.

Mrs D submitted that a realistic price for the property had not been obtained and said that, if she had been kept informed about the sale, she would have questioned the price.

Outcome

Mrs D's complaint was upheld. The Trustee had sought to rely on an unsigned form, in or around January 1996, giving Mr D's name as a contact. It was found that the unsigned form was insufficient to amount to an incontrovertible authority to deal solely with Mr D in respect of Mrs D's benefits. Separate letters should have been sent to Mrs D and Mr D, unless there was express authority to do otherwise.

The Trustee owed a duty of care to the beneficiaries, including Mrs D, and was required to obtain a reasonable price for the property. The Trustee allowed the sale of the property to be directed by one member only, and neither the Trustee nor the administrator, informed or checked matters with Mrs D.

The Trustee was directed to pay to Mrs D one half share of the difference between the first and subsequent sale prices (i.e. £52,500) plus interest, and a payment in respect of distress and inconvenience.

N00829: Correct level of widow's pension – whether overpayments made were recoverable

Background

Mrs N became entitled to a widow's pension on the death of her husband in 1991.

In April 2002, after she had queried why she had not received an expected increase in her pension, she was told that her correct pension was 50% of her husband's pension, but that she was entitled to fixed annual increases of only 3% (and not 5% on part of her pension). Arrears accrued since February 2002 were paid.

Mrs N felt that, instead of simply not paying an annual increase in June 2001, and waiting for her to query the position, the Trustees should have informed her of the problem. She also queried the decision to reduce her pension to its June 1991 level pending further investigation, and she contended that she was entitled to fixed annual increases of 5%, as had been paid.

Outcome

Mrs N was not entitled to annual 5% fixed increases; the correct figure was 3%. Paying annual increases of 5% was maladministration on the part of the then Scheme administrators.

Overpayments made amounted to about £36,000. Mrs N had changed her position in reliance on the payments made. She had no legal right to insist on the continued payment of her pension at the higher, incorrect level, so the Trustees had not acted wrongly by reducing the amounts paid to her. Although two instances of maladministration were found on the part of the Trustees in its handling of the matter, no direction was made in view of the substantial sums overpaid to her that she was retaining.

L00320, L00340, L00664, L00707 and M00042: Early retirement – requirement for consent

Background

These were similar complaints made by members of the same Scheme. All contended that they should be entitled to retire early and draw unreduced benefits from the Scheme from age 60.

Normal Retirement Age (NRA) under the Scheme was 65.

Under the Scheme Rules, the early payment of unreduced benefits at age 60 required employer consent (which was not forthcoming in the applicants' cases). With effect from 1999, the Scheme Rules had been amended to give a right to retire early, after age 50, without consent, with benefits reduced for early payment.

The general information given to Scheme members over the years by way of announcements, was not entirely clear, particularly when considered against the background of a prevailing policy of allowing early retirement and the payment of unreduced benefits from age 60.

Outcome

The failure to provide clear and unambiguous information regarding the Scheme and early retirement was maladministration on the part of the Trustee.

Although disappointment had been suffered (and a direction made to compensate for that injustice), no legal entitlement had arisen to retire early at age 60 with the payment of unreduced benefits.

P00891: Failure to inform member of time limits for an application to the Employment Tribunal

Background

As a part-time employee, Mrs A was not eligible to join the Scheme. She became aware that the issue of part-timers' pension rights was under consideration by the courts and, in March 2001, she contacted her employer about the possibility of backdated membership in respect of her part-time service.

The employer wrote to her in December 2001, saying that those responsible for the Scheme were looking at how various court decisions could affect the Scheme, a process which could take at least 18 months. The employer wrote to her again in October 2002, saying that some outstanding issues remained to be addressed and union negotiations were still ongoing. The employer wrote further in May 2004, saying that one of the issues that had needed clarification, was who would be able to claim retrospective membership of the Scheme, and the extent to which former employees could make a claim. The employer referred to a decision of the House of Lords in the case of Preston v Wolverhampton Healthcare NHS Trust and said that only current employees, or former employees who had brought a claim within six months of the date of termination of their employment, and who had submitted a valid claim to the Employment Tribunal, could be granted retrospective access to the Scheme.

Mrs A's employment had ended in August 2001, and it was therefore no longer open to her to bring a claim to the Employment Tribunal.

She complained that her employer had failed to inform her of the six months deadline after termination of her employment, for making a claim to the Employment Tribunal.

Outcome

Mrs A's application was not upheld. There is no general duty in law on an employer to provide advice to employees about pension rights. Although an employer has a statutory duty to provide information about its pension scheme, that duty does not extend to the giving of advice. A duty may arise in certain limited circumstances, for example, where a pension scheme's member has the opportunity to acquire a valuable pension right, but could not by his or her own endeavours, reasonably discover that right, then a term may be implied into the contract of employment that the employer should provide the information in order for that right to be exercised.

In Mrs A's case, the six month time limit from termination of her employment was a pre-existing time limit, which applied generally to applications to the Employment Tribunal (i.e. not just to applications from part-timers). The information which she considered should have been given, did not specifically relate to the Scheme, but to the exercise of a general legal right (i.e. the right to apply to the Employment Tribunal) which could have been obtained from a source other than the employer.

M01068: Delay in advising that a switch instruction had been actioned

Background

Mr P was a member of a Group Money Purchase scheme, under which the members had an individual pension account. There was a choice of funds in which they may invest, and the Scheme allowed the member to switch funds as required.

Mr P completed a switch instruction form on 5 October 2000, instructing Scottish Equitable to switch the investments he had in various funds to a different mix of funds. The total value of the funds being transferred was £211,866.27. The form was sent with a covering letter to Scottish Equitable's office in London.

In November 2000, Scottish Equitable issued a statement to Mr P which indicated that the switch had not been actioned. Mr P received two further statements, in February 2001 and April 2001, neither of which showed any record of a switch of funds having been made since October 2000. In June 2001, Mr P received a further statement which recorded that, on 10 October 2000, the assets of the funds had been switched in accordance with the instruction dated 5 October 2000. The total value of the fund was £178,993.82.

Scottish Equitable argued that they were contractually obliged to implement a switch instruction once they had received it, and a delay of any length does not detract from their contractual obligation to apply the instruction at the correct time.

Outcome

The complaint was upheld. Whilst it was accepted that Scottish Equitable were contractually obliged to effect a switch of investments once an instruction had been received, that obligation needs to be carried out in an efficient manner and within a reasonable time. This had not happened.

Mr P said that he would have chosen to switch back in mid-November, had the switch gone ahead when he made the instruction. This was not accepted, as the value of the fund after his switch was relatively steady until February 2001, by which time the fund had dropped in value by some 13%. Had he switched back at that stage, it seemed that the fund would have increased by £2,500 by June 2001, whereas in its switched form, the fund had decreased in value by about £6,500 between those dates. Although it was recognised that the disparity between the two investments had increased since then, it was felt that the greater disparity was a reflection of Mr P's failure to mitigate the loss after he became aware that the switch had taken place. Scottish Equitable were directed to credit Mr P's individual pension account by £9,000.

N01095: Misleading information

Background

Mr W had served in the Royal Navy and had been a member of the Armed Forces Pension Scheme. He asserted that he was given misleading information by the Armed Forces Personnel Administration Agency (AFPAA) when he transferred from a Supplementary Type B Short Career Commission (Type B SCC) to a 12 year Short Career Commission (12 year SCC). A Type B SCC was pensionable whereas a 12 year SCC was non-pensionable, but provided a tax-free gratuity on leaving the Services.

In 1980, officers serving on a Type B SCC, who had not reached their eight year break point, were offered the option of transferring to a 12 year SCC on gratuity-earning terms. Officers who transferred, forfeited their right to any pension accrued up to the date of transfer, but received a tax-free gratuity, in respect of all pensionable service, on leaving the Royal Navy.

In April 1982, Mr W opted to transfer to a 12 year SCC. He left the Royal Navy in October 1986 after 12 years' service, and received a tax-free gratuity of £17,760. In 1998, he contacted the AFPAA, who advised him that he was not entitled to a preserved pension as he had forfeited his right to such a pension when he transferred to a 12 year SCC.

The Ministry of Defence (MOD) upheld his complaint under the internal dispute resolution procedures on the basis that the information he received was misleading. He was offered three options:

1) to remain in his current position i.e. to retain the tax-free gratuity but with no right to a preserved pension;

2) to repay the whole of the gratuity (with interest) and become entitled to a preserved pension;

3) to repay a part of the gratuity (with interest) and become entitled to a smaller preserved pension. Repayment of the whole of the gratuity with interest amounted to £28,897.50.

Mr W maintained that, because he was given misleading information, he was entitled to a preserved pension in addition to the tax-free gratuity and, should he choose to repay part or all of the gratuity, he could see no justification in having to pay interest.

Outcome

Mr W's complaint was not upheld. The MOD had accepted that the information given in 1980 was misleading, and they had offered a variety of solutions, together with a payment of £300, as compensation. However, this did not entitle Mr W to retain his gratuity and receive a preserved pension; that was not an option to which he was entitled under the regulations.

Mr W had benefited from the money that had been paid to him and there was no reason in principle why he should not have to account for that by the payment of interest.

N01105: Early retirement

Background

Mr P was a member of his employer's final salary Scheme. His employer also established an Individual Pension Plan (IPP) for Mr P's benefit on a 'salary sacrifice' basis. The employer was the grantee of the IPP policy, until the policy was assigned to Mr P on leaving service. In June 2000, Mr P was made redundant and requested details of his pension benefits from the Trustees of the final salary Scheme. He opted to take his benefits early, with effect from March 2001. The option he chose was the maximum tax-free cash lump sum and a reduced annuity.

Mr P's complaint was that he should also have received quotations for the IPP at the same time as the final salary quotations. His contention was that he would have taken the maximum tax-free cash sum possible from the IPP, which would have resulted in his receiving a higher annuity from the final salary Scheme. He said that Equitable Life should have been aware of the existence of the IPP, and therefore have arranged for his early retirement quotations to include the benefits from the IPP.

Outcome

The complaint was not upheld. The IPP was set up under a separate Trust and there was no obligation for the Trustees of the final salary Scheme to provide Mr P with details for the IPP. Equitable Life provided him with the information he requested, and could not be criticised for failing to provide information which they had not been asked to provide.

In addition, it was found that, even if Mr P had been provided with quotations for both the final salary Scheme and the IPP, he had not provided any evidence that he would have chosen to commence payment of the benefits under the IPP at that time, having stated on more than one occasion that he had found new employment, which resulted in him paying tax at the higher rate, and therefore that he did not intend to commence payment of the IPP.

N00030: Early retirement in reliance on an incorrect quotation

Background

Mrs W's normal retirement date was 24 March 2007. On 22 June 2001, her employer, a local authority, provided her with an incorrect estimate of benefits becoming payable from an early retirement date of 25 March 2002. The estimate stated that she would receive an annual pension of £3,157.53,

and a lump sum of £10,333.04, from the Scheme. She also held an AVC fund with the Scheme, and she was told that this would provide an additional potential annual pension of £518.81.

Mrs W took early retirement. Her salary at date of leaving was £15,801. Actual benefits paid, however, consisted of a lump sum of £7,266.45 and a pension of £2,598.38. The employer stated the cost of providing the incorrectly quoted additional benefits would be £11,161.61.

Outcome

Had it not been for the incorrect pension estimate, Mrs W would not have retired; had she continued to work she would have accrued a further pension of £987.56 per annum. It would have been excessive to have compensated Mrs W in full for the loss of earnings (£69,392.57) and the loss of accrued pension (£987.56) as this amount (£70,380.13) far exceeded the difference between the wrongly quoted benefits and the correct benefits. Also taken into account was the benefit of extra leisure time that Mrs W had enjoyed in retirement.

The complaint was upheld and compensation was restricted to the value of the misquoted benefits which Mrs W was originally prepared to accept.

N00368: Transfer not allowed

Background

Mr R complained that he was not allowed to transfer his Scheme A benefits to Scheme B, unlike other colleagues in the same situation.

Mr R had accumulated service from 2 October 1967 to 8 November 1978, and accrued preserved pension rights within Scheme A. On 13 November 1978, he joined a new employer and became a member of Scheme B.

From 31 January 1979, Rules were introduced into Scheme A stipulating time limits for transfers to be conducted. Members who were discharged from the Armed Forces on or after 1 April 1975, when preserved pensions were introduced under UK legislation, but before the introduction of Scheme A transfer Rules, were given the opportunity to apply for a transfer of benefits into any scheme participating in the Public Sector Transfer Arrangements **(the Club)**. Scheme B participated in the Club.

The cut off date for applications to transfer out Scheme A benefits in this way was initially 31 December 1979, but this date was subsequently extended to 30 June 1980 and finally to 30 September 1981. A transfer between Schemes in the Club provided, broadly, for year for year benefits to be transferred. Thus 11 years' service transferred from Scheme A would provide the equivalent of 11 years' service in Scheme B. Revised timescales and guidance were provided to Scheme B members through newsletters that formed part of Mr R's required reading.

Mr R claimed that he became aware, long after the deadlines had expired, that other transfers between Scheme A and Scheme B had been allowed, and complained that he had been treated differently to other colleagues. However, investigations revealed that other transfers had been allowed outside the time limits only on the basis that maladministration had been identified by Scheme A.

Outcome

In Mr R's case, no maladministration had been identified. He had not claimed that he did not have access to the disclosure documents telling him about the revised timescales for applying for a transfer. It was concluded, therefore, that he had plenty of opportunity to have made an application before the expiry date and the complaint was not upheld.

N00282: Transfer payment less than guaranteed statement of entitlement

Background

Mr W complained that his transfer payment was less than the guaranteed statement of entitlement that was issued to him, and that he had thereby suffered a financial loss.

The Scheme was in wind-up during the period in question and, on 21 December 2001, all members, including Mr W, were issued with a guaranteed statement of entitlement by advisers appointed by the employer to administer the Scheme **(the Advisers)**.

The guaranteed statement of entitlement quoted £50,845.99 available for transfer. That quotation, although incorrect, was guaranteed for three months until 21 March 2002. Mr W signed his agreement to transfer on 6 March 2002, and the Advisers received this on 11 March 2002, which was within the three-month guarantee period. The Scheme was therefore obliged to make payment by 21 June 2002.

The Advisers said that the transfer form, received on 11 March 2002, did not constitute a valid transfer application. However, Section 94(1)(a) of the Pension Schemes Act 1993, stated that a relevant application was one that was in writing and specified the way in which the cash equivalent was to be used, and the transfer form complied with that requirement.

Outcome

Section 97(2)(b) allowed a cash equivalent to be reduced in accordance with Section 97(3) (c), because of the state of funding of the Scheme. The advice provided by the Scheme Actuary on 25 March 2002, confirmed that the correct transfer value should have been £47,327.94. Consequently, £47,327.94 represented Mr W's correct entitlement from the Scheme and the complaint was not upheld.

4

The Courts

There was considerably less litigation involving the office than last year. Cases where judgements have been issued during the year are summarised below:

27 July 2004

Farley and another v Secretary of State for Education and Skills and another [2004] All ER (D) 485 (Jul)

High Court, England - Peter Smith J

Miss Dann had worked as a teacher for East Sussex County Council (East Sussex CC) for all her working life, until her retirement as a headmistress in 1978. She had been a member of the Teachers' Pension Scheme (the Scheme) but, on her retirement, did not claim any benefits under the Scheme.

After her death in 1997, her executors claimed arrears of benefits under the Scheme, from 1978. Payment was made in February 1998 of the sum of £107,015, comprising arrears of pension and a lump sum, net of tax. The following month, the executors received the sum of £1,920 representing statutory interest payable from 1996, being the date from which the managers of the Scheme believed that Regulations as amended (see The Teachers' Superannuation (Amendment) Regulations 1996) made provision for payment of interest on arrears of pension.

The executors queried the amount of interest paid, contending that it should be payable from the time payment was due. The managers referred to the 1996 Regulations and said that there was no requirement to pay interest on late payment of benefits before October 1996 in the absence of maladministration. There had been no maladministration because they were unaware of a teacher's retirement date until notified by the employer, and no benefit was paid in the absence of a written application; the onus was on members of the Scheme to make a claim for benefit.

The executors complained to me about the Scheme for failing to pay interest on the arrears before 1996, and East Sussex CC for failing to advise Miss Dann about her pension rights on retirement. East Sussex CC responded that they notify the Scheme managers when a teacher leaves their service. All their records relating to Miss Dann had now been destroyed, but the procedure at the time she retired was that they would, on the retirement of a teacher, send him or her an application form for benefits under the Scheme for completion and forwarding to the managers.
The Department for Education and Skills, responding on behalf of the Scheme's managers, argued that, if I were minded to uphold the complaint, any award of interest should be based on the arrears net of tax, and should take into account any increase in state benefits Miss Dann had received by virtue of not having claimed her pension under the Scheme.

I upheld the executors' complaint. I found that, since East Sussex CC had no record of having sent Miss Dann a form to apply for her benefits, on the balance of probabilities they had not done so.
I found that the managers should have also, as a matter of good administration, taken steps to locate teachers such as Miss Dann who did not claim benefits due to them (steps which they say they have

been taking since 1996). The failure to take those steps before 1996 was maladministration. While I was inclined to accept the view that interest, pursuant to the Regulations, was payable only from 1996, I found that the maladministration that I had identified led to an injustice which should be redressed. Accordingly, I directed that interest should be paid from the date when instalments of the pension would have been payable, had it come into payment at the date of Miss Dann's retirement. I considered that such interest should be paid on the gross amount (less any state benefits received as a result of not receiving her pension) of pension due, because it fell due before any tax issue arose.

The Department and East Sussex CC appealed. The Department contended that I had erred in law in concluding that its failure to take steps to locate Scheme members who were not claiming benefits constituted maladministration. East Sussex CC contended that any maladministration by them was not causative of the alleged loss.

Peter Smith J upheld the appeal. In relation to the Department, he held that the relevant Regulations provided that no benefits were payable unless a written application for payment had been made. There was no positive duty under the Regulations to check whether members were entitled to, but had not claimed, benefits. This followed the general law that Trustees and administrators of pension schemes owed no duty to advise members of their rights under a scheme. Peter Smith J went on to hold that, even if he was wrong, the decision to award interest on gross amounts due to Miss Dann (rather than arrears net of tax) was an over-compensation, because it would give the estate a greater sum than Miss Dann would have received in her lifetime. Peter Smith J also held that there was insufficient evidence to show that the failure by East Sussex CC to send a letter to Miss Dann about her benefits caused her loss. So the determination against it was also set aside.

19 January 2005

Henderson v Stephenson Harwood (a firm) and others [2005] All ER (D) 140 (Jan)

High Court, England – Park J

Mr Henderson is a solicitor. In April 1989 he joined Stephenson Harwood, a firm of solicitors. In 1993, at the request of his employers, he was seconded to Stephenson Harwood Lo (in Hong Kong). He contended that, before going to Hong Kong, there was an agreement between him and Stephenson Harwood, that he would be granted early entry to the Stephenson Harwood Pension Scheme (the Scheme), and that his membership of the Scheme would be backdated to April 1989. These arrangements were not put in place.

In 1996, Mr Henderson left the employment of Stephenson Harwood Lo and joined another firm. However, he pursued the question of his pension arrangements with Stephenson Harwood, contending that their failure to admit him to membership of the Scheme was a breach of contract. After unsuccessfully seeking redress by negotiation or via the firm's internal dispute resolution procedures, he complained to me.

His principal complaint was of a breach of the agreement allegedly entered into in 1993. He claimed an entitlement to whatever sum would have purchased an annuity equal to the benefits he would have received under the Scheme, and a sum equal to what Stephenson Harwood would have paid for life cover. He also claimed compensation for distress and inconvenience.

I upheld his complaint to the extent of finding that there had been maladministration leading to an injustice in not allowing Mr Henderson admittance to the Scheme, and I directed that he should now

be admitted to it, subject to payment of contributions by him. I further directed, that if he required Stephenson Harwood to do so, they should give a transfer value for his benefits which could, if he wished, be transferred to a different Scheme. I did not uphold his claim for a sum equivalent to the life cover, nor for compensation for distress and inconvenience.

Mr Henderson appealed on the basis that it was not correct to remedy the injustice he had suffered by directing admittance to the Scheme, rather than the payment of damages. He believed that the correct remedy for a breach of the 1993 agreement was damages. He also appealed against the figure for notional salary on which I had found pension benefits should be calculated and the amount of contributions I had found he should pay. Finally, he appealed against my direction relating to payment of interest on contributions and against my finding that no payment of a lump sum equivalent to the life cover was due.

Stephenson Harwood cross-appealed on the basis that, contrary to Mr Henderson's contentions in his appeal, I had not found that they were in breach of contract. Further, any maladministration on their part did not justify the remedy awarded because, in the absence of a legally binding contract, as they contended, it was not permissible to award compensation as if there had been.

Park J dismissed Stephenson Harwood's cross-appeal. He found that there had been a breach of contract, saying that the documents supported this view. Furthermore, where an employer and employee agreed that the employee would join the pension scheme, that was usually all that was needed for a binding contract to be formed. A detailed understanding of the Rules of the scheme was not required.

Park J dismissed Mr Henderson's appeal that I should not have directed admittance to the Scheme, rather than damages for breach of contract. He found that, within limits which in this case my award did not exceed, I had a measure of discretion as to the appropriate award to make and, in general, the court should not interfere with the remedy which I had decided was appropriate. Section 151(2) of the Pension Schemes Act 1993 did not provide that I was tied to the particular remedy which a court would have given if the complainant had chosen to use the more formal processes of a civil action in the courts. The award must be of a kind which, under the general law, a court could grant, and the award of specific performance I had directed was such an award.

Park J found that the notional salary should be calculated by reference to the basic salary which Mr Henderson would have received plus profit related pay increases. Park J requested the parties to try to resolve this between themselves, failing which they could refer it back to court. As for the rate of interest directed, Park J held that a detailed matter of this nature was not something he could consider on an appeal limited to questions of law, and that the selection of the appropriate rate was a matter within the area of judgement left to me.

Mr Henderson's claim to entitlement to damages (equivalent to the total amount of the premiums which Stephenson Harwood would have to have paid, but did not) for the non-provision of life cover and permanent health disability was also dismissed. Park J agreed with my finding that no loss had been suffered by Mr Henderson in this respect. Mr Henderson had not incurred any personal expense in paying for this cover and there was, therefore, no loss.

4 February 2005

Lewis v (1)Pensions Ombudsman (2)Nortel Networks plc (3)Nortel Networks UK Pension Trust Limited [2005] All ER (D) 66 (Feb)

High Court, England – Lawrence Collins J

Mr Lewis was employed by Standard Telephones and Cables plc (the Company) and was a member of its pension scheme. The Company was taken over by Nortel Networks plc in 1990.

In 1989, a dispute between Mr Lewis and the Chairman, led to Mr Lewis walking out. He was prepared to return to work on negotiated terms, and a letter of November 1989 (the 1989 Agreement) set out the terms agreed for his return. The 1989 Agreement provided, inter alia, for the adjustment by the Company to his pension, either by means of a salary increase before he left the Company, or by means of a one-off capital injection into the pension fund to produce a pension equivalent to the Inland Revenue (IR) maximum pension at age 58, based on his salary before any adjustment for that purpose. In 1991, Mr Lewis was made redundant. The terms of his redundancy included a statement that he had received a lump sum payment of £46,225 into the pension fund in accordance with the 1989 Agreement. Mr Lewis signed the redundancy terms indicating his agreement to them in full and final settlement of any claims he might have against the Company in respect of his employment or its termination.

In November 2000, Mr Lewis reviewed his financial affairs and came to the view that he might not have received the full pension to which he was entitled. He had concerns about the funding of his AVCs and believed also that the phrase, 'Inland Revenue maximum pension', should mean the maximum permitted following changes to the IR's limits brought about by the Finance Act 1989 (the 1989 Regime). The 1989 Regime was more generous than that which previously applied– the 1987 Regime.

He complained to me that the Company had failed to ensure that he receive such maximum, in breach of the 1989 Agreement, and had failed to consult him about the possibility, and consequences, of applying different IR limits when calculating his pension. He also complained that the Trustees had failed to consult him about the effect of different IR limits on his pension, and that, by their applying the lower IR limit to his benefits, he thereby lost the benefit of AVCs which he had made over the years. He asked that, in the circumstances, his AVCs should be refunded to him. He said that, as a result of not being paid what he contended was the maximum permitted under IR Rules, his pension was £5,800 per annum lower than it should be.

During the course of the investigation into Mr Lewis' complaint, my jurisdiction was challenged in the light of Mr Lewis' acceptance that the agreed redundancy terms (which included a statement as to the amount to be paid into his pension fund) were in "full and final settlement" of any claims he might have against the Company in respect of his employment or its termination.

I did not uphold Mr Lewis' complaint. While I had some sympathy for the argument that the settlement agreement entered into in 1991 might oust my jurisdiction, since I was not upholding the complaint, I did not intend to make any finding about jurisdiction, as to decline to investigate at that late stage would be unfair to the other parties. On the merits of Mr Lewis' application, I concluded that Mr Lewis and the Company had entered into a contract in 1989, for the provision of a pension on the basis of the 1987 Regime. Accordingly, neither the Company nor the Trustees were under an obligation to consult and advise Mr Lewis about the possibility of an alternative IR Regime which might result in higher benefits. As for the AVCs, these could be included in calculating the further funding needed to bring Mr Lewis' pension up to the maximum permitted under the 1987 Regime.

Mr Lewis appealed. He submitted that the phrase, 'Inland Revenue maximum pension', meant the maximum permitted by the 1989 Regime and that the Company was under an obligation to inform him of the alternative higher limit. Nortel contended that the settlement entered into in 1991 barred the complaint to me. Mr Lewis contended that it did not apply to the 1989 Agreement and did not bar his complaint or appeal.

Lawrence Collins J dismissed the appeal. He held that the parties had agreed to the 1987 Regime. Words in a contract should be interpreted in the way in which a reasonable commercial person would construe them. The matrix of surrounding circumstances pointed to the conclusion that the parties had the 1987 Regime in mind when they reached the 1989 Agreement. Although details of the new IR limits had been published by the time of the 1989 Agreement, at the time, Mr Lewis had no statutory right for the 1989 Regime to apply to him and there was no obligation on the Scheme to confer such a right, although it could choose to do so. The 1989 Agreement would have had to be spelled out in much greater detail, if the parties had intended that the new 1989 Regime would apply to Mr Lewis.

The Company was under no obligation to notify Mr Lewis of the existence of a more favourable Regime. There were no circumstances implying a term that the Company was under a duty to tell him how he could maximise his pension. He was a senior employee and able to seek professional advice.

The words 'in full and final settlement' applied to claims of the kind made by Mr Lewis. The settlement agreement referred to the payment made under the 1989 Agreement.

2 March 2005

Trustees of the Saffil Pension Scheme v John Curzon [2005] All ER (D) 28 (Mar)

High Court, England – Park J

Mr Curzon was born in 1967 and, since 1985, had worked for Saffil Ltd (a subsidiary of ICI) doing work of a physical nature as a process operator or production packer. A degree of mobility was needed for his job. He was a member of the company pension Scheme.

During the 1990s, he became increasingly unable to perform his job because of both a prolapsed lumbar disc and his obesity; the two conditions interacting to exacerbate his difficulties. By 2000, he could not continue with his job and declined to change to another type of work. Saffil's occupational health adviser told the HR managers that she believed Mr Curzon was unfit for work for the foreseeable future. Saffil gave him notice of termination of employment and he left the company in March 2000. He applied for ill-health benefits.

The Trustees met to consider Mr Curzon's application on three occasions – June 2000, and May and December 2002. The application was rejected each time. Reasons were not given for the Trustees' rejections but, in subsequent submissions to me, they said that it was partly on the basis that, if Mr Curzon lost weight, he could undergo surgery to improve his back condition.

I upheld Mr Curzon's complaint. The relevant Rule provided for the grant of an incapacity pension if the Trustees were satisfied that the injury or ill-health from which he was suffering was likely to incapacitate him permanently or for an indefinite period from doing his ordinary work. I found that the Trustees had improperly asked themselves if they should be awarding a pension to an individual who had a health problem which, in the absence of obesity (which was a lifestyle issue), could be treated by surgery. They had failed to ask themselves how realistic it was for Mr Curzon to

lose the necessary weight for the surgery to go ahead. I also found that the Trustees had misconstrued the term 'ordinary work' to include light non-physical work, which was not the same as the physical work of a process operator. I concluded that the Trustees had come to a perverse decision and directed the payment of an incapacity pension under the relevant Rule.

The Trustees appealed on the grounds that I was wrong to conclude that 'ordinary work' could not include non-physical work, if it was of a similar grade, status and salary. They also argued that my approach to the question of permanence was wrong in law because obesity, as a lifestyle problem, was capable of improvement. They disputed my conclusion that the Trustees had come to a perverse decision. What I had done, the Trustees argued, was to substitute my own view for that of the Trustees, which I was not entitled to do, even if I disagreed with their decision. Lastly, even if I decided that the Trustees were in error, it was said that I was not entitled to grant Mr Curzon a pension and that I should instead have remitted the matter to the Trustees for reconsideration.

The appeal was dismissed by Park J. In relation to the first ground of appeal, he held that the relevant Rule referred to '*his* ordinary work' [my emphasis], meaning work of the same general nature as that which Mr Curzon had done before becoming incapacitated. In relation to the second and third grounds, which were considered together, the medical reports which the Trustees had before them did not support the view that, if Mr Curzon changed his lifestyle, he would cease to be incapacitated. At best, all that could be said was that, if he reduced his weight sufficient to have the operation, and if the operation were successful, Mr Curzon might be able to resume his previous work. However, the medical reports also made clear that, even if he did change his lifestyle, get his weight down and have the operation, this might still not have enabled him to get back to his job. In fact, the reports suggested that the odds were stacked against that happening. Thus, the only conclusion that reasonable Trustees could have reached, was that Mr Curzon's incapacity was, even if not yet permanent, at least indefinite. Finally, Park J held that my direction for payment of pension was entirely within my powers. I did not myself grant the pension, I ordered the Trustees to pay an incapacity pension to Mr Curzon. He considered that section 151(2) of the Pension Schemes Act 1993 gives me power to direct any person responsible for the management of the Scheme, to take such steps as I might specify, and that the direction given was appropriate, given my decision on the substantive matters which were before me.

5

Management

Costs

The office is funded through the Department for Work and Pensions. A budget of £1,960,000 was agreed following agreement to my business plan. Partly through provisions for certain expenditure not materialising and partly through normal controls over spending, my expenditure was substantially less than our original budget at £1,753m (£1.588m last year)

The main cost relates to staff £1.429m (£1.194m last year). Staff numbers had increased to 35 by year end from 32 at the beginning.

Appendix 1 – Staff in post at year end

Pensions Ombudsman
David Laverick

Business Manager
Mike Lydon

Team Leader
Tony Krishna

Senior Investigators
Michaela Brown
Ken Buckley
Caroline Leal
Deborah Sheaf
Aruna Sud

Investigators
Rebecca Miles
Robert Orr
Sundeep Panaich
Paul Strachan
Robin Willis

Legal Advisors/Investigators
Annabelle Cyprys
Lesley Stead

Investigation Assistants
Carl Monk
Natalie Winn

Team Leader
Velia Soames

Senior Investigators
Tom Bick
Jerry King
Peter O'Brien
Clancey Smith
Jane Stephens
Terry Stevens

Investigators
David Jones
Wilson Lam
Vasanthy Vijayaratna

Investigation Assistants
Kai Lau
Laura Francis

Management Assistant
Suzanne Little

Administrative Officer
Tanveer Chana

Team Leader
Fiona Nicol

Senior Investigators
Rod Joyce
Geoff Naldrett

Legal Advisor/Investigator
Claire Ryan

From left to right: David Laverick, Mike Lydon, Fiona Nicol, Velia Soames, Tony Krishna

Appendix 2: Expenditure

	2004–2005	2003–2004
	£'000	£'000
Staff	1,429	1,194
Telecoms/Computers	84	73
Printing/Stationery/Postage	55	58
Legal Costs	19	81
Other	166	178
Total Running Costs	1,753	1,584
Capital Expenses	2	-
Total Expenditure	1,755	1,584

PENSIONS

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