

Pensions Ombudsman

Annual Report

2006/2007



The Pensions Ombudsman David Laverick







To: the Secretary of State for Work and Pensions

I have pleasure in submitting the Annual Report of the Pensions Ombudsman for the year 1 April 2006 to 31 March 2007.

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

David Laverick

Pensions Ombudsman – July 2007

03	Chapter 1: Introduction	
09	Chapter 2: Casework Review	
19	Chapter 3: Case Summaries	
65	Chapter 4: Appeals to the Courts	
73	Chapter 5: Management	
77	Chapter 6: Pension Protection Fund and Financial Assistance Scheme	

“ ...procedures are fairer
and more transparent...
better quality decisions
being made. ”

Introduction

This will be my final Annual Report as the Pensions Ombudsman.

Resourcing the Office

I took office in the month of the attack on the World Trade Center in New York which brought in its wake a significant reduction in the value of UK Equities. Along with various other factors, that led to funding difficulties for many Defined Benefit Occupational Pension Schemes. Thus my time in office has coincided with a period when pensions have been in the political and media spotlight which may have been a factor in the volume of work undertaken by the Office being considerably increased during my tenure.

Over the last two years the level of incoming work has, however, fallen back enabling the Office to meet (and indeed exceed) the aim of having its output match that input.

Like most Ombudsmen, I have little control over the volume of incoming work and there have undoubtedly been times over my tenure when the Office has struggled to cope, particularly when there was a considerable delay in the Department authorising an increase in staffing to keep pace with the incoming workload. I do understand that Government Accounting constraints may make it difficult to increase an allocation within a financial year but that may need to be done if the Office is to continue to operate effectively and efficiently.

When I was appointed, I had read of concerns which my predecessor had expressed about the IT provision within the Office. Although I had been informed that those concerns had been met, it was quickly apparent that this was not so: the hardware was unreliable and the software unsuited to the task. Despite a determined, if belated, effort by DWP to tackle this problem over the last two years I should in fairness to my successor point out that the Office still lacks a management information system which is fit for purpose and remains tantalisingly unable to reap the full rewards of the investment which has been made in new IT hardware, welcome though the greater reliability of that hardware has been.

Protection for Pensions

Early in my tenure I expressed some concern about the illusory impression of security provided for members by the Minimum Funding Requirement: a scheme could be certified as meeting that requirement 100% only for the Employer immediately to go into liquidation and for members to find that their benefits were far from 100% secure. I also expressed the view that there was a moral obligation on the Government, which was anxious for the working population to make provision for retirement, to ensure that money which had been allocated for that purpose was indeed available when needed in retirement.

Thus I welcomed the establishment of the Pension Protection Fund by the Pensions Act 2004, the provision going a considerable way toward dealing with the consequences of money not being available on retirement. The lengthy assessment process laid down by that Act has delayed the point when the calculation and payment of benefits from the Fund could be expected to give rise to complaints. Thus it remains difficult to forecast whether disputes about the entitlement to such payments will become a significant part of the work of my successor.

If early experience is maintained, there is unlikely to be significant work arising from the PPF's assessment and revenue gathering processes: I have not been called upon to determine any aspect of that work although a few references arising from the imposition of the risk-based levy were received close to the end of the financial year.

Reasons for Decisions

Another of my early concerns was the widespread practice whereby pension schemes did not give reasons for decisions taken, for example, to refuse applications for ill-health benefits or applications for early retirements. Coming from a background in the public sector, this struck me as unfair, the more so when I took into account that the decisions could have a very significant impact on the lives of scheme members and their families. I am pleased to be able to note that over my time in office there has been a widespread change in such a practice. This not only means that procedures are fairer and more transparent but has also, I believe, led to better quality decisions being made. This is particularly so in relation to dealing with applications based on ill-health. Schemes are now sharing with the member concerned the basis on which such decisions are being made, allowing the opportunity both for any factual misunderstandings to be corrected and for alternative medical opinions to be put forward. Ω

A more difficult area in which to establish what reasons exist for decisions, and how to explain such decisions to affected members, is that relating to the distribution of death benefits. Essentially in order to avoid the possible imposition of Inheritance Tax, death benefits from pensions schemes are usually payable at the discretion of the Trustees or Managers of the Scheme albeit that Scheme Rules usually specify various classes of potential beneficiaries and allow the members themselves to make a nomination of the person or persons whom the member wishes to receive the benefit.

Some Trustees or Managers do seem to have operated under the belief that the Rules of the Scheme allow them to make arbitrary or capricious decisions for which they should not be held to account. I have not shared their view.

Other Trustees or Managers are too ready to focus on a sentence in a leading House of Lords decision¹ to the effect that Trustees would not be expected to require the production of a complete list of all the potential beneficiaries, as a justification of their actions in distributing benefits despite not having obtained highly relevant information. The House of Lords in their judgement made clear that there is a responsibility on Trustees to make diligent and careful enquiries commensurate with the need to bring such relevant information to light.

I remain to be convinced whether pensions schemes should continue to participate in what is essentially an Inheritance Tax loophole. A better system to my mind would be for the Scheme's death benefits to be payable in accordance with the expressed wishes of the Deceased as set out in any nomination form provided to the scheme or, in the absence of such a form, in accordance with the Deceased's Will or the provisions on intestacy. That would leave the responsibility for deciding whom to benefit firmly with the individual scheme member and would remove Trustees from having to negotiate their way through a potential minefield of competing interests, assuming indeed that the

¹ *Re Baden* [1971] AC 424

Trustees or Managers had adequate processes in place for bringing such interests to light.

Independent Trustees and Exoneration Clauses

Two other recurrent themes during my time in office have been concerns at the lack of effective regulation of Independent Trustees and the operation of what are known as exoneration or exclusion clauses by which Trustees, including paid Independent Trustees, can avoid the consequences of their failings. It seems to me to be wrong in principle for a person to be paid for his professional services and yet to be able to say that if a scheme or one or more of its members have suffered as a result of maladministration in the way in which such services have been provided then no redress should be available.

I commend the approach taken, for example by the Occupational Pensions Defence Union whose policy, as I understand it, provides cover for its membership despite the presence of an exoneration clause.

So far as concerns Independent Trustees, the Pensions Regulator has a statutory obligation to maintain a Register of persons who meet conditions set out in Regulation 3 of The Occupational Pensions Schemes (Independent Trustee) Regulations 2005. Where a Company has gone into liquidation only persons on the Regulator's list can be appointed by the Liquidator of the Company as an Independent Trustee for the purposes of winding up the Pension Scheme. Once appointed the Independent Trustee has power to act unilaterally, – and as the Chief Executive of the Pensions Advisory Service put it some years ago – can set his own fees, authorise payment of his own invoices, and indeed sign the cheque to make that payment.

A pre-requisite of registration by the Pensions Regulator is that the Independent Trustee must agree to fees and costs being scrutinised by an independent adjudicator and to be bound by that person's final adjudication.² The Regulations do not themselves contain any provisions as to the appointment of the independent adjudicator or what qualification such a person should possess. My understanding is that the Regulator is content for an Independent Trustee to make his own arrangements for disputes about fees to be referred for adjudication. I am doubtful whether such an arrangement can be described as independent. It would in my view be better to follow the model which applies to solicitors whereby a request can be made to the Legal Complaints Service for a disputed amount to be subject to the issue of a Remuneration Certificate, a service which is provided free of any direct charge to the parties.

Other pre-requisites for registration by the Pensions Regulator are that the Independent Trustee must be a fit and proper person to act as a Trustee of an occupational pension scheme, must operate sound administrative and accounting procedures and have adequate indemnity insurance cover. It seems to me that an arguable case can be made out that an Independent Trustee who has been found, as a result of investigation by the Pensions Ombudsman, not to have sound administrative procedures does not meet the requirements for registration and that the Pensions Regulator should take particular interest where such a person seeks to take advantage of an exoneration clause and so leaves the individual(s) affected by those faulty procedures without redress. There appears, however, to be a reluctance on the part of the Pensions Regulator to use the powers available under these Regulations.

² Regulation 3 (e) (i) of The Occupational Pension Schemes (Independent Trustee) Regulations 2005

Perhaps in an ideal world there would be sufficient self-regulation by the profession itself as to make unnecessary recourse to any statutory powers. I have welcomed the establishment of an Independent Pensions Trustee Group within the Pensions Management Institute, but the Code of Guidance produced by this Group contains no guidance on sheltering behind exoneration clauses and there seems to be no formal disciplinary process associated with membership of that group.

The Compensation Culture

I mentioned in my report last year that many people who approach the Office do so in the belief that if there has been an error on the part of a respondent some financial redress should automatically be provided. Indeed some look not for redress but for a financial penalty to be imposed. My office does not however impose penalties and a pre-requisite to requiring compensation to be paid is for me to find that some injustice has been caused. It does not follow that because there has been maladministration there has also been injustice, a view which I note, was upheld by Mr Justice Bean in high-profile proceedings involving the DWP during the course of the year.

The Future

The productivity of the Office in the last few weeks of the financial year was to some extent interrupted by the need to respond to proposals from the Independent Reviewer of the Pensions Institutional Landscape who seems to have extended his terms of reference somewhat in order to explore the possibility, canvassed but rejected by the Government during Parliamentary Debates in 2000, of merging the office into that of the Financial Ombudsman Service.

From a personal perspective, I shall be glad not to be further involved in the matter. There is much I admire in the operation of the Financial Ombudsman Service but the scale of its operations puts it outside my own concept of how an Ombudsman service should look.

I shall watch with interest to see whether the Government is indeed prepared to allow disputes of fact and law relating to pensions schemes to be dealt with according to the much less regulated procedures used by the Financial Ombudsman Service, than has been the policy over the period when there has been a Pension Ombudsman. I shall be interested too to see whether those responsible for resourcing the Financial Ombudsman Service succeed in establishing a financial regime which ensures that resources match the level of incoming pensions-related work.

One of the first telephone calls I took when commencing my duties in September 2001 was from Alan Pickering who was reporting on the need to simplify the regulatory regime governing Occupational Pensions. Six years later I doubt whether much progress has been made: indeed we have one major piece of new legislation (the Pensions Acts 2004) added to the Statute Book and a mass of additional regulations in its wake.

A central theme of Alan Pickering's thesis was that "a pension is a pension is a pension".

The move over the last few years from final salary pension schemes to money purchase pension schemes may lead to many employees on the point of retirement reflecting ruefully on that phrase as they realise whilst a pension may be a pension, the level of that pension depends on the view taken by annuity providers of likely investment returns and of the length of time over which any pension is to be paid.

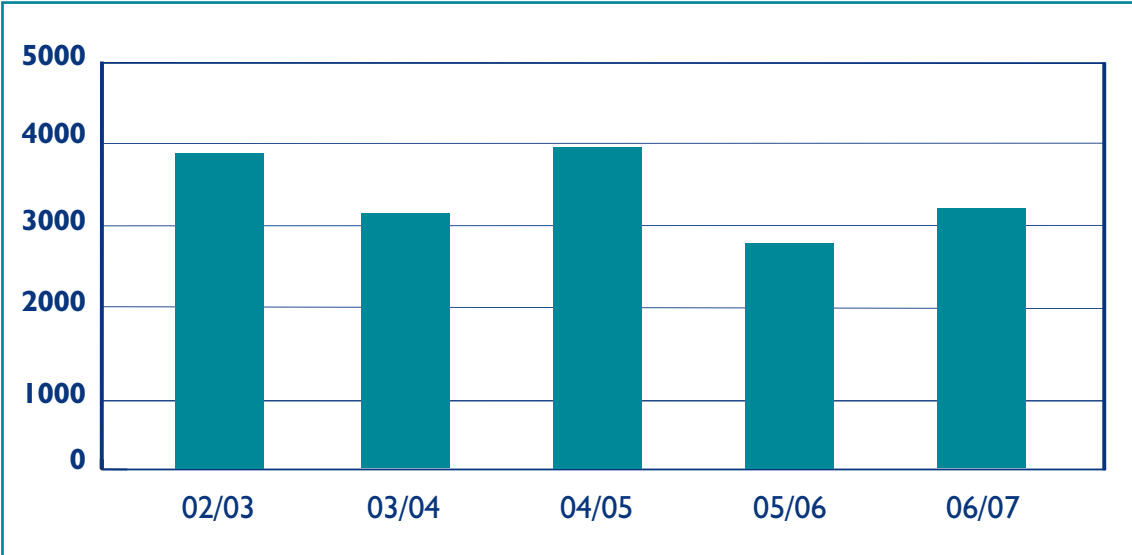
One of my successors at some stage in the future is likely to receive a number of references from people who find, at the point where they seek their annuity to put a pension into payment that their pension turns out not to be as large as the pension for which they thought they had been saving. Will they feel that “a pension is a pension is a pension”?

“ One of the aims is to avoid investigating matters... unlikely to result in any finding that injustice has been caused. ”

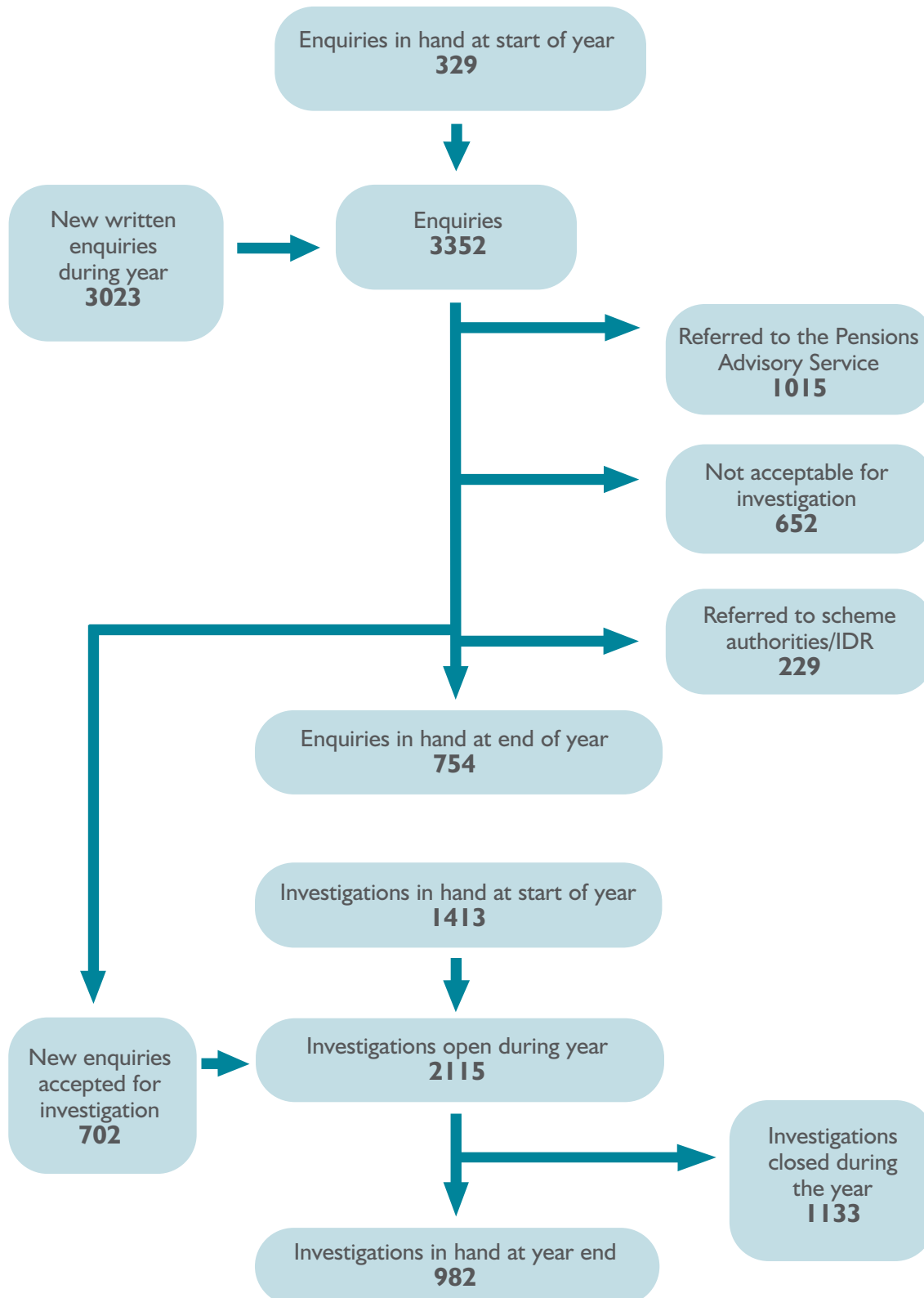
Casework Review

A distinction is made between incoming work, referred to as “enquiries” and those matters which are accepted for investigation, referred to as “investigations”. As a result of changes made to working practices during the year, rather more work is now being undertaken at the enquiry stage than has been the case in previous years. One of the aims is to avoid accepting for investigation matters which, although within jurisdiction are thought to be unlikely to result in any finding that injustice has been caused or the need for any direction to be made. Within that latter category lies the possibility of some matters being settled by agreement at the enquiries stage. A further change is to enable a more precisely expressed statement to be produced of the matters to be investigated although the possibility remains of that statement being varied as the investigation progresses.

Figure 1 - New enquiries received (last five years)



Investigation flow chart 2006/07



Enquiries

Some 3000 enquiries were received (see Investigation flow chart). This was an 8% increase on the previous year but still less than had been expected.

The number of enquiries in hand at the end of the year has increased by comparison with the beginning of the year. This is partly because, as shown in Figure 2, many more enquiries were received in March than in an average month and also because, as indicated above, those cases which are not immediately identified as being outside jurisdiction are subject to rather longer scrutiny at the enquiries stage than had previously been the norm.

As can be seen from Figure 3, the percentage of enquiries accepted for investigation has dropped from 33% to 27%. That is partly explained by the change in working practices to which I have referred, but it also reflects a downturn in the number of incoming cases which had previously been subject to the involvement of The Pensions Advisory Service (TPAS), itself a reflection of the markedly low number of enquiries received in the year ending March 2006, a third of which had been referred to TPAS.

Figure 2 - Enquiries per month (last two years) and average enquiries per calendar month (PCM) 2000-2005

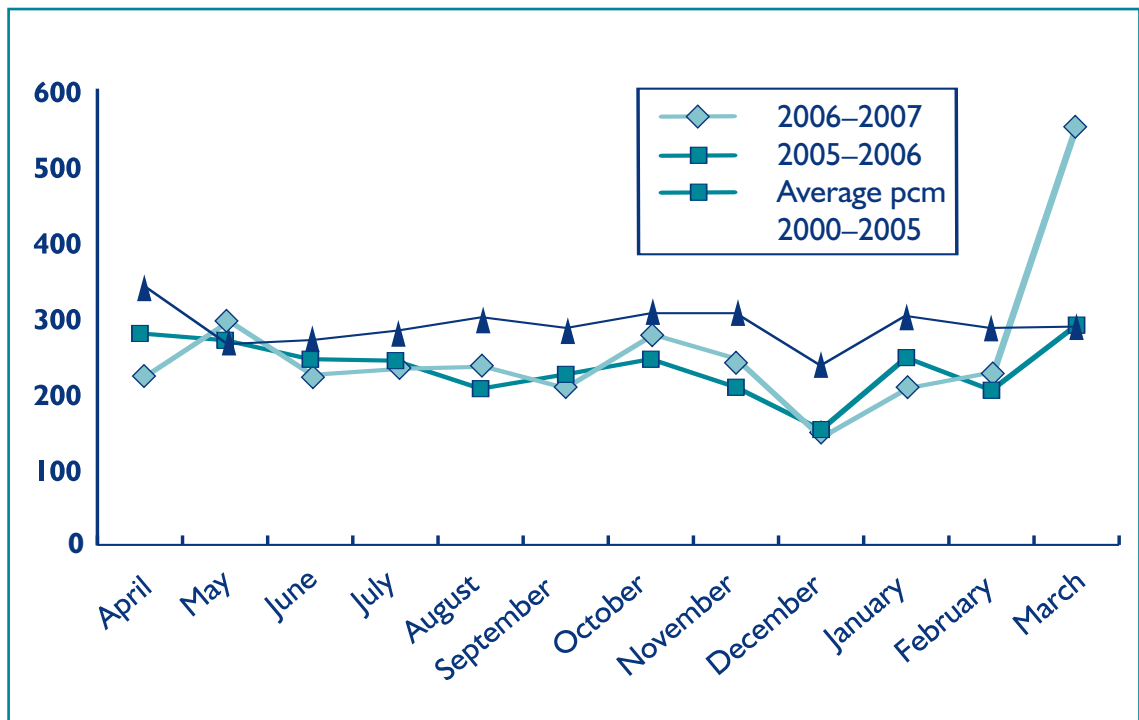
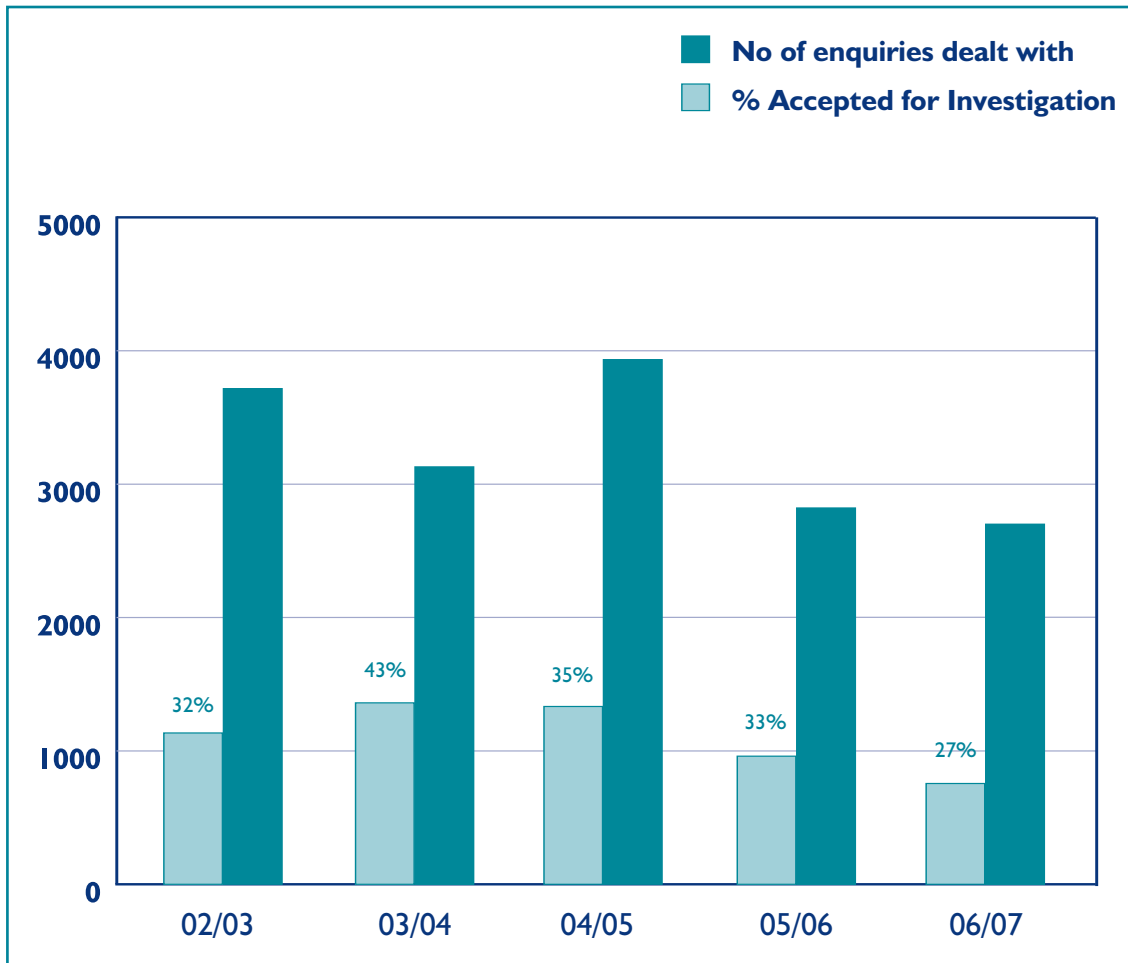


Figure 3 - Enquiries accepted for investigation (last five years)



In the year ending 31 March 2007, not only has there been an increase in the number of enquiries I have received but I have referred almost 40% of those to TPAS. That will usually be because the issue has been raised with me without having first been dealt with in accordance with the Scheme's own Internal Dispute Resolution Process.

In addition to referring approximately 1000 written enquiries to TPAS, all telephone enquiries to the Office (other than those which relate to existing casework) are also passed to TPAS. Figure 4 below shows how I and the Deputy Ombudsman dealt with those enquiries which were not accepted for investigation.

Figure 4 - Referrals and rejections (last two years)

Reason	2006/07	%	2005/06	%
Referred to financial advisor	2	0.11	1	0.05
Referred to FSA or FOS	91	4.80	153	8.12
Referred to The Pensions Regulator	6	0.32	2	0.11
Referred to Pension Schemes Registry	43	2.27	26	1.38
Enquiry not yet put to scheme/IDR not used	229	12.08	228	12.10
Complainant outside jurisdiction	10	0.53	12	0.64
Discretion not to investigate exercised	9	0.47	7	0.37
Enquiry abandoned/no action needed	315	16.61	301	15.98
Not relating to pension scheme/plan	8	0.42	2	0.11
Outside time limit	57	3.01	83	4.41
Protective Complaint	16	0.84	6	0.32
Referred to the Pensions Advisory Service	1015	53.53	951	50.48
Respondent not in remit	15	0.79	8	0.42
State scheme benefits	67	3.53	98	5.20
Subject to prior Court proceedings	8	0.42	6	0.32
FAS/PPF rejection	5	0.26		
Total	1896		1884	

Investigations

In previous years, I have had to report that the investigative workload of the Office being carried forward at the end of the year is greater than the number of cases closed during the year. I am pleased to be able to report that this year, the caseload in hand is 982 by comparison with an output of 1133.

Figure 5 below shows the different methods by which investigations were closed in the previous two years.

Figure 5 - Investigation closures (last two years)

Method of closure	2006/07 Total no	%	2005/06 Total no	%
Discontinued	93	8.2	83	6.8
Resolved	212	18.7	171	14.0
Caseworker's decision letter accepted	291	25.7	304	24.8
Determination following caseworker's decision	210	18.5	285	23.2
Full investigation and determination	327	28.9	383	31.2
Total	1133		1226	

Progress has been made in dealing with the older cases although concentration on that older work has diverted resources from those cases which were received more than a year ago.

Figure 6 - Age of investigations closed (last two years)

Age of investigations	2006/07 No of cases	%	2005/06 No of cases	%
Less than 6 months (183 days)	486	42.9	452	36.9
6 months to one year (183–365 days)	190	16.8	366	29.8
Longer than one year (365 days)	457	40.3	408	33.3
Total	1133		1226	

In my Annual Report last year I mentioned that it would be desirable for the Government to review the various detailed provisions of public sector schemes with the aim of having them operate on a more uniform basis. I mentioned a particular need to overhaul the provisions relating to injury benefits. As can be seen from the cases which are reviewed in the following chapter, the need for such a review – of both the provisions and the practical administration of these schemes – has not diminished.

I am frequently asked what category of pensions administration gives rise to most complaints. Figure 7 is produced in response to such a question but needs to be viewed with caution. Many, if not most, determinations involve consideration of more than one aspect and indeed most determinations involve the investigation of the actions of more than one Respondent. The table below is compiled on the basis of selecting the major aspect within each determination. But a complaint about misleading advice, may for example also involve a complaint about an ill-health pension.

There has been a slight increase in those determinations deemed to be mostly about ill-health pensions and a larger increase in those about winding up. So far as ill-health pensions are concerned, I note this heading includes determinations relating to the public sector injury benefit schemes which seem to be an increasing area of work. The increase in determinations about winding up suggests that the relatively low proportion reported last year under that heading was perhaps a statistical blip which has now been evened out.

Figure 7 - Closed investigations by subject matter (last three years)

Subject matter	2006/07	%	2005/06	%	2004/05	%
AVCs	44	3.9	37	3.0	46	3.6
Calculation of benefits	111	9.8	127	10.4	156	12.3
Contributions refunds and queries	47	4.1	53	4.3	64	5.0
Spouse's and dependants' benefits	27	2.4	42	3.4	28	2.2
Disclosure of information	5	0.4	9	0.7	6	0.5
Early retirement pension	53	4.7	100	8.2	73	5.8
Enhancement of pension	8	0.7	10	0.8	8	0.6
Equal treatment	2	0.2	8	0.6	3	0.2
Ill-health pension	126	11.1	100	8.2	103	8.1
Incorrect/late or no payment	15	1.3	34	2.8	30	2.4
Membership conditions	28	2.5	17	1.4	20	1.6
Misleading advice	58	5.1	158	12.9	140	11.0
Non response from scheme	4	0.4	6	0.5	3	0.2
Preservation requirements	2	0.2	1	0.1	3	0.2
Transfers	158	13.9	172	14.0	158	12.5
Use of surplus	0	0	4	0.3	5	0.4
Winding up	169	14.9	64	5.2	133	10.5
Other	276	24.4	284	23.2	290	22.9
Total	1133		1226		1269	

“ In order to allow a proper opportunity for an appeal, a member needs to know the basis on which such a decision has been taken. ”

Case Summaries

This chapter summarises some matters which are likely to be of interest to those beyond the immediate parties. The summaries concentrate on those matters and do not seek to be a comprehensive account of the particular determination. Some determinations are simply too complicated to attempt to summarise. All formal determinations made by the Ombudsman and the Deputy Ombudsman are published on the website (www.pensions-ombudsman.org.uk.)

Questions of Interpretation

Moo865 Retrospective amendment to Scheme Rules

Miss L was a Member of the Scheme for some 11 years prior to her retirement in 1998. Under the 1995 Rules pensions were based on an average of earnings over the three years prior to retirement or leaving employment. Between 1994 and 1996 discussions took place about amending the Scheme Rules to increase the period of earnings taken into account from three to 10 years and to dynamise the resulting average to take account of inflation. A Deed of Amendment was executed on 15 May 1996 to take effect from 1 October 1986.

The power to amend the Scheme's Rules expressly preserved the accrued rights of the Scheme's members. It also expressly empowered the Trustees to backdate an amendment to the Scheme.

The Ombudsman took the view that the power to backdate amendments did not allow the Trustees to override the accrued rights of members. The power to backdate was permissive – the obligation for the Trustees to preserve accrued rights was mandatory. Making

an amendment retrospective so as to have the effect of prejudicing rights accrued up to the date of that amendment is not consistent with the duty to preserve accrued rights even though it may benefit some members (or even a majority) of the Scheme.

The Ombudsman did not accept Miss L's claim that the entire Deed of Amendment should be regarded as invalid. The Ombudsman felt the invalid exercise of the amendment power (the retrospective aspect) could be excised leaving as valid the prospective aspect of the amendment.

Mo1124 “Broadly Comparable” Pension Arrangements

Mr M complained that the Council by whom he was employed failed to discharge an obligation to ensure that, following the transfer of his employment to the private sector, he was provided with pension arrangements “broadly comparable” to those of the Local Government Pension Scheme (LGPS), or, alternatively, compensation in lieu of such broadly comparable arrangements.

The Deputy Ombudsman noted that Treasury Guidance was only binding on central Government Departments and Agencies, but emphasised that Ministers “also wanted other public sector contracting authorities to make arrangements to meet the standards of protection for staff pensions which it set out...”. A circular issued by the Department with responsibility for Local Government did not go so far as to impose a positive obligation on the Council to apply the Treasury Guidance, but clearly intended that Local Authorities should have regard to similar considerations and made specific reference to the Treasury Guidance in relation to the concept of “broad comparability”. He noted too that a Cabinet Office Statement

of Practice expressly recognised that there were “obstacles to local authorities” following the Statement.

The Treasury Guidance, incorporated into the Cabinet Office Guidance, recognised the possibility that, exceptionally, “broadly comparable” arrangements may not be feasible and that, in such circumstances, compensation should be available. As the Government Actuary’s Department put it, “if comparability is not available ... any detriment on pensions [is] to be offset by elements of the remuneration package outside the pension scheme”.

The tender documentation used by the Council made clear that, if a “broadly comparable” arrangement could not be offered, then the remuneration package being offered to transferring employees should compensate for the absence of such provision.

The Deputy Ombudsman held that the Council had acted within the spirit of the Guidance. It had an independent actuary’s advice that the new pension arrangements were “comparable in value and more flexible than the Local Government Pension Scheme” and that they represented “a not unreasonable alternative to a broadly comparable scheme”. He noted that the new employer had also offered to increase rates of pay by 10%.

N00292 Surplus contributions

Mr R contended that surplus funds which arose at the time his annuity was purchased were not treated in accordance with the Rules of the Scheme or Inland Revenue requirements. Mr R sought to cancel the annuity arrangements set up and, instead, to receive a joint life, index-linked annuity on the basis of the annuity rates in force at the time the original annuity had been purchased. He argued that the surplus that would then exist should be returned to the Scheme which should consider its discretion to return some, at least, of the surplus to him.

The Deputy Ombudsman concluded that Mr R was provided with the maximum possible benefit albeit that, because of low inflation rates, he did not at present see the benefit of the higher escalation rate that was purchased to avoid leaving a surplus. The Deputy Ombudsman took the view that there had been no surplus at the time.

The Deputy Ombudsman was not persuaded that any excess funds could have been refunded to Mr R. Paying such a refund to Mr R would have meant that the funds were not available for the general purposes of the Scheme as envisaged by its Rules.

N00413 Termination of employment

The dispute concerned the date from which Dr B’s pension became payable.

The relevant Scheme Regulation provided that a member was entitled to a pension if he retired from pensionable employment on or after age 60. The Ombudsman held that the cessation of the member’s pensionable employment was not, of itself, sufficient to mean that the member had retired. Although Dr B’s pensionable employment had come to an end on the day before his 65th birthday, his contract of employment continued beyond that date. While Dr B remained employed the Ombudsman did not regard him as having retired within the meaning of the Regulation.

The Ombudsman also held that a payment (made at a time when the employment did end) to reflect the fact that Mr B had not taken annual leave did not have the effect of extending his employment.

No0975 Application of Early Retirement Factors

Mr C wished to have his early retirement pension under the Scheme calculated on the basis that a reduction factor should apply from age 58, rather than age 60, which is what he says that he was expecting from previous practice of the Principal Employer. He claimed that both his Employer under the Scheme, and the Trustees, acted improperly in changing the early retirement reduction factors.

Mr C's former Employer was taken over. The former Employer had a practice of treating employees who were made redundant as if they were being retired with Company consent or at the request of the Company. That practice changed in 1998. The new practice was for employees to be given a choice of two redundancy packages – a more generous compulsory redundancy payment coupled with a pension reduced to take account of the fact that it was being paid from an earlier date than for normal retirement, or a lower voluntary redundancy payment but with an augmented pension. An announcement had made clear that the continuation of its practice was dependent on funding being available.

Following the takeover the Principal Employer announced its intention of carrying forward the more generous practice for the initial five years of the Scheme's existence, but stated that this position was not sustainable in the long-term. The Scheme booklet referred to the generous early retirement terms as being available with the consent of the Principal Employer and the Trustees but did not express them in such a way as to provide a guarantee, stating that the policy was likely to change from time to time.

The Ombudsman did not interpret a statement of an intention to maintain a policy as equating to a binding commitment to provide an automatic entitlement to a practice being continued for the stated length of time.

Circumstances could arise to cause that intention to be revised. It was also important to bear in mind that the change in such a practice was not a change to the benefit entitlement under the Scheme. It was a change to a practice that had the effect of augmenting the benefits to which members were entitled.

The Principal Employer was entitled to consider and give priority to its own finances and to those of the Scheme, in setting, varying or revoking any policy of early retirement/augmented benefits.

Mr C was not entitled to rely on his former Employer's policy as setting a precedent for the present Principal Employer.

The Principal Employer was not making a substantive alteration to the Rules that would as a result necessitate disclosure to the members.

The Principal Employer could make these changes and chose to do so within the prevailing circumstances. The Trustees had no role to play in this decision – they administered the Scheme but did not set the policy under which the Principal Employer consented to the terms for early retirement.

In response to a complaint that the Employer had not properly consulted with the Scheme Actuary as required by the Rules of the Scheme, the Ombudsman stated that the established position in law is that consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. Consultation amounts, essentially, to considering any comments provided, or advice received. It does not mean an obligation to comply with the advice or views of another party.

The Trustees admitted that there had been a procedural error in considering Mr C's complaint under the Internal Dispute Resolution Procedure. The Ombudsman made a small compensatory award in respect of this.

No1399 Guaranteed Annuity Rates

Mr D complained that the Pension Provider had not applied a guaranteed annuity rate (GAR) as shown in his Policy Schedule. The Pension Provider argued that the GAR shown in the Policy was applicable only on a single life pension, but as the Policy required provision of a Guaranteed Minimum Pension it was necessary for a spouse's pension to be provided and therefore a lower annuity rate applied.

The Deputy Ombudsman noted that the conditions of the Policy were not clear. The Pension Provider could not explain its own interpretation and recognised that the Policy could be interpreted in the way which Mr D contended. He applied the doctrine of *contra proferendum*, so that the policy was construed in the manner which did not favour those who drafted it. He found that the GAR should apply to Mr D's pension and any subsequent spouse's pension.

P00103 Ill-health

Mrs L was aggrieved that her application for an ill-health early retirement pension had been rejected. She contended that the Terms of Reference drawn up by Trustees in delegating their powers to a Committee incorrectly included a test for permanency which did not appear in the Scheme Rules.

The Ombudsman held that it is well established that the need for permanency can be implied into Rules governing the early payment of benefits where the context so admits. There was clearly a need to distinguish between a condition from which the member may be expected to recover and a long-term disabling condition. Both may render the member incapable of undertaking the duties for which she was employed but it could not be intended that the former should result in a pension being payable.

The Ombudsman was critical of other terms of reference given to the Committee, including a requirement (which did not appear in the Rules of the Scheme) that the member needed to have taken steps to avoid ill-health. He said:

"Although the Terms of Reference say that the guidelines contained therein do not fetter the Committee's discretion and that each case must be decided on its merits the reality gainsays that statement."

Noting a reference in the evidence that the Committee was looking for clear evidence that Mrs L would never regain sufficient health to return to work, the Ombudsman stated:

"That clear evidence was not available should not have itself been a bar to finding that she did meet the criteria. The Committee needs to take a decision on such evidence as is available and may have to accept that certainty is not achievable."

However, the Ombudsman did not regard the Committee's decision as being against the weight of the evidence or perverse and thus did not uphold the complaint.

P00260 Employment elsewhere

There was a dispute as to whether Mr H had an entitlement to an unreduced pension of two-thirds of his final salary when he left service, irrespective of the fact that he left service before age 65.

Mr H's Service Agreement stated that the Employer "shall make the appropriate contributions" so that Mr H's pension "on retirement at age 65 will be two-thirds" of his final pensionable salary. The Service Agreement was silent on whether retirement at age 65 must be from active service or whether it can include retiring from deferred status.

The Ombudsman was inclined to think that, given the valuable nature of the benefit being promised, the likely intention would be that the benefit was available as a reward for remaining in active service with the Employer until age 65.

Benefits for employees retiring early would usually be governed by a Rule that, if a member ceases “to be in Pensionable Service” otherwise than by “death or retirement”, he is simply entitled at normal retirement age to whatever benefits could be secured by his share of the fund at the particular time. However, Mr H’s entitlement had been varied in the manner specified in a letter that stated that although the Employer would not be prepared to provide a full two-thirds pension at the age of 62, it would continue to fund its share of the premium for Mr H’s pension “from the time of [his] retirement to [his] 65th birthday”.

The Ombudsman concluded that the position was that if Mr H continued to work until he was 65, he could expect to receive a pension of two-thirds of his final pensionable salary. If he retired at age 62, he could expect to have his pension fund as at the date of his retirement topped up by such contributions as the Company would have made had he stayed in service until age 65. It would follow that provided he paid his own contributions to the fund then he could expect the fund again to provide at age 65 a pension of two-thirds of his final pensionable salary.

The Ombudsman was not persuaded by the Employer’s argument that Mr H had not retired (and that therefore the terms of the letter did not apply) because he continued to work in the same field of business after leaving the particular employment. The Ombudsman was satisfied that the effect of the letter, which did not impose any restrictions on Mr H’s activities, was to promise Mr H that the Employer would carry on making its contributions to the pension fund after he left its service.

The Employer had also based its argument on the impracticality of knowing what exact funding was required in order to guarantee a two-thirds pension. The system in place was for an actuary to advise each year on what contributions would be required so that the proceeds of the Policy would match the requirement. The Ombudsman stated that if, as the retirement age came closer, there was a shortfall, and then the relevant contributions would need to be increased accordingly. There was always a risk that the Policy proceeds would not be sufficient to provide a pension at the required level. The effect of the package under which Mr H was employed was that this risk rested with the Employer which had committed itself to provide him with a pension of two-thirds of his final pensionable salary at age 65. If the proceeds of the Policy were insufficient to meet that promise then the Employer would have needed to bridge the gap in some other way.

In the event, not only did Mr H retire before age 65, but he then failed to make the contributions which would have been needed to ensure that the Policy would indeed have paid sufficient proceeds to meet the promise that had been made to him. The Ombudsman held that Mr H’s decision not to pay his contributions did not alleviate the Employer of its obligation to pay its share of the contributions it promised towards Mr H’s pension.

Poo695 Date of Assignment

Mr C complained that he had not received a compensation payment when an Insurance Company demutualised.

A Policy held by Mr C’s Employer to provide retirement benefits for him had been assigned to him.

Because of the terms of the demutualisation, the critical issue which needed to be decided was the date on which the Employer ceased to be a holder of the Policy and the date on which Mr C

became the holder in its place. This depended, in the first instance, on the terms of the Assignment.

The demutualised Insurer regarded the Policy as having been assigned on the date of the Deed of Assignment. The Ombudsman did not regard the matter as being as simple as that. The Deed of Assignment specified that the Executive Pension Plan (EPP) was to be wound up and the policies assigned "in accordance with the Rules of the EPP". These made clear that any assignment was subject to the appropriate endorsement, about which the EPP was quite specific. Similarly, the terms and conditions of the policies made clear that any assignment was subject to an endorsement giving effect to the provisions of the EPP. The fact that the Deed of Assignment contained a date was not decisive as to the effective date of the assignment; it was more likely than not that the date was simply inserted by someone who did not appreciate its significance.

In the Ombudsman's view the effective date of the Assignment was more than two years later, i.e. the date of the endorsement, when the necessary conditions for the completion of the Assignment were fulfilled and the Assignment became absolute. Up to that point the most that can be said is that it operated as an equitable Assignment.

The Ombudsman's conclusion was that the Employer remained as the Policyholder and eligible Member until the later date and thus entitled to payments in accordance with the terms of the demutualisation scheme. When the Policy was legally assigned to Mr C he became entitled to the benefits that should have been received by the Company as compensation for loss of membership rights. Appropriate directions were made to reflect this.

Q00305 Augmented benefits

Mr D was a Member of the Teachers' Pension Scheme. His complaint was that, on his retirement in August 2003, his Employer reneged on an agreement made when he

accepted a temporary promotion at his College in 2002, that any associated temporary pay increase would be pensionable.

The Scheme Regulations provided that where an individual leaves or retires within three years of having received a substantial pay increase (i.e. more than 10% above the standard increase in any year), any increase in salary above that limit will be discounted in the pension calculation process, unless the Employer is prepared to fund the cost of the additional benefits.

Mr D had received a letter from his Head of College at the conclusion of their negotiations about his temporary promotion, that said his increased salary would be 'presentable for pension calculation purposes'.

The Ombudsman considered that the word 'presentable' meant 'to put forward' or 'to submit'. Thus the increased salary figures would be made available to the Scheme Manager for pension calculation purposes but the letter did not go so far as to promise to augment Mr D's pension. Later statements made by the Head of College and subsequent correspondence were not admissible evidence for the purposes of interpreting a contract said to have been established by the letter.

The complaint was not upheld.

Q00324 Amendment to Normal Retirement Age

The dispute related to whether Mrs H had a right to take benefits when she reached age 60 in 2004.

In accordance with the requirement to equalise retirement ages for men and women, following a European Court judgment, the Scheme had amended the normal retirement age to 65 for both sexes. The Definitive Deed contained a clause which allowed the Principal Employer to amend the Scheme Rules, with the consent of the Trustees, and allowed such amendments to be made retrospectively. The Deed of

Amendment effecting the change was dated April 1993 and stated that the amendment was to take effect from January 1993.

Subsequently, the Trustees received legal advice that Mrs H had the right to take part of her benefits at age 60 and, if she exercised this right, the Scheme was required to pay all of her benefits at the same time, albeit that benefits in respect of pre-May 1990 service and post-April 1993 service could be reduced by reference to a normal retirement age of 65. The Trustees put Mrs H's pension into payment on this basis.

The Ombudsman noted that it was not necessary to amend the normal retirement age retrospectively in order to comply with the equalisation requirements. The Employer had an implied duty to act in good faith. The retrospective application of the amendment was not consistent with that duty. Nor was it consistent with the Trustees' duty to act in the best interests of the Members to agree to a retrospective amendment which had the effect of prejudicing Members' accrued benefits.

It was entirely possible for the Employer and the Trustees to amend the normal retirement age, provided that accrued benefits were safeguarded. Mrs H did not retain the right to take her benefits at age 60. Her normal retirement age following the amendment was 65. However, the benefits she had accrued in respect of service up to January 1993 should not be reduced for retirement on or after age of 60.

Retirement prior to age 65 would require the consent of the Employer. In the absence of consent from the Employer, the Trustees did not have the power to pay Mrs H's benefits early. Consent should not be unreasonably withheld but financial considerations were an appropriate factor for the Employer to take into account. It was not improper for the Employer to withhold consent on the grounds of the financial strain payment would place on the Scheme.

Q00456 Use of guidelines

Mr G complained that his Employer failed to give proper consideration to his request for 'added years' compensation following his redundancy, and failed to follow its own procedures when dealing with his request.

Regulations gave the Employer discretion to increase the total period of membership of an active member of the Scheme. The Employer was required to formulate and keep under review the policy to be applied in the exercise of such discretionary power.

The Deputy Ombudsman held that it was entirely proper for a policy to be formulated which would apply in the "normal" case, provided discretion to depart from that norm and consider whether a case warrants a departure from it, was not unduly fettered. The Deputy Ombudsman saw nothing to suggest that the fact that money was not set aside for the purchase of added years meant that Mr G's circumstances could not be properly considered. His decision was that there had not been an inappropriate fettering of discretion.

Q00672 Augmented benefits

Mr S claimed to be entitled to augmented benefits under the Scheme. Unusually, the reference came from the Independent Trustee who was winding up the Scheme.

The Employer had undertaken to arrange for Mr S to receive enhanced benefits. Mr S was unable to pursue any claim against the Employer, which had been dissolved. The Employer had also been the Scheme's Trustee. Acting as Employer, the Company had asked itself as Scheme Trustee to augment the benefits. There was no record of the Company as Trustee agreeing to the augmentation.

The Deputy Ombudsman held that it was apparent that the clear intention of the Company, and therefore of the Scheme Trustee, was that

Mr S's benefits should be augmented. It seemed highly unlikely (if not inconceivable) that the Company, having committed itself to Mr S (with the benefit of legal representation) and having requested the augmentation as Employer, would have refused to exercise its discretion to agree the augmentation as Scheme Trustee. To have done so would have exposed it, as Employer, to an action by Mr S, for breach of contract.

The Deputy Ombudsman concluded that the Company, as Employer, requested and, as Scheme Trustee, agreed to, the augmentation of Mr S's benefits. This appeared to have been confirmed by the benefit statement issued by the Insurer involved with the Scheme.

The direction took into account that benefits might need to be scaled back in light of any deficiency in Scheme funding.

Delays

N00067 Delay in arranging transfers of benefit

Mr H complained of a delay in providing him with a statement of his transfer value.

The Ombudsman noted that there was no requirement in the Scheme's Regulations for a request for a statement of transfer value to be made in writing. He did not uphold the claim that the statutory timescale for complying with the request had expired and in any event did not accept that a transfer would have resulted had the requested information been provided by the date claimed by Mr H. A delay in providing an explanation when that was later requested did not alter the position.

Nor was injustice caused by delays in the Internal Dispute Resolution Procedure or any failure to keep records of telephone conversations.

N00445 Transfer between Self Invested Personal Pensions (SIPPs)

Mr T complained that the Administrator failed to deal with his transfer between SIPPs in a timely manner and, in particular, was late in obtaining the cash transfer value of an Insurance Policy. Mr T said that, as a result, he suffered an additional penalty charge and also had to take living expenses from his savings because of the delay in the payment of his tax-free cash sum and pension from the new SIPP.

The Deputy Ombudsman found that, although the Administrator had meant to surrender two Insurance Policies, only one Policy was set out in the paperwork and, consequently, the second Policy was overlooked. This was maladministration and caused delay. The delay resulted in a direct financial loss to Mr T in that the penalty charge was greater than if the Policy had been disinvested without delay. Mr T also suffered injustice in that the eventual payment of his retirement benefits from the new SIPP was further delayed by around one month.

The Deputy Ombudsman directed payment to the new SIPP of an amount equal to the direct financial loss together with interest. He also directed payment to Mr T of an amount equal to one month's retirement pension.

N00746 Reimbursement of costs

Mr P alleged delay on the part of two Insurance Companies. He said that a fund transferred from Insurer A was not invested by Insurer B for over five months. Mr P claimed loss of interest on the sum, further interest he paid on borrowings, an amount he had to pay to his Financial Adviser to try to sort matters out for him and £4,000 compensation for the time he himself had spent in trying to resolve the problem.

The Ombudsman found that a letter referring to an enclosed cheque for the transfer amount was inadequately addressed, and, even if dispatched,

was not received. The transfer was in fact received by telegraphic transfer but without clear details of the receiving scheme. The Ombudsman was critical of Insurer B for not making contact quickly with Insurer A to establish this.

The Ombudsman disagreed with Mr P's calculation of what additional interest charges he had paid as a result of maintaining an overdraft of a greater amount than would have been needed had the transfer taken place. He directed payment of the lower amount produced by his own calculation.

The Ombudsman said that he did not normally direct compensation to be paid to cover the cost of an adviser's time spent in sorting out an applicant's difficulties. Both the services of his office and of The Pensions Advisory Service (TPAS) are free, and Mr P could have used the services of TPAS once he began to encounter problems. Having said that, he noted that Mr P was obliged to chase the matter for a year in an attempt to find out why it had taken so long for the transfer value to be invested, and what had happened to the interest the transfer value would have earned in the meantime, before he asked his Financial Adviser to sort out the matter for him. He then worked in conjunction with his accountants in trying to have the matter resolved. It seemed reasonable to have involved his Financial Adviser at that stage, in view of his lack of success in having the problem sorted out, despite having written a number of letters and made a number of phone calls, without success, over the previous year. The Ombudsman considered that Insurer B should reimburse Mr P for such of his Financial Adviser's fees as were incurred in connection with this matter and an appropriate direction was made.

The Ombudsman does normally direct the payment of what the Courts have referred to as "modest compensation" to cover the time a successful applicant has had to spend in trying to sort out problems with respondents. But that compensation is not calculated on the kind of basis envisaged by Mr P.

Payments for distress and inconvenience suffered as a result of maladministration are not fines and are not intended to be punitive. The Ombudsman directed that a payment of £300 be made, in line with awards he had made in similar cases.

No1363 Delay in making transfer

Mr C alleged that an Insurer's delays in dealing with his request to transfer funds from two Free Standing Additional Voluntary Contributions Policies resulted in him paying additional charges in the form of an increased Market Value Adjustment (MVA).

Under one of the policies, the Ombudsman found that delay by the Insurer had caused financial loss to Mr C whose fund was subject to a MVA of 14% compared with 10% had such delay not occurred.

As far as the other policy was concerned, the delay was caused not by the Insurer but by the Scheme's Administrator. Although the Insurer could have been more proactive it was not responsible for any injustice arising from the Administrator's delay.

P00298 When was an option exercised?

Mr H said that at the heart of his complaint was an Insurer's failure to inform him of a change in terminal bonus rates when he telephoned on 22 May. He argued that, had such information been given, he would have undoubtedly accepted a quotation issued on 27 April. The Ombudsman did not doubt his statement but did not share his view that the person receiving his call should have volunteered information about an issue not directly raised with her.

Mr H also submitted that, by expressly confirming over the telephone his intention to buy an annuity from the Insurer, it was understood that he was not looking elsewhere, and that he had accepted the offer based on the 27 April quotation. However, given that the

quotation said that, should he wish to vest his policies, he needed to provide the Insurer with an Annuity Application Form and various other documents, the evidence fell short of establishing that he had accepted such a quotation and he must have known this when he went on holiday from 28 May to 1 June.

Mr H knew that the quotation which he had received, and which his Independent Financial Advisor had advised him to accept, was guaranteed only until 1 June. By that date, he had sought (but not received) confirmation from the Insurer that it might be to his advantage to delay purchasing the annuity for some five months due to an increase in the guaranteed annuity rate. On his account of the telephone call taking place earlier than 22 May, he would have expected to have received this information before he went on holiday. Not having received it, he allowed the guaranteed date to pass.

He hoped that by so doing he would gain a financial advantage. In the event the delay worked to his disadvantage. The Ombudsman saw no reason for the Insurer to indemnify him against that disadvantage.

Q00351 Provision of information

Mr W complained that the Trustee of the Scheme had failed to provide the information required to effect a transfer of his benefits to a personal pension with another Provider. Mr W was the sole Member of the Scheme, an occupational pension scheme, established by Mr W's Employer (the Company, which was also the Trustee). At the time Mr W and his wife were the sole owners and Directors of the Company. Mr W and his wife subsequently sold 80% of their shares in the Company. The month after Mr W left work he requested that his benefits be transferred to a personal pension but the Trustee consistently failed to respond.

The Ombudsman found that the Trustee had failed to comply with the Disclosure of

Information Regulations and the Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996 by failing to reply to Mr W's solicitor's letters and not by invoking the correct procedures when asked to do so.

A direction requiring a response was made.

The matter was also drawn to the attention of the Pensions Regulator and the Department for Trade and Industry so that those bodies might consider whether to take action to preclude the current Directors acting as Trustee, from continuing in such a capacity.

Q00404 Delay in paying transfer

An Insurer delayed for about three weeks between calculating a transfer value and making the payment. Mr J claimed that the payment should have been made on the date of its calculation and that the delay cost him around £6000 as a result of fund price movements between the two dates.

The transfer took (allowing for Christmas) 12 working days compared with the Insurer's own standard of two to three working days. The Insurer referred to a statement by the Association of British Insurers which referred to a two week timescale. The Deputy Ombudsman found it ironic that the Insurer referred to those guidelines when other parts of those same guidelines had not been followed.

The Deputy Ombudsman stated that whether any delay is acceptable in a particular case will depend on the specific circumstances at the time.

Noting that, in effect, the only explanation for the time taken was that the Insurer was particularly busy, the Deputy Ombudsman stated that a delay of even a few days can make a material difference once units had been encashed. It did not seem reasonable for the Insurer to have taken four times as long as it normally would to issue the cheque.

The Deputy Ombudsman stated that in correcting an injustice (e.g. a financial loss) the aim should be to put the affected party in the position that he would have been in if the injustice had not occurred. Mr J's calculation of his loss did not achieve this. His actual loss equated to the difference between the number of units he could have purchased in his chosen funds had the transfer been made within a reasonable time and the later date when the transfer actually took place. A direction was made on that basis.

Mr J had also sought a payment calculated by reference to an hourly rate of payment in respect of the time he had spent on pursuing the matter, and one which penalised the Insurer. The Deputy Ombudsman confirmed the practice of the Office whereby payments for distress and inconvenience, whilst modest, recognised the extent of the intrusion into the individual's time and said it would be quite inappropriate to adopt the method of calculation proposed by Mr J. It was not the role of Ombudsmen to direct payments which are punitive.

Q00584 Inaccurate calculation of benefits

Mr S wished to take the benefits from his Pension Plan but disputed the calculation of benefits due, delaying the process by several months, during which the fund value reduced. Mr S was in ill-health, retiring early due to the onset of Parkinson's Disease, and had engaged an adviser to handle this matter for him on an hourly fee basis.

The Deputy Ombudsman found that the Insurer (whose calculation had been wrong) had been responsible for the delay and subsequent reduction in fund value. The Insurer was directed to make good the loss. The Deputy Ombudsman found that it was reasonable for Mr S to have engaged the services of a fee-earning adviser and thus for his resulting costs also to be paid by the Insurer.

Medical Issues

M00767 Failure to apply Internal Dispute Resolution Procedure (IDRP)

Mr J complained about being denied an ill-health early retirement pension.

The Regulations governing the Scheme stated that an ill-health pension is payable from the Scheme if the Member retires from pensionable employment because of physical or mental infirmity due to the Member being permanently incapable of efficiently discharging the duties of their employment.

The Ombudsman endorsed the view that permanent should be taken to mean up to the Member's normal retirement age, under the Scheme.

The Ombudsman stated that there was no automatic entitlement to an ill-health pension because a member's employment was terminated as a result of his medical condition. Dismissal from employment can take place on the grounds of temporary, rather than permanent, incapacity. Nor did it follow that a member is entitled to an ill-health pension from the Scheme because the DSS (at that time) confirm that he is unfit for work. An applicant's incapacity does not have to be permanent to qualify for incapacity benefit from the State. For the purposes of the Scheme, however, permanent incapacity is required.

The Ombudsman concluded that, as a matter of fact, Mr J did not retire. As his contract of employment was terminated on the grounds that he was incapable of carrying out his duties it would be more accurate to say that he was dismissed. But there may be an argument that he should have been offered an early retirement pension instead of being dismissed.

The basic dispute was whether Mr J had a physical or mental infirmity that made him

permanently incapable of efficiently discharging his duties. There was certainly medical opinion to support the view that the permanency condition had been met. But the Scheme had received contrary advice from its own advisers, advice which had been maintained despite a series of medical appeals under a practice operated by the Scheme.

The Ombudsman held that there was a difference between an appeal under the IDRPs and what the Scheme Manager referred to as an appeal against medical assessment. The former involved reviewing a decision to establish whether benefits should be granted and whether that decision has been correctly made. The latter was limited to the Medical Adviser (or a different one) deciding whether to change the advice.

The latter was also, despite an apparent contrary impression given in Scheme literature, an informal process to which no reference was made in the Regulations that govern the Scheme. The Ombudsman did not accept that such an informal process could be seen as meeting the requirements of the Occupational Pension Schemes (IDRP) Regulations 1996. He accepted that there is no requirement in the Regulations governing the IDRPs for the Scheme's IDRPs to be set out in the Scheme's own Regulations. The only statutory requirement is for the Scheme's Manager to make arrangements (of a kind which comply with Regulations) for the resolution of disputes. But an arrangement which is stated to be an appeal against a medical assessment is not an arrangement for the resolution of a dispute about whether a pension should have been granted.

The Ombudsman directed the Scheme Manager to issue a formal determination under the IDRPs.

No1204 Pre-existing condition

In 1996, Mr H was assaulted whilst off duty and suffered an injury to his face, requiring surgery. He also suffered from depression and Post Traumatic Stress Disorder (PTSD). Mr H returned to work following a period of sick leave. In 1999, he injured his back whilst on duty. Mr H was able to return to work, following a period of sick leave. However, he later went on sick leave again and then retired on the grounds of ill-health.

Under the Scheme, injury benefit is payable where the injury is solely attributable to the nature of the individual's duties, or is the result of an attack or similar act which is directly attributable to the nature of the employment. In either case benefit is only payable if the individual's earning capacity is impaired by more than 10%.

The Scheme Managers declined benefits on the grounds that the medical evidence showed that Mr H had pre-existing degenerative changes in his back prior to the 1999 incident and, therefore, his back condition was not solely attributable to that incident. It was accepted that Mr H qualified in respect of the injury caused in 1996 but the resulting condition (PTSD) was assessed as not impairing his earning capacity by more than 10%.

The Deputy Ombudsman was not persuaded that the existence of pre-existing degenerative changes automatically precluded Mr H from qualifying for benefit. 'Injury' sustained over a period of time, could still be 'in the course of official duty'. Noting that Mr H had been engaged for some years in work of a physical nature, the Deputy Ombudsman stated that the Scheme Managers needed to satisfy themselves that the degeneration present in Mr H's back prior to the 1999 incident was not itself a result of his official duties over the period of his employment. No evidence was forthcoming that the Scheme Managers had done this.

The Deputy Ombudsman did not disagree that it would be simplistic to conclude that, because Mr H's job was physically demanding, it must have led to his back condition, but considered that the possible cumulative effects of an individual's duties should not be disregarded altogether.

He noted that Mr H had been described as 'fit and well' prior to the 1999 incident and that the condition of his back before then was said to be consistent with that of somebody of his age. The Scheme Managers needed to satisfy themselves that there was indeed a pre-existing 'condition' above and beyond natural age-related degeneration, and the Deputy Ombudsman had seen nothing to persuade him that this had actually been considered. Their conclusion had simply been that, as there was prior degeneration at the time of the 1999 incident, the solely attributable test must fail.

The approach envisaged by the Deputy Ombudsman was that the decision-makers should ask themselves whether the pre-existing degeneration was no more than would be consistent with the individual's age, in which case it would make a nonsense of the Rules to describe it as a 'pre-existing condition'. If the degeneration was felt to be greater than that normally expected for the individual's age, the next question should be to what extent was this effect of the individual's duties. If the answer to that question was that the pre-existing degeneration is, on the balance of probabilities, attributable to the duties, that would seem to satisfy the test in the Rules.

In the context of assessing the extent to which PTSD was impairing Mr H's earnings capacity, the Deputy Ombudsman was concerned by the lack of weight given to any medical opinion other than that of the Scheme's own Adviser, and by the failure of the Scheme Managers to take a decision rather than regarding such a decision as a matter for their Adviser.

Mr H's application was remitted to the Scheme Managers for a further decision to be taken.

No0550 Applying correct criteria

Mr P complained that the Scheme's Trustees wrongly refused him an ill-health early retirement pension.

Mr P's application for ill-health benefits was made in November, and his employment ceased in the following February. There seemed to have been some confusion on the part of the Trustees as to whether, once Mr P's employment had come to an end, they were to treat his application for ill-health benefits as having been made from active or deferred status. The Ombudsman held that, as the requirement under the particular Rules was for him to apply from active status, he met that requirement.

Under the relevant Rule, a member of the Scheme must fulfil three requirements:

- He must apply for the pension before leaving service;
- He must satisfy the Trustees that he is under an incapacity – defined as deterioration in health so serious that the Member will be unable, indefinitely, to undertake any paid employment of a kind which the Employer may reasonably expect him to do having regard to his position in life, qualifications and experience; and
- Both Trustees and Employer must consent to the pension being paid.

The Ombudsman stated that it was for the Trustees to decide what was the reasonable expectation of the Employer as to the kind of job which the Member could undertake. In Mr P's case the Employer had withheld its consent to a pension being made, and only on reviewing Mr P's application did the Trustees

seek to establish to their own satisfaction whether he met the definition of incapacity. If there had been some proper reason why, regardless of the Member meeting the medical criteria involved in the definition of incapacity, the Employer (who needed to act in accordance with its duty of good faith) had withheld consent, then the Ombudsman saw some practicable advantage in the Employer giving an early view. This might for example avoid the stress and cost of medical examinations.

However, what seems to have happened in relation to Mr P is that the Employer took it upon itself to undertake the Trustees' role in deciding whether Mr P met the medical criteria. The Ombudsman had reservations about that process, although he said he would not disagree with the view that on the medical evidence at the time of the original decision, Mr P did not meet the definition. But the medical evidence then changed.

In reconsidering the matter, the Trustees felt that Mr P's application should be rejected on the basis that there was no evidence that he was unable to undertake any work at all. But that was not the test provided in the Rules. The Trustees were directed to reconsider the matter.

No0899 Ill-health benefits

Mr M was aggrieved that the Scheme's Trustees had rejected his application for an ill-health early retirement pension.

The Ombudsman noted that when the Trustees considered Mr M's application, a locum acting for his GP, had stated that Mr M was not permanently incapable of continuing in comparable employment. In light of that information no criticism was made of the decision to refuse his application. Evidence from another doctor during the first stage of Internal Dispute Resolution Procedure (IDRP) did not cast doubt on the decision that Mr M did not meet the criteria.

During the second stage of IDRP, Mr M's GP supported his application. The Scheme's Medical Adviser then examined Mr M and reported that Mr M could be expected to recover from his illness.

The Ombudsman held that in the face of such evidence the Trustees' decision could not be seen as perverse.

No1078 Extent of Incapacity

Mrs A felt she met the Scheme's definition of Total, rather than Partial, Incapacity. She also argued that her pension should be backdated to the time when she ceased to receive a salary.

The Scheme Rules provided for a member to receive a Total Incapacity pension where he or she was permanently incapable of any gainful employment either with the present or any other employer. A Partial Incapacity pension could be payable where the Member is unlikely to be capable of following his or her normal occupation, or his or her future earnings capacity is seriously impaired because of a permanent condition. The decision fell to be made by the Employer.

The Deputy Ombudsman stated that there is nothing intrinsically wrong with the Employer preferring one doctor's opinion above another's, provided that such a preference does not go against the weight of the available evidence. In the particular case, the Employer had not so much done that as come to a compromise decision. That was not perverse.

The Scheme Rules provided for the Member to elect for an immediate pension (if the Employer agreed) if she retired on account of Incapacity. The approach suggested by the Employer appeared to be for the Member to make the election after retirement had been agreed and for the pension to be paid from the date of the election. The Deputy Ombudsman disagreed with that interpretation.

The date when Mrs A ceased to receive a salary was not the same as the date when she retired. Indeed she had still not retired at the time of the determination. A direction was made for the pension to come into payment on the date of retirement which was specified in the determination.

No1609 Reason for leaving employment

Mr P was aggrieved because his Employer did not accept that he left service as a result of being permanently incapable of discharging his duties due to ill-health.

Mr P was a carpenter and suffered from asthma. Although certified by the Employer's doctor as being fit to return to work Mr P wished to return only upon conditions as to the type and place of work. His Employer was not willing to agree to those conditions and Mr P was dismissed.

An Employment Tribunal later found that although Mr P said he had been dismissed on grounds of incapacity, the reason for dismissal was misconduct. The Employment Tribunal had found that, because of procedural errors, the dismissal was unfair but reduced the compensation due to Mr P by two-thirds on the basis that if the correct procedure had been followed there was only a one third chance of a different outcome.

The Ombudsman found that Mr P did not leave his employment by reason of being permanently incapable of discharging his duties; he left because he was dismissed for what the Employment Tribunal identified as misconduct. As he did not meet the qualifying condition (in that his employment did not end because of his ill-health) he was not entitled to the payment of an ill-health benefit.

The Trustees had asked for guidance on the medical evidence to be taken into account in reconsidering the application. In particular, they drew attention to the decision in *Re: McClorry* which indicated that it was the Applicant's health at the time of cessation of his employment which

should be taken into account. The Ombudsman stated that this did not mean that the Trustees should ignore later evidence as to what Mr P's state of health was at the time he left employment. Mr Justice Lightman in the case of *Spreadborough v Pensions Ombudsman* had said:

"For this purpose, incapacity by reason of permanent ill-health or infirmity means incapacity in respect of which there is no reasonable prospect of recovery, taking account of the available treatment and the various possible courses that a condition may take and the potential outcomes. A reliable diagnosis may require the decision to be deferred over a period of time, and the eventual diagnosis may or may not be retrospective or prospective."

The Judge had also said:

"The critical issue is indeed the date of onset of permanent incapacity: the date that this condition was diagnosed is very much of secondary significance."

P00197 Stress

Mrs A considered that she had been incorrectly refused an injury benefit.

Mrs A's eligibility for an injury benefit rested upon her 'injury' being 'wholly or mainly attributable to the duties of [her] employment'. She retired on the grounds of ill-health, suffering from stress-related anxiety and depression. The Scheme Manager took the view that, for a stress-related condition to be considered 'attributable', there must be some 'exceptional circumstances' over and above 'the normal stress experienced in the post'. The relevant Regulations referred to an injury sustained or a disease contracted 'in the course of the person's employment'. There was no reference to 'exceptional circumstances'.

The Ombudsman commented that medical advice seemed to have been based on some factual inaccuracy as to when Mrs A had first raised her concerns.

Subsequent medical reports returned to the question of whether Mrs A's allegations of bullying had been substantiated. Whether the bullying actually took place was not, in the Ombudsman's view, the right question to be answered. The correct question was whether Mrs A's condition had been caused wholly or mainly by her perception of and reaction to the behaviour of her colleague. If the answer to that question was yes, then Mrs A would qualify for an injury benefit because her condition would be one which had been sustained 'in the course of her employment' and was wholly or mainly attributable to that employment. The lack of evidence of actual bullying was not fatal to Mrs A's case in the way that the Scheme Manager and its medical advisers believed.

The matter was remitted for a fresh decision to be reached.

Poo272 Relevant duties

Mr B complained that the Trustee did not properly consider his application for an incapacity pension.

There had been considerable disagreement about the nature of Mr B's duties in the face of which the Trustee undertook a considerable amount of research. The results revealed a division between the views of managerial staff and those working 'at the coalface'. Mr B appeared to be carrying out duties which were not in his job description. The Trustee took the view (with which the Ombudsman agreed) that it should measure Mr B's abilities against the duties he was required to undertake rather than against the duties he (and some others) had perhaps in practice undertaken. Whether this was because they were under pressure to facilitate the completion of a job, or because they wished to help out colleagues, was not a matter the Trustee or the Ombudsman needed to determine. That Mr B may have received training on particular equipment whilst a member of a gang did not support the

contention that he was required to use that equipment for the purposes of his own job.

The Ombudsman stated that Health and Safety issues were a matter between an individual and his employer rather than between a member of the Scheme and the Trustee. The question of whether the Employer carried out its responsibilities towards Mr B in that context was not a matter in the remit of the Ombudsman or the Trustee.

The mere fact that the Trustee preferred one piece of evidence over another was not enough to find that its decision was perverse, i.e. a decision to which no other decision-maker could reasonably come if faced with the same evidence.

The complaint was not upheld.

Poo377 Distinction between review and fresh consideration

Mr T complained that it was unreasonable for the Scheme Manager to refuse to backdate his ill-health retirement pension to an earlier date.

The Ombudsman found that information about the Scheme Manager's system for considering appeals against medical decisions did not comply with the Disclosure of Information Regulations. Such an appeal would be considered using only written evidence which would have been available at the time of the original application including reports written by a doctor, consultant, or other medical professional who was treating the member at the time of the original application.

The Ombudsman expressed reservations about whether the Internal Dispute Resolution Procedure (IDRP) could be limited to reviewing only such medical evidence. He stated that the IDRP was not limited to considering only written evidence which would have been available at the time of the original application. The Ombudsman could see no basis for denying a person who wished to contest a decision the opportunity of introducing material,

for example in the form of another medical opinion, as part of an argument that the original decision had been wrongly taken. Such evidence need not, as a matter of law, be restricted to that coming from doctors who were treating the patient at the time.

There was a distinction between arguing that the original decision was wrong and arguing that there had been changes in an applicant's condition which meant that while he may not previously have qualified for the benefit he now did. The practice followed by the Scheme Manager undoubtedly blurred that distinction and appeared to indicate that if new medical evidence were submitted the matter would not be considered to be an appeal at all but would instead be treated as a new application.

The Trade Union representing Mr T could not have been clearer when lodging the appeals at both Stage I and Stage II of the IDRPs: they stated categorically that what they were doing was appealing against each of the decisions that had been made and that by so doing they were not making a fresh application. Nevertheless on each occasion a fresh application was subsequently made.

Decisions on those fresh applications could not be regarded as decisions made as part of the IDRPs. They did not for example give information about the Pensions Ombudsman or The Pensions Advisory Service as required by the IDRPs Regulations.

Mr T's appeals eventually led to his being awarded a benefit but it was not backdated to as early a date as he would have wished. The Ombudsman noted that the Scheme Manager appeared to be arguing that even if a different decision should have been taken originally the pension could not be backdated to that earlier date.

The Ombudsman expressed the view that if the outcome of any appeal (or of any proceedings before him or the Courts) was that on a true

appreciation of the matter the Scheme Manager (in this case a Secretary of State) ought, at any particular stage in the process, to have determined that the person was incapacitated then it cannot be right to postpone payment of the pension until some much later date. A relevant Regulation (which limited backdating to no earlier than six months before the last medical report considered by the Secretary of State) needed to be read as referring to the medical reports before the Secretary of State at the time when he ought to have taken the correct decision. Any other interpretation would have the effect of making the incapacitated person suffer the consequences of the failure of the Secretary of State to act correctly.

If wrong in that view, then the Ombudsman said he would reach the same end result by directing, not that a pension under the Scheme should be paid from the earlier date, but that a payment equivalent to that pension should be paid by the Secretary of State to redress the injustice arising from an earlier decision taken with maladministration.

Poo388 Exhausting avenues of treatment

Mr B said that his application for ill-health benefits had been unreasonably refused.

There was no dispute that Mr B was suffering from an illness or injury. The issue was whether his illness was such that he was likely to be permanently unable to undertake his kind of work before his normal retirement date.

The opinion of the Scheme's Medical Advisers was that as Mr B had not at that stage been referred to a consultant psychiatrist or clinical psychologist it was premature to speculate whether his current level of disability would cause permanent incapacity. The Ombudsman observed that the wording of that opinion reflected some misunderstanding of the Regulations governing the Scheme which did not require the question of permanent unfitness

to be considered only in relation to the current level of disability. Nor did the Regulations require a member to have been referred to a consultant psychiatrist or clinical psychologist.

Further advice given during the IDRPs was that it would be premature to say Mr B was permanently incapable until all avenues of treatment had been exhausted. The Ombudsman concluded that this too reflected a misunderstanding of the Regulations which contained no requirement for all avenues of treatment to be exhausted. The medical evidence which the adviser needed to evaluate was to the effect that Mr B was undergoing treatment which was not expected to lead to sufficient improvement to enable him to return to his work.

A report was obtained from the consultant psychiatrist but this offered no opinion as to the prognosis of his condition or his ability to return to work. Mr B's consultant psychiatrist later advised that, in his opinion, Mr B's psychiatric condition was permanent. The Ombudsman was surprised that the Scheme Manager simply held this letter on file with a view to it being considered should there be a further appeal from Mr B. If the letter had been properly considered, the view could have been taken earlier that Mr B was permanently incapacitated and had indeed always been so.

Following a prompt from the Ombudsman, the Scheme Manager granted Mr B enhanced ill-health benefits backdated to six months before the consultant psychiatrist's report but contended that, under the Regulations governing the Scheme, entitlement to an ill-health benefit could not arise at a date earlier than six months before the date of the last medical report or to the date paid employment ceased, whichever is the later.

The Ombudsman held that if the original decision was so unreasonable or perverse as to entitle a Court or Ombudsman to strike it down, it could not be right that receipt of a pension should not be backdated to take effect from the time of that

original decision. It would be absurd for the Scheme Manager to say that had the original decision been reversed without a further medical report the pension could have been put in payment from an earlier date whereas the mere existence of the later report (which may not have contained decisive information) resulted in payment from a later date.

The Ombudsman went on to say that even if the Scheme Manager were right in saying that the law did not require a pension to be paid, redress needed to be provided for the injustice caused by maladministration. The Ombudsman had noted flaws, which the decision-maker had failed to notice, in the reasoning of the medical advisers. That meant the original decision was taken with maladministration. In consequence, payment of the pension had been delayed. Without that maladministration, the payment of benefits would have commenced on the termination of Mr B's employment. To redress the injustice arising from that maladministration the Scheme Manager should now make a payment equivalent to the pension which had been lost as a result of its commencement being delayed. The Ombudsman made a direction to that effect.

P00501 Pre-existing condition

The dispute was about whether Mrs W's injuries were "wholly or mainly" attributable to her employment.

The Ombudsman could see no cause to criticise a decision that her condition had not been wholly caused by the incident she has described, but whether her condition was mainly caused by that incident was not a matter which had been properly considered. Rather the Scheme and its advisers seemed to have proceeded on the assumption that because there was evidence of pre-existing degeneration, her condition could not be seen as being wholly or mainly caused by the incident. Some evidence of a pre-existing condition did not either necessarily or

probably mean that such a condition was wholly or mainly the cause of Mrs W's present incapacity.

The matter was remitted for a fresh decision to be taken.

P00579 Investigation of cause of injury

Ms M was aggrieved by the refusal of her claim for temporary injury benefits. Ms M claimed that her injury was stress, caused by being bullied at work.

The essence of the dispute was set out in a response provided as part of the IDRP. This stated that applications were considered on a no fault basis and that it was neither the purpose nor within the scope of the Scheme Manager to determine the rights and wrongs of an individual case. Such applications should not be regarded as an extension of or an alternative to a complaints/grievance procedure. Therefore, it would not be appropriate for the Scheme Manager to conduct an investigation into the allegations contained within the original application and letter of appeal. The Scheme Manager could only consider the evidence available to it and decide whether that evidence conclusively showed that a 'qualifying injury' had occurred. The particular application was said to have centred on Ms M's perception of how she was treated by her line manager. Without any conclusive independent corroboration of inappropriate/bullying behaviour on the part of the line manager (e.g. the upholding of a formal complaint) the conditions for receipt of an injury benefit were not shown to be met.

The Scheme Manager also said that it deferred to the Occupational Health Service (OHS) in order to determine whether an injury was work-related as that Service is the recognised authority to make such a judgement.

Finally the Scheme Manager said that just as it deferred to the authority of the OHS in determining whether or not an injury had occurred, it also deferred to the appropriate

authority, the employing department, in an attempt to seek corroboration of claims made in the course of an injury benefit application.

The Ombudsman noted that although her application for injury benefit had been denied, no alternative reason had been put forward to explain Ms M's condition than that which she had put forward. The only medical evidence was that her condition was work-related.

The Ombudsman determined that it was not for the Scheme Manager to defer to OHS in deciding whether an injury was work-related. Medical factors may well be a major part of such consideration but there may be others.

Noting the Scheme Manager's submission that it could not conduct any formal investigation of what had been happening in the workplace, the Ombudsman stated that the Scheme Manager was responsible for determining whether Ms M's injury was or was not attributable to the nature of her duty or had arisen from an activity reasonably incidental to the duty. That essentially was a question of fact to determine in the light of the available evidence. Given the kind of claim made by Ms M it was hard to see how the Scheme Manager could avoid becoming involved with considering what evidence there was to establish the cause of her injury. The belief that it 'cannot' conduct such an investigation was, in the Ombudsman's view, unsound.

The Scheme Manager was entirely right to seek information from the employing authority. But it was not the employing authority which is appropriate to determine such a claim – that was a task for the Scheme Manager without deference to the employing authority.

The difficulty in accepting the Scheme Manager's conclusion was that no other explanation for Ms M's "injury" had been offered. While it was fair to say that there was some mutual inconsistency between the various accounts from people at the workplace as to what, if any, stress factors were present, no reasonable decision-maker

could come to the view on the evidence that was available that the injury was not attributable to the nature of her duty or arose from an activity reasonably incidental to the duty.

The Ombudsman could see that it could fairly be argued that the evidence fell short of establishing that the nature of the duty or activities reasonably incidental to the duty were such as inevitably to cause injury to anyone who held the post. But that was not the test to be applied. The test was not whether such injury was inevitable or whether it would have been caused to the average member of staff or to most members of staff undertaking those duties. Rather the test was whether the particular member of staff had suffered such an attributable injury. The evidence, particularly the medical advice, led overwhelmingly to the view that she had.

The Ombudsman directed the Scheme Manager to move on to the next stage in the process and calculate the amount of benefit payable on the basis that there had been a qualifying injury.

Poo662 Querying specialist medical advice

Mrs S claimed that her Employer and the Scheme Administrator failed properly to consider her application for ill-health early retirement.

A key question to be answered was whether Mrs S had left her employment by reason of being permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body. She had in effect hedged her bets by saying that she would accept an offer of leaving on redundancy terms if her application for ill-health retirement did not succeed. Her Employer was willing to explore that latter option.

The Ombudsman noted that the High Court has made clear, in the case of Spreadborough, that a decision on that key question can, in appropriate circumstances, be made retrospectively in the light of medical evidence which later becomes available. In that sense, therefore, there need not be a once and for all decision as to whether the criteria had been met. If later evidence established that the condition regarded as making her permanently incapable was present (but not at the time identified) at the time she left employment, then an ill-health pension could still be awarded.

The dispute giving rise to the issue before the Ombudsman was whether Mrs S's condition was such as to have permanently prevented her undertaking her duties. Under the Rules of the Scheme it was for the Employer to determine in the first instance whether an applicant was eligible for an ill-health early retirement pension although that decision could then be reviewed as part of the Internal Dispute Resolution Procedure. Eligibility depended on a certificate being obtained from a suitably qualified doctor as to whether the applicant was permanently incapable of discharging efficiently their duties because of ill-health or infirmity of mind or body.

At the time when Mrs S left employment, no certificate had been issued as required by the Regulations. A Medical Adviser's view was that the results of further investigations were needed before it could be said whether Mrs S met the criteria. As someone who was advising the Employer, that Medical Adviser (as he himself later commented) was not in a position to supply the certificate required by the Regulations governing the Pension Scheme.

The Ombudsman could see why, in the light of the Medical Adviser's view, the Employer proceeded down the redundancy route, but this meant that no formal decision could be taken at the time about whether Mrs S met the criteria for payment of an incapacity pension.

As a result of Mrs S pressing for such a decision, the Employer took further medical advice from a Doctor A, who queried an opinion from a specialist saying that the specialist had not given reasons for that opinion.

The Ombudsman stated that where a specialist's opinion is queried by a doctor who does not have the specialist qualification, the decision-maker needs to act with caution. If the opinion being queried relates to the specialist's own area of expertise, it is prudent for further specialist opinion to be sought. If, however, the specialist whose opinion is being queried has expressed views on a matter outside the area of his own specialism, the Ombudsman would see less need for the decision-maker to commission further advice. On which side of that line the particular specialist opinion fell was not easy to determine. Dr A had suggested that further advice would be needed if the case were to be taken further, before then saying that if the Employer were content to proceed on his own view he would advise that the criteria were not met. The Ombudsman saw little evidence that the Employer applied its mind to deciding whether Dr A's view should indeed be preferred.

The Ombudsman remitted the matter for a further decision to be made.

P00796 Conflicts of medical evidence

Mrs P complained that her application for an incapacity pension from the Fund had been wrongly rejected by the Trustees of the Fund.

It was for the Trustees to satisfy themselves that Mrs P was likely to be permanently disabled from her normal employment as a call centre operator by reason of her ill-health.

Mrs P told the Ombudsman that the Trustees had not given her reasons for turning her application down, and that made it difficult to argue against their decision. While Mrs P was right to contend that an applicant who is refused

benefits should be told why, the Ombudsman felt that the Trustees did make sufficiently clear at each stage why she was not entitled to the benefits she sought.

The Trustees were initially faced with a recommendation from their medical advisers, that Mrs P was permanently disabled (that recommendation being based on an inconclusive report from her GP but a much more supportive statement from her consultant). The Trustees who first considered her application decided that they needed further information before they could grant her ill-health benefits. The Ombudsman accepted that this was their prerogative; the Trustees, rather than the medical advisers, were the decision-makers. But the information sought was not directed to the point at issue. That Mrs P was not at the time capable of working did not appear to be in doubt. What was in doubt was the extent to which her condition could be regarded as permanent. The Ombudsman held that for the Trustees to seek a functional capability assessment as the further information they required was not likely to help them resolve any doubt about the degree of permanence.

Nevertheless the physiotherapist who carried out the Blankenship assessment concluded that Mrs P was able to fulfil the majority of her previous job demands, subject to some 'reasonable accommodations' on the part of both Mrs P and the Employer. The Ombudsman said that some of the recommendations made by the physiotherapist were more easily suggested than fulfilled. Into such a category he put the weight reduction programme and another referral to a pain clinic – which had not previously brought Mrs P much benefit. The particular physiotherapist's advice needed to be set alongside the views of Mrs P's surgeon who, unlike the physiotherapist, did have responsibility for treating Mrs P.

The Ombudsman noted that on being asked to review their decision, there was a volte-face

from the Scheme's medical advisers who referred to "objective evidence" by which they presumably had in mind the Blankenship assessment. But "objective evidence" is not a term the Ombudsman would use to describe that assessment. The outcome of the Blankenship assessment was essentially a subjective opinion from the practitioner that the individual concerned was producing results which were consistent with that individual not making sufficient effort.

The Ombudsman was surprised that, faced with the knowledge that they were effectively reversing their earlier opinion, the medical advisers did not take steps themselves to examine Mrs P or to arrange for her examination by an appropriate specialist. Perhaps the key lay in their apparent belief that Mrs P had previously been entitled to an ill-health pension but that she no longer was, presumably because her condition had improved. The Trustees did not themselves query the way that second opinion was expressed.

Mrs P provided a copy of her GP's report which noted that her back pain had not improved, and was unlikely to do so. That evidence had been before the Trustees at the time they made their final decision.

Given the inconsistent medical evidence and the conflict between the findings of the physiotherapist and the opinion from Mrs P's surgeon, the Ombudsman held that the Trustees should, at the very least, have asked that surgeon and Mrs P's GP to comment on the physiotherapist's report. He could not escape the conclusion that the Trustees were a little too eager to seize upon the view of the physiotherapist. They were directed to obtain further medical evidence and to reconsider their decision.

Po0972 Stress

Ms F complained that she had been improperly refused an ill-health early retirement pension (IHERP).

The Deputy Ombudsman said he had difficulty with a doctor's view that stress-related illness brought on by a person's perception of a work problem could not constitute grounds for ill-health retirement. Perception of a work problem could, in the Deputy Ombudsman's judgement, lead in some circumstances to a situation in which an IHERP could be granted under the relevant Regulation which governed the Scheme.

Nevertheless there was sufficient evidence in support of the Council's view so that he dismissed the main part of Ms F's complaint.

Po1191 Guidance on back conditions

The Ombudsman expressed reservations about the way in which a Scheme's medical adviser had applied guidance issued by the Faculty of Occupational Medicine.

The Ombudsman said that the document concerned did indeed say that the physical demands of work account only for a modest proportion of the total impact of lower back pain occurring in workers, and that there was little evidence that physical loading in modern work caused permanent damage. But it could not be assumed that a particular individual did not fall within "the modest proportion" referred to. Certainly the document constituted advice to occupational physicians to be wary of accepting that back pain was primarily job-related. But, against that background, each case needed to be considered in relation to its own presenting signs and symptoms and be subject to individual determination rather than an assumption that the injury cannot be job-related.

P01248 Disciplinary proceedings as cause of injury

Mr R complained that the Scheme Manager had wrongly denied his entitlement to injury benefits on the basis that his duties were not the sole cause of his injury. He also complained of delay.

Mr R attributed his injury to an excessive workload coupled with his treatment at the hands of his line manager and the protracted nature of disciplinary proceedings conducted in respect of him. The Respondents argued that disciplinary action lay outside the scope of his duties and also that it was not part of his duties for him to act inefficiently so that if his injury was caused by such inefficiency it did not fall within the definition. The Ombudsman had reservations about both those lines of argument. But leaving those matters aside, the evidence, in his view, left open as a conclusion that could reasonably be drawn by the decision-maker, the view that Mr R's injury was not solely caused by his treatment at the hands of his line manager or the protracted nature of the disciplinary proceedings.

The Ombudsman held that the issue as to whether there was a qualifying injury was a question which did not need to wait for the outcome of disciplinary, grievance or any other procedure and was therefore critical of the delay which occurred. He did not, however, accept that the delay as Mr R claimed caused serious financial loss. Any financial effect was largely as a result of the decision that Mr R was not entitled to the injury benefit and not as a result of a delay in reaching that decision.

P01373 Restricted duties

Mr C complained that the Trustees had not properly considered his eligibility for an immediate pension on the grounds of 'chronic ill-health' or 'incapacity.'

The Trustees pointed out that Mr C could be expected to achieve greater mobility, which would enable him to return to a wider variety of roles. The Ombudsman took the view that the ability to return to a wider variety of roles was not necessarily the same as an ability to undertake the primary duties of his normal occupation which was the criterion set out in the Scheme.

Mr C had been moved to restricted duties prior to going on sick leave. The Trustees contended that it was those restricted duties which should be taken as his normal job. The Ombudsman held that the restricted duties an employee may be forced to undertake because of his state of health are not the same as the primary duties of his normal occupation.

The Ombudsman also stated that the question of whether Mr C's earnings capacity had been seriously impaired had not been adequately addressed by the Trustees.

P01372 Wrong criteria

Mr L was aggrieved that his application for early retirement through incapacity had been rejected.

The Scheme Rules referred to consideration of whether a member's earning capacity would be seriously impaired. The certificate provided for completion by the medical advisers asked for a statement as to whether the member could be gainfully employed.

The Ombudsman concluded that a member may be gainfully employed and yet still suffer serious impairment of earnings capacity. Because of that mismatch between what the Rules said and how the matter was put to the doctors, the procedure used by the Trustee was flawed.

Q00113 Chain of causation

Mrs A claimed injury benefit following an accident at work in April 1989. An auxiliary nurse, Mrs A had hurt her knee on a bed whilst working on a ward. Several weeks later, and still in pain, she was prescribed Ibuprofen, (a non-steroidal anti-inflammatory drug) which her doctor noted had well-known side effects.

Mrs A suffered a gastro-intestinal bleed in July 1989, as result of which she became hypertensive and subsequently developed left hemiplegia with blurred vision and weakness in the left side of her body. Her employment was terminated on grounds of ill-health on 31 December 1989.

The Regulations required that any qualifying injury should be attributable to the duties of an individual's employment. Mrs A argued, with the support of her GP, that there was a chain of events, commencing with her knee injury at work, which led directly to her current disability. In the first instance, Mrs A's claim was rejected by the Scheme Manager, who then on appeal accepted that her knee injury was a qualifying injury but that benefit was not payable as her Permanent Loss of Earning Ability was assessed as being less than 10% as a result of that injury.

The Ombudsman did not uphold her claim, saying that her argument that her current condition had been caused by her NHS employment was too speculative.

Q00117 Assessing degree of impairment

Mr H argued that the Scheme Manager incorrectly applied a 'sole attribution' test to the assessment of impairment of earning capacity in determining whether injury benefit was payable to him.

Mr H was suffering from Post Traumatic Stress Disorder (PTSD). Having accepted that Mr H was suffering from a qualifying injury, the

Scheme Manager asked its medical advisers for an assessment of the extent to which his earning capacity was impaired.

The medical advisers offered the opinion that, whilst Mr H's earning capacity was clearly impaired, less than 10% of the impairment could be attributed solely to his employment. The Scheme Manager suggested that some confusion had arisen because of the medical adviser's use of the word "solely" and that Mr H's earning capacity had been assessed in accordance with later Rules which used that word. Given that the medical advisers had stated:

"... there would be a need to assess the impairment of earnings deemed solely attributable to the incidents in the work environment as sole attribution criteria is applied to impairment of earnings ..."

and

"... impairment of earnings assessments must be made against sole attribution criteria ...",

the Ombudsman found it easy to see how that 'confusion' might have arisen.

Having accepted that Mr H's PTSD was directly attributable to his employment, the next step was for the medical advisers to assess what effect the PTSD had on his earning capacity. Instead, the Scheme Manager set about assessing what part of Mr H's PTSD should be attributed solely to his duties. The Ombudsman was not persuaded that this is what was called for under the relevant Rule. That Rule called for a medical assessment and it was quite proper for the matter to be referred to the medical advisers. But the Scheme Managers must take responsibility for ensuring that the advisers understand what is being asked of them. The Ombudsman did not agree that Scheme Managers had no alternative other than to take the medical advice where that advice did not accord with what is required under the Rules.

If there had been other factors in Mr H's case, i.e. other than his PTSD, the medical advisers would have been correct in taking these into account. But they went a step further than this in trying to determine how much of Mr H's PTSD was attributable to his employment.

The Ombudsman held that the level of proof to be applied in such assessments is that of the balance of probabilities.

Q00164 Pre-existing condition

Mr M was denied Permanent Injury Benefits on the basis that his injuries were not "wholly or mainly" attributable to his employment.

The Deputy Ombudsman said that some evidence of a pre-existing condition did not either necessarily or probably mean that Mr M's work is not wholly or mainly the cause of his incapacity. There may well be a single or multiple "incident(s)", which precipitate the claim, but the 'injury' may equally have been sustained over a period of time and still be "in the course of the person's employment". The Scheme Manager should have considered the cumulative effect of the nature of Mr M's duties and should have satisfied itself that the pre-existing degeneration was more than would be consistent with the individual's age, failing which it would make a nonsense of the Regulations to thereby exclude entitlement.

Q00184 Present and permanent incapacity

Mr B complained that the Trustee of his scheme came to a perverse decision in considering his application for an ill-health retirement pension.

The Scheme's definition of 'Ill-Health' did not specifically mention a need for the member's condition to be permanent. The Ombudsman held, however, that case law has established that, in the absence of provision to the contrary, an implied requirement for permanence may be read into the Rules. In these circumstances,

permanence was taken to mean that the member's ill-health/incapacity is likely to last at least until his normal retirement age.

The Trustee took the view that Mr B met the definition of ill-health at the time he left employment but there were doubts as to whether the condition was permanent.

The Ombudsman stated that the fact that the Employer opted to terminate Mr B's employment did not mean that the Trustee was then obliged to authorise payment of an immediate pension. There may be circumstances where a member is suffering from ill-health which prevents him from carrying out his duties in the short to medium term. An employer may not wish to retain the employee for the period until his health recovers. In such circumstances, the Trustee could legitimately decide not to pay a pension on the grounds that the member was likely to recover before normal retirement age.

The decision based on a view that Mr B had not explored treatment options which had the potential to control his condition sufficiently for him to undertake his normal occupation was not perverse.

The fact that the Trustee subsequently agreed to pay Mr B's deferred pension early on the grounds of ill-health did not mean that its earlier decision was perverse. The medical evidence later taken into account indicated both that Mr B's back condition had not responded to treatment and that he had also developed a heart condition.

Q00225 Redundancy

Mr M complained that he had been wrongly denied ill-health early retirement (IHER).

Under the relevant Scheme Rule, to be eligible for IHER benefits, a member must leave service because of Incapacity, as defined. Thus, if service terminated as a result of redundancy, the

payment of IHER benefits was precluded. Mr M's position was that he had not made any formal application for IHER before he was made redundant. The Ombudsman stated that, on the face of the matter, Mr M was not eligible for IHER as he had left service because of redundancy, not incapacity.

Mr M said that he had been told that he should have applied for IHER before his service terminated and further that he was dissuaded from applying on the basis that his application would not succeed.

The Ombudsman stated that, as a matter of law, an employer is under no general legal duty to advise an employee as to what action an employee should take best to protect his interests in relation to a pension scheme. In certain circumstances, including where the member has an opportunity to gain valuable pension rights and could not, by his own reasonable endeavours, discover that right, then a term might be implied into the contract of employment that the employer will supply that information. Those circumstances did not arise in relation to Mr M, especially as he took legal advice prior to the termination of his employment. Mr M should have been able to have ascertained for himself that any application for IHER ought to be made before his employment terminated. Even though the legal advice given concerned the termination of Mr M's employment, it was clear, from the attendance note, that the pension was mentioned and that Mr M was advised to clarify his position in relation thereto.

The Ombudsman stated that different considerations applied if an employer deliberately sought to dissuade an employee from applying for IHER at an earlier stage in the knowledge that his service would then cease by reason of redundancy. Whilst not going so far as to say that that was the Employer's motive, the Ombudsman thought there was evidence that Mr M was misinformed about applying for IHER

and, in particular, the criteria he needed to meet. Although there was no general legal duty to advise, any information or advice given should be correct. The provision of incorrect information or advice will amount to maladministration.

Both what the Employer individually told Mr M and a statement in the Scheme Booklet reflected an inaccurate view of the relevant Scheme Rule.

Although he had concerns about the information that was provided to Mr M, the Ombudsman was not persuaded that Mr M, in consequence, failed to make an earlier application for IHER than he would have done had the correct information been supplied. By the earliest date upon which he might have made an IHER application, the Employer's business review had been ongoing for some time and Mr M was subsequently given notice of redundancy which he did not challenge at the time.

Nevertheless, before the Ombudsman, Mr M argued that his selection for redundancy was unfair. The Ombudsman rejected an argument that he ought not to consider this: where redundancy is the reason put forward as to non-eligibility for IHER, he could consider whether that reason is sustainable.

The Employer had been able to accommodate Mr M in his normal role albeit with some adjustments to his duties to take account of his condition. However, when it came to selection for redundancy, the Employer belatedly decided that Mr M had changed his normal job. The Employer regarded Mr M as in effect unable to carry out his normal occupation but that was not the starting-point from which Mr M's potential eligibility for IHER had been approached. If Mr M ought to have been retained on the basis governing the redundancy process, then the Employer could not successfully argue that redundancy precluded Mr M's application for IHER.

The Ombudsman directed that the Trustee should consider whether Mr M would have been eligible for IHER, had he made an application as an active member and disregarding his redundancy. If a decision were ultimately reached that Mr M was eligible for IHER and should have received benefits on that basis, Mr M would have to repay or give credit for the redundancy payments that he received: Mr M could not fairly expect to receive benefits on the basis that he had retired early due to ill-health and at the same time retain benefits paid in consequence of his employment ceasing for a different reason.

Q00234 Was injury caused by employment?

Mr M claimed to be suffering from work-related stress and anxiety. Factors to which he drew attention included criticism of himself and colleagues for their handling of an incident at work, being telephoned at home whilst he was on duty leading his wife to suspect him of infidelity, and a failure to implement a non-smoking policy.

The Respondent took the view that any injury arising from the criticism would be due to a perception of or reaction to management comments rather than solely due to the nature of Mr M's duties or an incidental activity, and that the telephone call to his home was not an incident solely attributable to the nature of Mr M's duties or an activity in support of those duties.

The Ombudsman took the view that management actions, such as that which followed the incident at work, were activities reasonably incidental to one's official duties. He would take the same view of a work-related telephone call which is not to say that he accepted the proposition that any injury to Mr M was solely caused by such a call.

In the absence of any suggestion that attendance was for purely social purposes, the Ombudsman

took the view that attending a member's place of work is an activity reasonably incidental to the member's official duties. If, by so attending, an individual encounters an atmosphere which is injurious to him, there is potential for benefit to be payable provided of course that there is the necessary link with the relevant injury. The Ombudsman rejected a suggestion that the failure of an employer to implement a non-smoking policy could not be seen as the basis for a claim for injury benefit under the Scheme – if working in such an environment is the sole cause of the injury then the test would be met.

The Ombudsman determined that it was not tenable for the Scheme Manager to claim that even if the relevant injury had been caused in the way claimed, benefit was not payable because the specified activities were not connected to Mr M's duties.

The Ombudsman held that if, at the end of the day, Mr M's reaction to the course of action taken by his Managers following the incident at work was the sole cause of his injury, then he was entitled to an award under the Rules of the Scheme. The fact that Mr M's perception may be wrong or that management were within their rights to question his actions was irrelevant. That Mr M's reaction must be reasonable is not part of the test in the Rule.

The Scheme's decision was quashed, not on grounds that it was perverse, but because it had been taken under a misapprehension of law. In those circumstances, the Ombudsman remitted the matter for a fresh decision to be taken.

Q00283 Reviewing previous decision or considering a fresh application

Mrs D said that her application for ill-health benefits had been unreasonably refused.

There was no dispute that Mrs D was suffering from an illness or injury. The issue was whether

her illness was such that she was permanently unable to work in the particular kind of employment before her normal retirement date.

As is not uncommon, the various medical opinions which had been obtained by one or other party were not unanimous. The Ombudsman held that for the decision-maker to favour one doctor's opinion over that of another was not evidence of any perversity in the decision, but simply represented the weighing of one set of evidence against another.

The Ombudsman also held that there was sufficient medical opinion in support of the Scheme Manager's view to mean that it could not be regarded as perverse.

Mrs D believed that the Scheme Manager should have given greater weight to the fact that she was in receipt of Disability Living Allowance. The Ombudsman said that the criteria for an award of Disability Living Allowance are different to those of the Scheme but it is not unreasonable to expect the Scheme Manager to take account of this matter. However, taking such a matter into account is not the same as being bound by it. Mrs D still needed to meet the tests under the Regulations governing the Scheme. She did not.

The Ombudsman expressed concern about the Scheme Manager's practice with regard to the Internal Dispute Resolution Regulations (IDRR). In accordance with a well-established practice, Mrs D had been told that there was an appeal system whereby her application for ill-health retirement could be considered by a medical adviser other than the one who made the original recommendation to reject her application. The leaflet giving details of this system stated that the appeal could be considered using only written evidence on the state of her health which would have been available at the time of the original application. This could include reports written by a doctor, consultant, or other medical professional who

was treating her at the time she made her original application. But she was also told that if she submitted fresh medical evidence this would be treated as a fresh application.

The Ombudsman stated that the leaflet did not comply with obligations imposed by the IDRR 1996.

The Ombudsman also expressed reservations as to whether the IDRR could be limited to reviewing the medical evidence in the way described in the Scheme's leaflet about appeals. In his view the IDRR process is not limited to considering only written evidence which would have been available at the time of the original application to receive a benefit. He could find no basis for that statement in any of the Regulations which govern the Scheme.

The Ombudsman could see no basis for denying to a person who wished to contest a decision the opportunity of introducing material, for example in the form of another medical opinion, as part of an argument that the original decision had been wrongly taken. Such evidence need not, as a matter of law, be restricted to that coming from doctors who were treating the patient at the time.

The Ombudsman stated that there was a distinction between arguing that the original decision was wrong and arguing that there have been changes in an applicant's condition which meant that while she may not previously have qualified for the benefit she now does. The practice followed by the Scheme Manager blurred that distinction and appeared to indicate that if new medical evidence is submitted the matter will not be considered to be an appeal at all but will instead be treated as a new application.

Q00313 Arbitration

Mr W complained about the Scheme Trustees' refusal to allow him an ill-health pension. He also complained about their use of arbitration to resolve disputes.

Mr W applied for an ill-health pension because his eyesight was failing. The Scheme Rules provided that decisions on ill-health applications were to be taken by the Scheme's medical adviser. The medical adviser rejected Mr W's application without examining Mr W or obtaining up-to-date medical evidence. Mr W was given no reasons for the decision. The Scheme Rules provided that an appeal could be made by way of arbitration.

Mr W found the arbitration very difficult. He could not afford the professional representation suggested by the arbitrator. Mr W was in and out of hospital and had difficulty in attending hearings and complying with the arbitrator's insistence on formal pleadings. The arbitrator refused to accept medical evidence from the ophthalmic surgeon who was treating Mr W and threatened to decide the matter without Mr W's evidence, if he did not submit it in what the arbitrator indicated was the correct manner.

Mr W repeatedly asked the Trustees to remove the arbitrator. The arbitrator refused to resign and the Trustees were reluctant to remove him, although they eventually did so.

In their response to the complaint to the Ombudsman, the Trustees stated that the Scheme's Internal Dispute Resolution Procedure (IDRP) did not apply to appeals against its medical adviser's decisions.

The Ombudsman concluded that the act of determining whether a member met the Scheme's ill-health criteria was an act of scheme management, and thus the medical adviser's decision fell to be considered under the Scheme's IDRP. If Mr W was dissatisfied with the result of the IDRP, the Trustees should have informed him of his right to make an application to the Ombudsman. Instead of following the IDRP and Ombudsman route, Mr W had been wrongly directed to a process requiring legal expertise and bearing the risk of costs.

The Trustees should have ensured that the medical adviser had up-to-date evidence on which to make his decision. The decision should have been conveyed to Mr W in such a way as to enable him to know the reasons behind it and thus the grounds on which it could be challenged.

The Ombudsman directed the Trustees to arrange for Mr W's application for an ill-health pension to be considered afresh, having regard to all the available medical evidence. The decision was to be communicated to Mr W with reasons.

Q00515 Attributable to nature of duty

Mrs I claimed to have suffered financial loss as a result of her application for temporary injury benefit being declined.

Mrs I worked for the police. As a result of police enquiries into terrorist activity, details of her car were found in the possession of people suspected of being dissidents. On being notified of this, Mrs I went on sick leave because of stress. She subsequently returned to work at a different location.

Such dispute which existed was about whether the injury was suffered "in the course of official duty, provided that such injury is solely attributable to the nature of the duty or arises from an injury reasonably incidental to the duty, or as a result of an attack or similar act which is directly attributable to his being employed, or holding office, as a person to whom the scheme applies." The quotation was from the Regulation governing the Scheme.

The Scheme Manager did not dispute that stress was caused by the receipt of the message informing her that private details about her had been found in the possession of dissidents. The Ombudsman had no doubt at all that the injury was suffered either in the course of her official duty or from the nature of that duty. In his view

both factors applied. It arose because of information received in the course of her duty. The nature of that duty also meant that she suffered stress in the knowledge that she was a named potential target.

The Ombudsman said that in reaching a contrary conclusion the Scheme Manager had misdirected itself. Its concern seems to have been based on establishing how the information came to be in unauthorised hands. That was a different question to that of how the injury was caused to her.

Q00545 Comparable employment

Mrs A complained that her Employer had wrongly refused to grant her ill-health early retirement benefits.

The Deputy Ombudsman held that it did not follow that, because an employee was dismissed from a particular job on grounds of lack of capability, he or she was permanently incapable and thus met the criteria for payment of a pension based on ill-health retirement. Such a dismissal could, for example, take place where the condition is not regarded as permanent.

The relevant Regulations governing the Scheme provided that benefit could be awarded only if the member was unable efficiently to discharge her own or "comparable employment" as defined in the Regulations.

The Deputy Ombudsman held that the Regulations did not require any alternative employment actually to be available. The test was whether the member was capable of performing the duties of the employment, not whether the employment was actually available.

The Deputy Ombudsman had doubts as to whether a Medical Adviser could be regarded as "independent" (as required by the Regulations) where the doctor had already advised in relation to the Member's ongoing employment. But the

IDRP meant that appropriate medical advice was given by a doctor who did not have that connection and thus rectified any hint of unfairness that there may have been.

Entitlement to benefit turned upon a view being taken, which the Deputy Ombudsman did not criticise, that Mrs A's condition was not permanent.

Q00731 Perverse decision

Miss B complained that Trustees had declined to award her an incapacity pension.

Under the Rules of the Scheme the decision as to whether a member's condition amounted to incapacity (and therefore whether he or she is eligible for an incapacity pension) is one for the Employer. The Trustees submitted that the Member's entitlement to the scale pension was still subject to their discretion.

The Ombudsman did not disagree with the Trustees that it was proper for them to satisfy themselves that the Employer was not seeking to defraud the Scheme. But that did not mean that the Trustees should form their own opinion as though they were the decision-maker expressed under the Rules. The most that the Trustees could do was to review whether the Employer's opinion was perverse or irrational.

Even if the Trustees could duplicate the role which under the Rules is given to the Employer, the issue would turn on whether Miss B was permanently unable to return to her former duties before her normal retirement date. The Trustees had indicated an intention to determine such a matter on the basis of the "balance of probabilities" meaning more likely than not, more than a 50% chance. The Ombudsman had no concerns about that basis but did have concerns about the way that approach was applied.

The Ombudsman could not see how any reasonable decision-maker faced with a battery of medical opinion pointing one way and with

no dissenting medical opinion could “on the balance of probabilities” conclude that Miss B was not permanently incapable of carrying out her duties. The Trustees’ submissions, made rather late in the day, suggested that the advice of their own Medical Adviser was in stronger terms than it appeared on paper and was based on his own assessment of two specialist opinions as to an underlying cause of Miss B’s medical condition. A difficulty in the way of the Ombudsman accepting the Trustees’ submission was that whichever underlying cause was preferred neither specialist was indicating a possibility of Miss B being able in the future to carry out her own duties.

The Ombudsman said that alarm bells should sound in the minds of Trustees if an occupational health specialist is offering advice in the area of another specialist. If the Trustees had looked properly at the medical opinions before them they should have appreciated that there was in fact no disagreement as to the essential issue they needed to determine. If their own adviser was seeking to persuade them otherwise, the Trustees should have recognised that the specialists were not supportive of his view. For the Trustees to have reached the conclusion to which they came was, in the legal sense, perverse.

In the face of a decision which was originally perverse and which the Trustees had persistently failed to correct, the Ombudsman directed that the appropriate pension be paid to Miss B. The evidence before the Trustees permitted no other conclusion so there was no purpose to be served by remitting the matter to them for a further decision.

Q00881 Obtaining appropriate information

Mr R was aggrieved by a decision that he was not permanently incapable of engaging in regular employment.

Mr R was concerned that the Scheme Manager’s medical advisers formed their opinion

on the basis of paper evidence rather than a physical examination. The Regulations governing the Scheme do not require a physical examination and the desirability of such an examination is a matter of judgement for the Scheme Manager and its medical adviser. The Scheme Manager needed to weigh the opinions of doctors, who had seen Mr R and certified that he was incapable of work against that of its own adviser, who had not seen him but advised that he should be capable of sedentary work. Faced with that conflict and the information about benefits provided by the State (which, although based on different criteria, gave some indication that Mr R was not a fit man), the Ombudsman was surprised that the decision-maker did not ask its adviser either to see Mr R or to commission such an examination from some other practitioner.

The medical adviser had commented on the paucity of information, particularly of a current or specialist nature, concerning Mr R’s condition. The Ombudsman was surprised that, having received a letter from a consultant saying that he was not in a position to provide a current view on Mr R’s condition and suggesting a formal report was necessary, the Scheme Manager did not follow this up.

The Ombudsman said that the approach taken seemed to have been to determine whether the evidence to hand supported Mr R’s application rather than to seek to establish whether Mr R met the requirements of the particular Scheme. If Mr R met those requirements he was entitled to receive his benefits. The Scheme Manager was responsible for ensuring that members of the Scheme received their entitlement. It must therefore accept some responsibility for establishing what that entitlement might be.

If evidence was withheld from the Scheme Manager and/or its medical advisers, it was entitled to take that fact into account.

The Ombudsman was not persuaded that the Scheme Manager had taken sufficient

appropriate steps to establish whether Mr R had an entitlement to a pension under the relevant Regulation.

Provision (or lack of Provision of Information)

M00097 Reduction of Guaranteed Cash Equivalent

Mr H said that the Respondents had failed to honour an offer of a transfer value from the Scheme and claimed that delays in dealing with the transfer resulted in a reduction in his transfer value and a loss of investment growth.

The transfer value originally quoted to him was incorrect. A previous period of service had been counted twice in the calculation, which had also been based on a normal retirement age of 60, rather than the correct age of 65. The Ombudsman held the provision of the incorrect calculation to be maladministration.

The quotation was guaranteed until the end of October. There was some uncertainty about whether Mr H's written instruction was received before then. The Ombudsman decided on the evidence that it was most likely that his written instruction had been received but that the papers were then subsequently lost in the course of a transfer from one administrator to another.

Accordingly, the Ombudsman found on the balance of probabilities, that the first Administrator was provided with appropriate evidence to show that Mr H had made a valid "relevant application", as in Section 94(1) (aa) of the *Pension Schemes Act 1993*, for the cash equivalent of his benefits in the Scheme to be applied as a guaranteed cash equivalent to a Personal Pension Transfer Plan within the guaranteed period.

On the question of whether the inaccurate quotation should be honoured, the Ombudsman noted that the effect of the Act was that once a member applied in writing for the cash equivalent transfer to be made, and provided that the application was received before the expiry of the guarantee period, the cash equivalent became a guaranteed cash equivalent, which cannot normally then be reduced. However, the Transfer Value Regulations allow certain exceptions whereby the amount of the guaranteed cash equivalent may be increased or reduced.

Regulation 9(5) requires that the guaranteed cash equivalent shall be increased or decreased as if that sum had been correctly calculated in accordance with the *Pension Schemes Act 1993*. It followed, therefore, that the three-month guarantee was a specific regulatory requirement, relating to guaranteed statements of cash equivalents where the correct benefits had been calculated. Mr H's guaranteed cash equivalent had not been calculated correctly.

No direct contractual relationship existed between Mr H and the Administrator who could not be held to honour a wrong quotation. Nor could the Trustees pay an incorrectly calculated amount. The Ombudsman endorsed an offer of £1 000 made by the Administrator to compensate Mr H for the distress and inconvenience caused to him.

M00534 Notification to Members

Mr R complained that the Scheme Manager did not inform his wife that she could have made provision for a Widower's Death in Retirement Pension when she retired.

The Ombudsman concluded that the Manager of the Scheme was responsible under the Disclosure Regulations for taking reasonable steps to inform members about any material alterations to the Scheme. Those steps could be less than communicating directly with all active

members of the very large public-sector scheme. He was not critical of the practice of using employers as a channel of communication.

Mrs R had seen letters which provided information about Widower's pensions. There was some doubt as to whether she had seen a particular leaflet which gave information about the exact terms of this aspect of the Scheme. But if she did not, the evidence fell well short of establishing that this was due to maladministration by the Scheme Manager.

No0300 No causal link between maladministration and the claimed injustice

An Employer complained that an Insurer assisting in the wind up of the Scheme provided inaccurate information.

In September 2001, the Trustees had agreed that the Scheme should be wound up.

The Insurer, in August 2002, clearly gave inaccurate information about the value of the Scheme's assets. This inaccuracy was not of the relatively minor sort that might be expected in circumstances where a figure was expressed to be only an estimate. Rather, the figure overstated the value of the Scheme's assets by in excess of 25%. Although the Insurer acknowledged its mistake in a letter some six weeks' later, this initial provision of such inaccurate information amounted to maladministration. However, there was nothing to suggest that the information concerning the solvency position of the Scheme previously supplied was incorrect. It was on the basis of that previous information that the Trustees and Employer had decided to wind up the Scheme.

That the Insurer had overstated the value of the Scheme's assets was not, of itself, the cause of a loss of assets. A change in the value of the Scheme assets and liabilities was in no way connected to the error by the Insurer.

The Employer said that, in the six weeks between the erroneous figure being quoted and the true value being provided, the Trustees had informed Members that their benefits could be secured in full. The Ombudsman found that there was no advice offered that the Trustees should tell the members that their benefits could be secured in full. It was not for the Insurer to advise the Trustees when and how to communicate with the members.

It seemed to the Ombudsman that, if there had, as the Employer suggested, been any bad feeling from the workforce, this was because the Scheme had become underfunded. The remedy for that rested with the Employer not with the Insurer.

The Employer submitted that, had the maladministration not occurred, it would have had an opportunity to take various courses of action other than the winding up of the Scheme that might have helped to secure Members' benefits. But such a submission overlooked the fact that the decision to wind up the Scheme preceded the maladministration.

P00607 Loss of expectation

Mr D complained that the Scheme Managers should have advised him about a restriction applicable to his salary for the purpose of calculating his pension.

Under the Scheme, pensions were usually based on the final salary during any one of the last three years of employment. But there was a Regulation which stated that any increase in salary which was more than 10% above a "standard increase" could not be used in the calculation of benefits unless the Employer paid an additional contribution to the Scheme equivalent to the actuarial value of the increased benefits. Mr D's salary had increased because he had taken up a high paid post. The Ombudsman commented that the majority of cases he saw which involved the application of the Regulation were consequent upon the individual having

taken temporary promotion shortly before retirement. In Mr D's case, the increase in his salary was the result of his taking a new permanent post at a higher salary shortly before leaving the Scheme. The Regulation did not differentiate between temporary and permanent appointments.

Before deciding to retire Mr D had obtained an estimate of the benefits payable to him. That estimate had not taken account of the application of the Regulation.

The Ombudsman held that Mr D was receiving the benefits to which he was entitled under the Regulations. In that sense he had not suffered any financial loss although he may be receiving less than he had expected. Loss of expectation is not the same as loss of entitlement. The Ombudsman did not agree that the Scheme Managers should be required to pay the pension quoted to him, or £75,000 compensation suggested by Mr D. The Ombudsman was not persuaded that Mr D's decision to retire would have been different had the quotation been for the amount of pension he is now receiving rather than the amount he was quoted.

Q00017 No detrimental reliance

The Deputy Ombudsman said there was no dispute that the Insurer had issued incorrect valuations in respect of Mr P's entitlement. That constituted maladministration. To uphold the complaint the Deputy Ombudsman needed also to be satisfied that Mr P incurred a loss as a direct consequence of that maladministration.

Although Mr P received incorrect details of his benefits based on incorrect valuations, that did not confer on him a right to the incorrect figures quoted.

Mr P maintained that he would not have left full-time employment to take up self-employed part-time work if the incorrect valuations had not been issued, and would not therefore have suffered the reduction in his income; nor would

he have spent £30,000 of his savings supplementing his income.

The Deputy Ombudsman's review of the evidence led to the conclusion, on the balance of probabilities, that even if Mr P had been given correct estimates, he would still have chosen to leave his employment, become self-employed, and use some of his savings until he took his benefits. He, therefore, concluded that Mr P did not rely on the information provided to his detriment.

In the course of his determination the Deputy Ombudsman said that someone suspecting that he may have suffered a loss had a responsibility to take reasonable steps to mitigate the loss.

Q00216 Impending Rule changes

Mr M complained that the Trustees failed to inform him of impending changes to the Scheme Rules and thereby denied him the opportunity to apply for early retirement before the changes took effect.

Mr M had enquired whether there were any plans to change a policy whereby members were allowed to draw their pension at age 60 without any reduction for early payment. The Scheme's Pension Manager replied that members were able to receive their deferred pensions between the ages of 60 and 65 without penalty, but said that the Scheme's normal retirement age is 65 and members do not have the automatic right to an early retirement pension. He also said there is no guarantee that these factors and discretions will continue to apply.

Mr M retired three months later, becoming a deferred member of the Scheme. Three months later still, an announcement was made that the Trustees and Employer intended to continue to exercise their discretion in granting early retirement pensions to deferred members after the age of 50, but that in calculating the pension payable a reduction would be applied

of 6.5% per annum for each year of retirement before age 65.

Mr M stated that it had been his intention to make the same enquiry about change every six months until his 60th birthday. He suggested that, in the event of being alerted to imminent change, he would have been able to request immediate early retirement and thus avoid any additional penalties.

The Ombudsman concluded that Mr M's future plans were founded upon the assumption that all he had to do was request early retirement and the Trustees and Employer would give consent. This was not a reasonable assumption to make. Much can happen to a pension scheme in two years and there was no guarantee that such consent would be forthcoming. The letter from the Pensions Manager was sufficient to remind Mr M that deferred members were not entitled to an unreduced pension at age 60 and also to warn him that there might be a change to such a practice.

Q00421 Teachers' Pensions Additional Voluntary Contributions (AVCs) failure to provide information

Mr and Mrs R complained that they had been improperly persuaded to pay AVCs and had not been informed that they could purchase past added years (PAY) in the Teachers' Pension Scheme.

The Ombudsman found that the PAY alternative had not been brought to Mr and Mrs R's attention. This constituted maladministration, in that it denied Mr and Mrs R an informed choice.

Directions were made effectively to allow Mr and Mrs R retrospectively to make such an informed choice.

Q00547 Misleading information about a Widow's Pension

Mrs H complained that her husband had incorrectly been informed that she would receive a widow's pension on his death.

Mr H had been in receipt of a pension since his retirement in 1968. He had converted part of his lump sum in order to provide a benefit for his wife. She had subsequently died and Mr H had remarried. At a time when Mr H was going to re-write his will in 1990 he asked the Scheme Manager what pension would be payable to his wife in the event of his death. He was told she would receive one-third of his pension.

The Regulations governing payment of Mr H's pension in fact provided for the payment of a widow's pension only to the wife to whom the member was married prior to the date on which the member started to receive his pension.

The Ombudsman found that the provision of inaccurate information to Mr H was maladministration, but regarded as too speculative Mrs H's submission that, had the correct information been provided, Mr H would have altered his will in the specific way she suggested. He did, however, order payment of £250 to reflect the distress caused to her. The complaint was not upheld.

Q00560 Lack of information not to detriment

Mr C complained that he had improperly been persuaded to pay additional voluntary contributions (AVCs) and had not been informed that he could purchase past added years (PAY) in the Teachers' Pension Scheme.

The AVCs application form signed by Mr C included a question designed to establish whether he was purchasing PAY in the Teachers' Pensions Scheme. The question was not, however, answered one way or the other. The Ombudsman was wary of concluding from this

that Mr C was made aware of the PAY option. After considering all the available evidence, the Pensions Ombudsman decided, on the balance of probabilities, that the PAY alternative was not brought to Mr C's attention.

The Ombudsman found no evidence that Mr C was improperly persuaded by the representatives to enter into the AVC arrangement. The Insurer's representatives took some care in establishing Mr C's financial circumstances and aspirations. It was not inaccurate to indicate that an AVC arrangement was a suitable way of meeting those aspirations.

Mr C's belief that AVC benefits may only be taken at normal retirement age (NRA) was not correct. The benefits could be taken before (but after age 50), at or after NRA.

The evidence strongly suggested that Mr C was contemplating early retirement; thus the AVC option was likely to have been more attractive to him than paying for PAY, which would have been calculated on the basis of his serving until his NRA. Thus on the balance of probabilities, the Ombudsman did not believe that, had Mr C been alerted to the alternative, he would have taken a different course of action than he did in fact follow. No directions were therefore made.

Q00601 Ex post facto evidence

Mr H said that, just prior to his making his last investment into the Plan, an Insurer, without informing him or his Adviser, effected a 're-price' which reduced the return that he had been led to expect from the investment.

The Deputy Ombudsman stated that the alteration was sufficiently substantial that it should have been properly notified to potential investors or their advisers. The key point at issue was whether the Insurer took reasonable steps to alert Mr H or his Adviser to the change.

The Deputy Ombudsman noted the Insurer was unclear about what would and should have

happened, so could not rely on the likelihood that the "normal" procedures would have ensured that the Adviser was alerted. No convincing evidence had been offered to suggest that written notification of this change was communicated to the Adviser. A note of an oral conversation indicated strongly against the information having been communicated in that way. The Deputy Ombudsman concluded from the evidence that, more likely than not, specific warning of the change of terms was not given. That failure amounted to maladministration. He did not consider it appropriate for the Insurer to rely on post-sale material which, on inspection, might have suggested that something had changed, as a proper and reasonable communication of the change of contractual terms that ought to have been made clear before the contribution was made.

The Deputy Ombudsman directed the Insurer to stand by its previous terms.

Q00611 No evidence of injustice

Mrs A complained that she had improperly been persuaded to pay additional voluntary contributions (AVCs) and specifically advised against the alternative option of purchasing past added years (PAY) in the Teachers' Pension Scheme.

The Ombudsman noted that there was little supporting evidence to confirm or deny what had been said to Mrs A. If indeed she had been dissuaded from making a lump sum purchase of PAY, that was an option that had remained open to her prior to retirement. If the finance was not later available that was presumably because she used the money she had intended to make available for some other purpose than purchasing PAY.

The evidence led the Ombudsman on balance to conclude that the representative did not go beyond simply making her aware of PAY and fell short of establishing that injustice was caused to her as a result of any maladministration.

Q00785 Failure to warn of Market Value Adjustment (MVA)

Mr B complained that the Provider failed to warn him that deferring the taking of benefits from the Plan beyond his Selected Retirement Date (SRD) would result in a MVA being applicable.

The terms of the Policy, as reflected in the booklet that was available at the outset, conferred upon the Provider the broad ability to impose a MVA.

A pre-retirement letter warned Mr B that, if he did not retire, his SRD would be deferred for five years but made no mention of the possibility of a MVA being imposed in those circumstances.

The Deputy Ombudsman held that whilst the Provider had no responsibility to advise Mr B of the options available to him, it needed to take steps to ensure that the consequences of any decision were reasonably clear. This it failed to do. Mr B therefore never received the opportunity to make an informed decision as to whether to take his benefits at his SRD.

The Deputy Ombudsman was not persuaded that, more likely than not, Mr B would, as argued by the Provider, have deferred taking his benefits had he been given the requisite information. Mr B's financial awareness was not such that he might reasonably have been expected, based on the information supplied to him, to appreciate that he exposed himself to a MVA if he deferred taking his benefits. The Provider's failure to adequately warn Mr B of the consequences of deferring taking his pension benefits amounted to maladministration.

The Deputy Ombudsman directed that Mr B should be reimbursed by the amount of the MVA which had been applied.

Q00819 No reliance on mistake

Mr R said that an Insurer had reneged on a commitment made to him in writing as to the value of his pension fund.

The Deputy Ombudsman noted that a document sent to Mr R incorrectly overstated the guaranteed cash sum attaching to his Plan. That amounted to maladministration. But the Deputy Ombudsman held that there could be no question of this document giving Mr R a contractual entitlement to the incorrect sum.

The Deputy Ombudsman needed to determine to what extent Mr R placed reasonable reliance upon this document, and what detriment to him, if any, may be inferred from his acting in reliance on it.

Mr R had received two benefit statements in the ten months preceding that when the incorrect statement was issued, one only two months previously, both indicating substantially lower benefits than the incorrect one. He did not query this with the Insurer. The Deputy Ombudsman felt that the difference was of such magnitude that it might reasonably have been queried. When, six months' later, Mr R received a further statement reverting to a much lower figure he demanded that the previous higher figure be honoured.

The Deputy Ombudsman saw no evidence that Mr R had acted, in the period following receipt of the incorrect information, in reliance on a mistaken belief as to his fund value. Mr R was aware that the value could decrease. There was no basis for Mr R's claim that the Insurer should provide him with a fund value greater than that to which he was strictly entitled.

Overpayments

P00268 Errors and recovery

Mrs B complained that the Administrator of the Scheme overpaid benefits to her despite having been informed that she had reduced her working hours. She disputed her liability to repay the money and complained that the Administrator was seeking to recover the overpayments in a way that caused her financial hardship and distress, by withholding a large portion of her pension.

Mrs B was a Member of a scheme which included provisions whereby her pension was abated if she returned to local government service at a salary which, when added to her pension, meant that her income exceeded that which (after taking account of inflation) she earned during her previous employment.

The Ombudsman found that overpayments had arisen as a result of maladministration by the Administrator who had failed to act when alerted to Mrs B's re-employment in local government. But the Administrator was entitled to recover overpayments of benefits. Indeed, as a public authority, it could be subject to criticism if it failed to do so.

Mrs B had been given an opportunity to notify the Administrator if the proposed repayment schedule was too onerous for her. She did not do so. The Ombudsman regarded it as reasonable for the Administrator to take her initial lack of response as implied acceptance of the proposed schedule.

Distress had been caused as a result of the maladministration. The Ombudsman made a direction for Mrs B to be paid £250. He was critical of the failure of the Administrator to use powers provided by the Local Government Act 2000 to redress the injustice caused by its maladministration.

P00334 Irrecoverable expenditure

Mr F was overpaid more than £9,000 because of a breakdown in communications between various departments of the Insurer, which administered his Personal Pension Plan. The Insurer recovered the overpayment by reducing Mr F's fund value at his retirement date.

The Deputy Ombudsman said that a recipient of an overpayment can claim that, in reliance on the overpayment, he or she changed position so that it would be unfair to have to repay the money, either in full or in part. In effect, that the injustice of requiring him to repay could outweigh the injustice of denying the claimant restitution.

The Deputy Ombudsman noted that Mr F commented that the payment had come as a complete surprise and indeed he did query its payment with a then member of the Insurer's staff who checked more than once that Mr F was entitled to the refund. It was difficult to see what else Mr F might reasonably have been expected to do to check whether he was entitled to the payment.

Mr F used the refund to purchase a conservatory for his house. The Deputy Ombudsman concluded that this purchase was likely to have enhanced the value of his property but that short of selling his house and realising any enhanced value, the purchase of the conservatory was irreversible.

The Deputy Ombudsman said that, taking all relevant considerations into account, he considered that the inequity imposed on Mr F, were he to have to repay the full amount, outweighed any injustice faced by the Respondent in not being able to recover the overpayment. Mr F had been considering spending in the order of £3000 on a conservatory, but went ahead with the actual cost only after receiving the overpayment without which the project would have been prohibitively expensive for him. In these

circumstances the Deputy Ombudsman concluded that Mr F should be entitled to retain that part of the overpayment in excess of the sum he was already considering spending.

Trustees' and Managers' Responsibilities

Moo173 Date when wind-up commenced

The dispute concerned the winding-up date of the Scheme and particularly whether this was before or after a pension was put into payment for Mr W.

The relevant rule of the Scheme provided that if contributions ceased, the Trustees shall cause the Scheme to be wound up, either "forthwith" or "when they consider it expedient to do so". The provisions were also triggered by an Employer giving notice of its intention to terminate its liability to continue to make contributions.

Mr W argued that wind-up was postponed in accordance with the Trustees' power to do so. Such action might have been expedient in order to maximise the chances of recouping a substantial loan made from the Scheme to the Employer.

There was no minuted decision by the Trustees to delay commencement of the winding-up. Nor was there any minuted decision to commence wind up with immediate effect. The Annual Report indicated only that the Scheme had been closed to new entrants.

The Ombudsman held that whilst the cessation of contributions opened up the possibility for the Scheme to be wound up, it did not automatically trigger the wind-up. As a matter of fact that wind-up had not been triggered by the time Mr W became a pensioner. The Independent Trustee was directed to treat him accordingly and to restore the pension which it had sought to reduce.

Moo754 Selection and oversight of Additional Voluntary Contributions (AVCs) Providers

Mr L complained, amongst other matters, that Trustees failed to safeguard his AVCs. Mr L wished to transfer his AVCs fund away from the chosen Provider and was aggrieved that the Trustees did not nominate an alternative Provider.

The Ombudsman concluded that the Trustees were not obliged to offer more than one Provider. Nor were they obliged to guarantee the performance of the AVCs Scheme.

He was critical of the failure of the Trustees to seek an alternative Provider as recommended by their professional advisers but considered that this was not the cause of injustice to Mr L who had other options available to him.

Moo939 Failure to obtain certificate

Mrs B complained that an Insurance Company failed to obtain the necessary certificates when she transferred previous benefits into the Plan so that the tax-free cash sum she was allowed to take from the Plan was £2,000 less than it would otherwise have been. In addition, Mrs B asserted that there was a consequent delay in setting up her benefits, during which time annuity rates worsened so she would receive a lower pension over her lifetime than would otherwise have been the case. Mrs B also complained that she was not given adequate information by the Insurer and, as a consequence, her funds remained in a high risk investment during the relevant time.

The relevant Regulation provides that no lump sum may be paid, in respect of transferred benefits, unless the administrator of the receiving scheme has obtained the appropriate certificate from the administrator of the paying scheme.

The Ombudsman did not accept the Insurance Company's argument that the receiving scheme did not have to do anything. The use of the phrase 'to obtain', suggested that some action on its part is to be expected. 'To obtain' is not the same as 'to receive'. He accepted that the receiving scheme could not force the paying scheme to provide a certificate. The law envisaged the possibility of no certificate being provided by imposing a restriction on the provision of a tax-free cash sum when such a situation occurs. It would no doubt have been possible for the law to have precluded a receiving scheme from accepting a transfer unless a certificate was provided and it is significant that this is not what the legislation provided.

The Insurance Company did not make reasonable efforts to obtain the relevant certificate; it did not approach the ceding schemes until a considerable lapse of time after Mrs B's transfers. This made 'obtaining' the certificate considerably more difficult than it might have been if it had acted sooner. This amounted to maladministration.

The fact that Mrs B was not able to take as much of her fund as a tax-free cash sum as she wished did not represent a financial loss to her. If the Insurance Company was required to pay Mrs B the difference between the tax-free cash sum she might have been able to take, and the amount she did take, she would, in effect, benefit from the funds twice.

The Ombudsman held there should be some recognition of the fact that Mrs B was unable to take her benefits in the form that she wished and required a payment of £300 to be made to her.

The delay caused by the belated attempts to obtain a certificate meant that Mrs B was without a pension for some four months. That loss was in

part offset by the fact that the annuity when obtained was for a higher amount. The Insurance Company was directed to make a payment of £1,000 to redress the injustice caused.

No0041 Change of Investment Provider

Mr S complained that his investments within the Scheme had been transferred to an Insurer without his knowledge or consent and had thereby been substantially reduced.

The Deputy Ombudsman held that there was no requirement for the Trustees to obtain Mr S's consent to their decision to change the Investment Provider. However, there was no evidence that an Announcement Letter about the change had been sent to him or other deferred members of the Scheme. That omission was maladministration.

But no financial injustice was caused. A subsequent downturn in performance of the Insurer's Managed Fund occurred after Mr S had received information and after he had been given the opportunity to switch to other funds.

No0756 Application of Internal Dispute Resolution Procedure (IDRP)

Mr M claimed to be entitled to additional benefits from his scheme. The Ombudsman found that as Mr M had not left service due to invalidity he was not entitled to any additional benefits from the Scheme.

The Scheme Manager said that Mr M's complaint was not covered by the IDRP requirements, as the matter related to the reasons for his discharge and not a matter concerning the administration of the Scheme. The Ombudsman did not share that view. When Mr M made his complaint under IDRP, he was claiming that he should be receiving benefits under the Scheme. That his claim may have

depended how he had been, or should have been, discharged did not mean that IDRPs did not apply. The failure properly to apply IDRPs was maladministration, but given the ultimate outcome of Mr M's complaint, this did not cause him any injustice.

P00664&5 Exercising a discretion

Miss H and Mrs C complained that an Insurer did not exercise a discretion as to where a death benefit should be paid rather than paying the proceeds of the Policy in accordance with its normal practice to their father's widow.

Under the Pension Plan the Insurer had power to decide to whom a lump sum death benefit was payable.

The Ombudsman said it is arguable that the Insurer could have sought more information as to the potential beneficiaries and the wishes of the deceased. As a matter of good administration, he would have expected the Insurer to have a note of what factors were taken into account in exercising its powers. Although the Insurer said it had written procedures (since lost) as to the way such decisions were taken, no such procedure had been provided to the Ombudsman who expressed considerable doubt as to whether such written procedures actually existed.

There was simply no evidence to support the Insurer's assertion that the discretion had been properly exercised: the fact that money was distributed was not of itself evidence that a discretion had been properly exercised. On the other hand, there was evidence that the decision was taken without proper consideration but instead by applying what was said to be normal practice.

The matter was remitted for a fresh decision to be taken.

P00940 Suspending Pension

Mr F complained that Trustees had improperly suspended his incapacity pension.

Mr F had taken up employment while receiving an incapacity pension and thus triggered the Trustees' power to review his pension.

The relevant Rule required the Trustees to obtain written medical advice before making their decision. The Ombudsman could see no reason why medical advice could not come from a chartered physiotherapist.

The Trustees decided to terminate Mr F's incapacity pension. They indicated that they were prepared to reconsider this decision on appeal. The Rules of the Scheme did not provide for any such reconsideration by the Trustees.

The Ombudsman said he could understand the Trustees' desire to provide such a step as their procedure lacked fairness: although Mr F knew that his pension was being reviewed, he did not know what material the Trustees were taking into consideration and had no opportunity to contest any factual inaccuracies or refute any advice or expressions of opinions, which were being made to the Trustees. Ceasing the payment of a pension had a very significant consequence for the recipient. It was not a step to be taken lightly and needed to be taken after a process which allowed adequate opportunity for the Member concerned to put his point of view.

In the Ombudsman's view, it would have been far better if that opportunity were given before the Trustees reached their decision rather than for the member to be first given a decision and then told that he can appeal against that decision to the very body which has taken it. Moreover, in order to allow a proper opportunity for an appeal, a member needs to know the basis on which such a decision was taken. One of the factors which appeared to be behind the Trustees' original decision was information they had obtained from a private investigator but

there was no mention of this in the notification of the decision that was sent to Mr F.

The Ombudsman stated that the indications were that no proper consideration was given to medical evidence submitted by Mr F.

In the course of the Internal Dispute Resolution Procedure the Trustees were faced with conflicting medical advice. The Ombudsman stated that in such circumstances the Trustees must exercise their judgement in weighing up the evidence before them. It is not a numbers game whereby two views automatically outweigh one. The Trustees' decision should not be considered perverse simply because they favoured the advice from their own medical advisers over that provided by the Member. How much weight to give the respective views was a matter for the Trustees. There was no assumption that greater weight would be given to the views of someone who had examined Mr F.

The Trustees gave further consideration to the matter during the course of the investigation but again took the decision to suspend payment. The Ombudsman did not regard that decision as perverse.

P01291 Failing to respond properly to a query

An Insurer failed to provide Miss D with a complete response to an enquiry she made about back contributions, which prevented Miss D from benefiting from a carry back to a previous tax year.

Miss D did not understand the difference between backdating and carry back when she issued her enquiry asking: "Is April this year the furthest to which I can backdate?"

The Deputy Ombudsman said that Miss D's intention at the time was clear, i.e. she wished to establish what facility was available to allow her to contribute for earlier years on reinstatement. If Miss D's request was not clear,

as the Insurer since argued, the Insurer should immediately have clarified its understanding with her. The Insurer itself appeared to confuse the terms "carry back" and "backdating".

The Deputy Ombudsman accepted that the Insurer should not proffer advice but did not accept that making her aware of the carry back facility constituted advice. He noted too that the Insurer had no qualms about notifying Miss D about the 'Life Time Allowance' and maximum insured contribution permitted from April 2006.

The Insurer's failure properly to respond to Miss D's correspondence constituted maladministration which deprived her of the opportunity to make a contribution to the Plan for the relevant tax year, 2002/2003. A direction was made to restore Miss D to the position she would have been in but for that maladministration.

Q00146 Retirement after contested dismissal

Mr M did not wish to apply for an ill-health pension prior to the outcome of his appeal against dismissal but, having waited, found himself considered a deferred member and unable to apply for an ill-health pension.

The Ombudsman stated that he could well understand that an employee who wishes to contest an employer's view that he is incapable, by reason of ill-health, of continuing in employment would be reluctant to apply for an ill-health pension before such a contest had been resolved. The Ombudsman said that there seems to be an inherent unfairness if, after Mr M has lost that particular contest, he is then denied an ill-health pension on the grounds that he should have applied earlier.

The Rules of the particular scheme did not, as claimed by the Employer, require an application to be made by Mr M. Nor, in the Ombudsman's view, could a member of a pension scheme be expected to work out that, because the consent of the employer would be needed for him to

retire with an incapacity pension, the initiative for such retirement needed to come from him, as the employee, and not from the employer. The Employer asserted that it would be impractical to consider a member for ill-health retirement without that member's co-operation because of the necessity of obtaining medical advice. The Ombudsman stated that it ought not to be beyond the bounds of an Employer's ability to obtain a member's consent to such consideration. The key lay in understanding what might be preventing the member from applying. In Mr M's case, this was his apprehension about prejudicing his appeal case. It should not have been beyond the capability of the Employer to have ascertained this and taken steps to alleviate his fears.

Giving a purposive construction to the Rules of the Scheme, it seemed to the Ombudsman that if the employer himself suggests, and is agreeable to, retirement on medical grounds then the fact that the employee did not, himself, initiate that step should not result in such a pension being denied on the grounds that an employer cannot consent to his own act.

Mr M's dismissal was stated to have been on grounds of ill-health. The Ombudsman held that retirement can come about as a result of dismissal. The Ombudsman noted that the Employer had positively encouraged Mr M to explore the option of medical retirement with the implication that its own consent would be forthcoming, although this would, under the Rules of the Scheme, have been dependent on a medical opinion being obtained. Surprisingly the Employer then wished to argue that there was no implication, in its encouragement for Mr M to apply for an ill-health pension, that consent would be forthcoming. The Ombudsman commented that this came very close to breaching the Employer's duty of good faith.

The matter was remitted to the Employer for a fresh decision to be made.

Q00381 Interest on late payment

Mrs B complained that, although the Trustee had determined that her deferred pension should have been paid from October 1997, it refused to pay interest on delayed payment of her lump sum.

The Ombudsman found that it was appropriate for the Trustee to take account of pensions increases for the period between 1997 and 2000 in determining what benefits should be payable as a result of its subsequent decision (following a previous decision of the Ombudsman) to backdate her pension.

The correct approach, having determined that Mrs B's benefits were payable from October 1997, would be to put her in the position she would have been in had the Trustee properly considered her application in the first place. Had Mrs B's benefits been put into payment in 1997, her lump sum would not have been increased in line with pensions increases. However, Mrs B did not have the benefit of her lump sum for the period from October 1997 to October 2000. This was through no fault on her part and the Ombudsman held it would be appropriate for her to receive recompense for this.

Q00514 Costs incurred by Trustees

The Trustees complained that the Employer had failed to pay sufficient contributions to the Plan. The Ombudsman upheld that complaint and made an appropriate direction for the Employer to make good the loss of investment income to the Scheme.

The complaint made to the Ombudsman by the Trustees had been a counterclaim to one made by the Employer.

The Trustees requested the Ombudsman to direct that they should be compensated for the legal costs that they had incurred. The Ombudsman felt that the £12,000 claimed was

an extraordinarily large amount bearing in mind that there is no requirement for lawyers to be involved in referring a dispute to him. The Trustees argued that it was entirely reasonable and consistent with the Trustees' fiduciary duties for them to seek legal assistance over their options in obtaining payment, preparing the response to the Employer's complaint and in preparing their own complaint by way of a counterclaim. The Ombudsman's decision was that Trustees could not seek to use the present complaint as a means of recovering the costs they chose to incur – in his view unnecessarily – in defending the complaint against themselves.

The Trustees suggested that if the Employer was not required to meet any of the Trustees' legal costs it would not have suffered any adverse financial consequences as a result of having failed to pay employer contributions to the Plan when due. The Ombudsman said his purpose in directing any financial payment is to provide redress for injustice, not to penalise.

Q00649 Failure to provide information

Mr E complained that the Trustee failed to provide information required to assign the benefits held in his name under the Scheme to a Policy held in his own name, and that the Trustee failed to pay the annual premium due for 2002.

The Trustee had claimed that Mr E's employment had ceased in January rather than December 2002. The Deputy Ombudsman stated that the Trustee had produced no evidence to support the assertion and that the decision of an Employment Tribunal supported the view that Mr E's termination date was 22 December 2002, and that he was entitled to have the 2002 annual premium contribution paid to his pension fund.

The Trustee's failure to answer requests for information reflected a wanton disregard of the obligations incumbent upon a Trustee of a

properly administered pension scheme. The Trustee has an obligation to co-operate with reasonable requests to ensure a member receives their benefits, and failure to do so without reasonable cause amounted to maladministration.

In addition to making a direction to ensure that redress was provided for the injustice to Mr E, the Deputy Ombudsman drew the matter to the attention of the Pensions Regulator and to the Department for Trade and Industry so that those bodies could consider whether further action was appropriate given the behaviour of the Employer, as Trustee, and of its Directors in this respect.

Q00707 Financial considerations

Mr R complained that the Trustees of the Scheme were wrong to refuse him an ill-health early retirement pension.

The Scheme Rules provided that the Trustees may allow a member to retire from pensionable service on immediate pension at any age if retirement is due to incapacity. The Ombudsman held that the use of the words "may allow" meant that there was no automatic right to ill-health early retirement even if a member did meet the Scheme's definition of "incapacity".

In the Ombudsman's view, the Trustees were entitled to take into account that the Employer was unwilling to inject the funds which were estimated as being the cost of Mr R's ill-health retirement. This was however but one factor that they had to weigh. The decision as to whether to approve the application rested with the Trustees not with the Employer, whose consent was not required.

Despite what the Trustees said in submissions after the event, it was clear to the Ombudsman that, at the time, they saw themselves as being unable to agree to a request for early retirement unless the Employer indicated a willingness to make a specific commitment to funding. Although the Trustees referred to a deteriorating

funding position, the Ombudsman noted that on a Minimum Funding Requirement basis the Scheme was actually in surplus. Looking at the contemporary documentation he had no doubt that the Trustees had misdirected themselves when considering the application and he remitted the matter to them.

Q00717 Employment matters

Mr G contended that, when he was made redundant on 17 December 2004 (his 50th birthday), he should have been granted an immediate undiscounted early retirement pension, as he had then reached the “attained age” of the Scheme, but the Employer denied him this pension.

Dealing with the Employer’s argument that the issue was an employment matter and not for the Trustees to deal with under the Internal Dispute Resolution Procedure (IDRP), the Ombudsman said that because there is a dispute between an employer and an employee which could be described as an employment matter did not mean it was outside his jurisdiction. Actions which an employer takes in relation to an occupational pension scheme, including whether or not to give consent to a pension being taken on early retirement or whether to meet the cost of such a pension, are matters that fall within jurisdiction. The way a pension is calculated will generally be for the Trustees to determine in accordance with the Rules and their decisions (which may in appropriate circumstances depend on whether or not consent from an employer has been given) will be subject to review under the IDRP. The Employer had been in error in asserting otherwise.

“ Reliance and detriment
were distinct concepts...
both issues needed to be
addressed separately. ”

Appeals to the Courts

Appeals continue to be fairly uncommon: by comparison with 1133 investigations which were determined during the year only five new notices of appeal were received.

I summarise below appeals in respect of which judgment was handed down during this reporting year.

The Courts have relatively short time scales for lodging an appeal. A party seeking to lodge an appeal after the initial time for appeal has expired must first seek an extension of time. One notice of appeal received this year was more than 18 months outside the 28 day deadline. The Court subsequently refused an application for an extension of time and so the appeal did not proceed.

The legislation provides for an appeal against determinations to be restricted to a point of law. No permission is required for such appeals to be lodged.

If the lawfulness of some other matter is challenged then the appropriate route is by way of judicial review for which permission needs to be sought. Generally it is not open to a party who disputes the lawfulness of a determination to seek a judicial review of that decision: the proper course is to appeal. Judicial review is more usually a challenge to some aspect of jurisdiction or procedure.

That said, one of the two applications for judicial review lodged this year sought to quash my determination. I had upheld an application against the Scheme Trustees that a Member's cash equivalent transfer value had been incorrectly calculated by not taking account of a bonus. An application for permission to obtain judicial review was lodged by the Member's former Employer to whom the Trustees could look to fund the increase in the Member's

benefits consequent upon my determination. The Employer contended that the process by which I had reached my determination was unfair and in breach of natural justice and Article 6 of the Human Rights Act 1998 in that the Employer had not been given details of the complaint by me or formally allowed an opportunity to make representations. Permission to seek judicial review was not granted on the papers, Mr Justice Hodge noting that my decision had been taken with the benefit of representations from various Directors and others involved with the Employer both presently and in the past and that the Employer had been kept informed of exchanges between me, the Trustees and the Applicant. Although notice was given for the application to be renewed by way of a hearing, the application was subsequently withdrawn.

In the other case, which is still ongoing, the Applicant sought permission to seek a judicial review of my decision to discontinue an investigation. Permission has been granted but the substantive application will not be heard until later this year.

Appeals

McCullum v Civil Service Pensions (Northern Ireland) [2006] NICA 22 (12 May 2006)

Civil Service Pension Scheme (Northern Ireland)
 – *Injury Award*
 – *Social Security Benefits*
 – *Industrial Disablement Benefit*
 – *meaning of accrued right.*

My determination

I upheld Mrs McCullum's complaint that the Respondent had wrongly withheld arrears of an

Injury Award (IA) due to notional deductions for Industrial Disablement Benefit (IDB) that Mrs McCollum had not in fact been granted for the period in question. I rejected the Respondent's argument that where it is subsequently found that there would have been an entitlement to benefit (in Mrs McCollum's case, IDB) had that benefit been claimed within relevant time restrictions, then a notional benefit should still be deducted from the IA. The relevant Scheme Rule referred to "rights which have accrued or probably will accrue from injury by way of [IDB] ...". I concluded that no right to IDB existed if an application is made out of time and there could therefore be no accrued right to that benefit.

Civil Service Pensions' (Northern Ireland) appeal

The main ground of appeal was that there was a distinction between the accrual of a right to benefit and an entitlement to benefit.

The Court's decision

The Court of Appeal in Northern Ireland (Lords Justice Nicholson, Campbell and Sheil) allowed the appeal.

The Court felt compelled to accept that there is a legal difference between "accrual" of rights and "entitlement" to rights. The non payment of IDB was not as a result of ineligibility but because the application had to be made within certain time limits. The Court accepted the Respondent's argument. IA was not intended to be a substitute for benefits which would have been payable but for failure to apply.

The Court remitted the application to me to consider if there was any maladministration in rejecting Mrs McCollum's application for IA in March/April 1998 and failing to make a temporary or final award until April 2002.

Stephens v Michelin Pensions Trust Limited [2006] EWHC 1640 (Ch); [2006] All ER (D) 16 (Apr)

Death of member

- *payment of lump sum death benefit*
- *exercise of discretion by Trustee*
- *Applicant benefiting with another*
- *whether exercise of Trustee's decision open to challenge by Applicant.*

My determination

The complaint was made by a Grandfather on behalf of his Granddaughter. Following the death of the Granddaughter's father, the Scheme Member, the Trustees had paid one third of the lump sum death benefit to the Granddaughter with the balance to the Father's Partner. The Father had died intestate and had made no nomination in respect of the death benefit. I did not uphold the complaint which was made on the basis that the details as to the evidence taken into account by the Trustees in reaching their decisions had been withheld and the Partner had been wrongly identified as a potential beneficiary.

Ms Stephens' appeal (made on her behalf by her grandfather)

The grounds of Ms Stephens' appeal were:

- I should have found that the Trustees had no sufficient material before them to conclude that the Deceased's Partner was a dependant;
- If I had given sufficient weight to the fact that at the time of the Deceased's death his only "blood" relative was Ms Stephens, then I would have found that her one third share was inadequate; and
- I failed to recognise that it had been an abuse of the Trustees' power to pay the Deceased's Partner with the intention that her Daughter from her relationship with the Deceased, but unborn at the date of the Deceased's death, should benefit.

The Court's decision

Mr Justice Lindsay dismissed the appeal.

The Deceased's Partner had indicated that the Deceased had provided mortgage, household and living expenses to her and the Trustees had no reason to disbelieve her. The Trustees had an absolute discretion and no special preference amongst the classes of beneficiaries and dependants was given to blood relatives of the deceased. The abuse of power point, which had not been raised before me, was also dismissed. There was no complaint that the Trustees' enquiries had been inadequate and their decision was one at which a reasonable trustee might arrive.

Strouthos v Pensions Ombudsman and another [2006] EWHC 1868 (Ch)

Ill-health benefits

- *whether wrongly refused*
- *whether irrelevant factors taken into account*
- *correct interpretation of Scheme Rules and Trustee's powers*
- *whether decision reached perverse.*

My determination

I did not uphold Mr Strouthos' complaint that he had been wrongly refused ill-health benefits. Mr Strouthos formally applied for ill-health benefits after he had been dismissed from his employment. I did not agree that the Trustee had taken into account Mr Strouthos' employment after his dismissal. Although the Trustee had favoured another medical opinion over that of Mr Strouthos' General Practitioner, that was not evidence of perversity but simply represented the weighing of one piece of evidence against another. I was satisfied that the Trustee had applied the proper tests and the correct methodology.

Mr Strouthos' appeal

The main grounds of Mr Strouthos' appeal were that I had:

- taken into account inadmissible evidence which reflected Mr Strouthos' position after certain dates;
- interpreted incorrectly the relevant Scheme Rule;
- confused two, different, powers of the Trustee; and
- reached a perverse decision.

The Court's decision

Mr Justice Mann dismissed the appeal.

The relevant Scheme Rule referred to the Member having left service. Thus a decision as to entitlement to ill-health benefits would always be to some extent retrospective, ie after the employee has been dismissed. The Trustee was not required to decide the issue on the evidence crystallised as at a particular date: the Trustee was entitled to obtain up-to-date evidence. Although the Trustee needed to look carefully at the period to which the evidence related, there was nothing wrong with a medical report which expressed a view not only as to what the position was at that time but as to what the position was at any prior time. Mr Strouthos' point was based on a fundamental misunderstanding as to how trustees were entitled and required to act. I had not misinterpreted the relevant Scheme Rule, I had not confused two separate powers, and my decision was not perverse.

Allsop v (1) Pensions Ombudsman and another (2006) EWHC 2129 (Ch)

Pension membership certificates

- *whether legally binding promise to pay pension in amounts shown on certificates*
- *enforcement of certificates not sought*
- *whether certificates amounted to contractual documents*
- *lack of consideration*

My determination

I upheld the first part of Mr Allsop's complaint (in respect of which there was no appeal) that he was entitled to be treated as if his pensionable service had been continuous, despite a break in his membership between 1996 and 1998. The second part of his application concerned two "pension membership certificates" which he had received in 2000 issued by the Scheme Administrators. Mr Allsop claimed that the certificates constituted a legally binding promise to him to pay the amounts shown on the certificates. I rejected that claim.

Mr Allsop's appeal

The case advanced by Mr Allsop on appeal was somewhat different to the arguments he had made to me. In his appeal, Mr Allsop maintained that a promise had been made, not to him, but to the Scheme Trustees. Mr Allsop contended that there was ambiguity such that the certificates should be construed in his favour.

The Court's decision

Mr Justice Mann dismissed the appeal.

Mr Allsop did not assert that the certificates represented promises which should be enforced. The upshot of my finding that Mr Allsop should be treated as if his pensionable service was continuous was that he was entitled

to a pension greater than the aggregate of the two sums appearing on the certificates. That rendered his arguments as to whether there was a promise an academic issue with which the Court would not deal.

As Mr Allsop did not seek to enforce the promise then he had no *locus standi*. If the promise was made to another party then it was for that party to enforce it. Further, and in any event, the certificates did not constitute any promise to anyone at all but were merely an indication of the benefits that could be expected from the Scheme. The certificates did not amount to contractual documents and, even if they did, there was no consideration for any promise.

Chaudry v Deputy Pensions Ombudsman (unreported)

Refund of contributions from Local Government Pension Scheme

- *adequacy of information as to repayment into Teachers' Pension Scheme*
- *whether financial loss suffered*

Deputy Pensions Ombudsman's determination

Mr Chaudry's complaint that he had not been given adequate information to allow him to repay into the Teachers' Pension Scheme contributions which had been refunded to him from the Local Government Pension Scheme was not upheld by the Deputy Pensions Ombudsman.

Mr Chaudry's appeal

Mr Chaudry said that he had suffered financial disadvantage as a result of a lack of adequate information and that he wished to appeal against the determination "based on the facts of the case".

The Court's decision

An appeal lies on a point of law. Mr Chaudry's grounds of appeal went to the facts of the case and did not raise any point of law. The appeal was dismissed on the basis that Mr Chaudry had no grounds for appeal.

Steria Limited and others v Hutchison and others [2006] EWCA Civ 1551

Estoppel

- *written representations in letter and booklet*
- *whether normal retirement date altered*
- *requirement for employer consent*
- *disclaimer in booklet*
- *whether detrimental reliance established*

My determination and the appeal to the High Court

This case was mentioned in my last annual report. It concerned representations made in a letter sent to Mr Hutchison in 1994 (the 1994 letter) and the Scheme booklet (the 1991 booklet) which, Mr Hutchison contended, altered his normal retirement date (NRD) from 65 to 62 such that the Employer and the Trustees were stopped from later arguing otherwise. The Employer and the Trustees unsuccessfully appealed to the High Court against my determination but were granted leave to appeal to the Court of Appeal.

The Court of Appeal's decision

The appeal was allowed and my determination and directions made set aside. Lord Justice Mummery gave the leading judgment. Lord Jacob agreed. Lord Neuberger delivered a concurring judgment dealing in detail with certain aspects of estoppel.

The 1994 letter and the 1991 booklet had to be read together. Read as a whole and in context, neither made the representation or

promise, as alleged by Mr Hutchison, that his NRD was altered from 65 to 62. The representation was more restricted than a change to Mr Hutchison's NRD. It was that, in stated circumstances, benefits could be taken at 62 without actuarial reduction. But that statement was not made in respect of deferred pensions which were dealt with under a different section in the 1991 booklet which clearly referred to a reduced pension on retiring early. Further, there was a requirement for employer consent to early retirement on unreduced benefits. There was no statement in the 1994 letter or the 1991 booklet that consent was or would be given.

The last page of the 1991 booklet dealt with the provision of information and stated that the Trust Deed and Rules governing the Scheme prevailed over the booklet. That warning made it impossible for Mr Hutchison to rely on the 1991 booklet and the 1994 letter summarising it. The statements made in those documents were either consistent or inconsistent with the express provisions of the Trust Deed and Rules. If consistent, they added nothing to Mr Hutchinson's legal rights. If inconsistent, the effect of the disclaimer was such that the formal legal documents prevailed and there could be no operative reliance on the 1991 booklet and/or the 1994 letter.

In any event, Mr Hutchison had not established detrimental reliance. Reliance and detriment were distinct concepts and, although there was authority to the effect that there was a presumption of detriment, both issues needed to be addressed separately. Had Mr Hutchison not joined the Scheme but instead had remained in his previous scheme, his contributions would have been less and so too his benefits. This did not amount to detriment suffered by Mr Hutchison in reliance on the 1991 booklet and the 1994 letter.

Davies v Saint-Golbain Calmar Limited and another [2007] EWHC 438 (Ch); All ER (D) 118 (Mar)

Dispute as to definition of final salary

- *matters to be included in calculation*
- *items expressly referred to*
- *whether term to be implied into agreement between the parties*

My determination

Mr Davies made a number of complaints against his former employer (the Company) who was also the Scheme Trustee. His main complaints were that the Company was attempting to make arbitrary changes to his benefits because his pension was underfunded and that the Company had failed to ensure that funding was sufficient to meet the contractual benefits promised. One of the issues was how Mr Davies' final salary was to be calculated and what emoluments should be excluded from the calculation. His letter of appointment dated 31 August 1994 (when he relocated to Singapore to take up a new position with part of the company's operations) expressly excluded an international assignment premium and a cost of living adjustment. I found that all of Mr Davies' emoluments that were assessable to Schedule E taxation (or would have been had he continued in employment in the United Kingdom) were to be taken into account unless specifically excluded (such as the two items set out in the letter of appointment). I went on to say that items such as housing allowance, home leave, airfares, etc, would not be assessable to income tax under Schedule E.

Mr Davies' appeal

Mr Davies submitted that other items of payment set out in the letter of appointment which would fall into charge under Schedule E should be taken into account in calculating his final salary (including transport allowance; home leave air fare; costs of storing and insuring furniture in the UK; life, accident, medical and permanent ill-health premiums; schooling allowance; club fees and dues; and housing allowance).

The Court's decision

Mr Justice Pumfrey upheld Mr Davies' appeal.

It could not be implied that, notwithstanding that such payments had not been expressly excluded by the letter of appointment, they should have been excluded from the calculation of Mr Davies' final salary. The argument that the parties could not have intended to include, in calculating Mr Davies' pension benefits, sums which were paid to compensate him for disbursements consequent upon his relocation to Singapore was rejected. The Court will not imply words into a contractual document unless it is necessary to do so in order to make the contract work as the parties must have intended it. A term cannot be implied without proper knowledge of the relevant factual matrix and there was insufficient information to enable such a term to be implied.

Appeal to the Court of Appeal

The Company has now sought permission to appeal to the Court of Appeal.

“ The proportion of casework in excess of a year old is lower than 12 months ago... ”

Management

In last year's Annual Report I referred to three key issues about the management of the Office: accommodation, IT and planning for the work related to the additional jurisdiction for the Pension Protection Fund. As can be seen from the next Chapter, the volume of work during the present year associated with the role of PPF Ombudsman has been very small, so the planning undertaken last year has not yet been seriously tested.

My sojourn in temporary accommodation was longer than expected and it was disappointing that when I moved back to Belgrave Road I found the roof leaking in the same place as had been the case before I left, albeit with one or two further leaks as well. With that exception the accommodation which is now entirely open plan is much improved and lends itself much more easily to team working. The only drawback is that space was not available to provide suitable accommodation for holding Oral Hearings and indeed for other meetings, although some can sometimes be held in a room managed by the Pensions Advisory Service if not required by that organisation.

In my report last year I wrote that I was not confident that the new case and document management system would be up and running by the time I retired. I can now say with much more confidence that my foreboding was justified. It is now clear that despite a great deal of further effort during the past year the new system will not be introduced during my time in office.

Albeit later than planned, we have had the benefit of new hardware and operating platforms as from the time of the move back into Belgrave Road in October 2006. The suppliers and their sub-contractors have been commendably quick in resolving such teething troubles as have emerged.

The cost of providing the new IT system is being met by the Department, but there is an ongoing cost in the sense of the drain on the time of my staff in helping to design and test the new systems. An inevitable consequence has been that time which would otherwise have been spent on the core task of investigating complaints and reaching decisions upon them has been diverted in this way.

To a lesser extent, time has also needed to be spent in preparing to bring directly into the Office responsibility for a number of functions, previously undertaken by the Department, as a result of changes in funding arrangements which came into effect after 31 March 2007. Those changes will also have the effect of increasing the costs shown as being incurred by the Office in future years.

The proportion of casework in excess of a year old is lower than 12 months ago; there has been an increase in the proportion of cases determined within six months of receipt. Provided that the level of the incoming workload does not exceed expectations then within the next year the Office should have largely eliminated its "backlog" and will be running on an even keel in the sense of output matching input. While the aim of the Office is to ensure that cases are determined in no more than a year, there needs to be a recognition that the nature of an investigative process means that this will not always be achievable.

During the first half of the year 10 complaints were received, mostly about the time taken to deal with a case. For the second half of the year this dropped to 7 complaints. I hope this reflects an improvement in the way in which we have been working since obtaining a level of resource commensurate with the workload of the Office. I know that under the proactive casework management of the Deputy Ombudsman there

has been a greater effort in keeping people informed about what is happening to their case and of course a generally falling caseload makes this easier. As older cases are cleared and pressures on staff ease, I hope that my successor will be able to maintain the progress which has been made.

It is fair to say that more expressions of dissatisfaction are received than the 17 complaints that I have mentioned. The others come from parties who are not happy with the determination issued after the investigation of the dispute. But those determinations are final and binding subject only to an appeal on a point of law and expressions of that kind of dissatisfaction are not dealt with under the internal complaints system. Nevertheless, as

with those complaints which are so recorded, account is taken of them so that the staff and I can consider whether there are ways in which we can improve. To a lesser extent letters of appreciation are also received. It is especially rewarding to receive such letters from people whose submissions have not been upheld but who nevertheless recognise that the issue has been fairly and thoroughly considered.

Expenditure for the year under review, which is summarised in the following table, was within the budget agreed for the Office but, as noted above, these costs do not reflect the total cost as some items, such as accommodation, which form part of the main Department for Work and Pensions accounts.

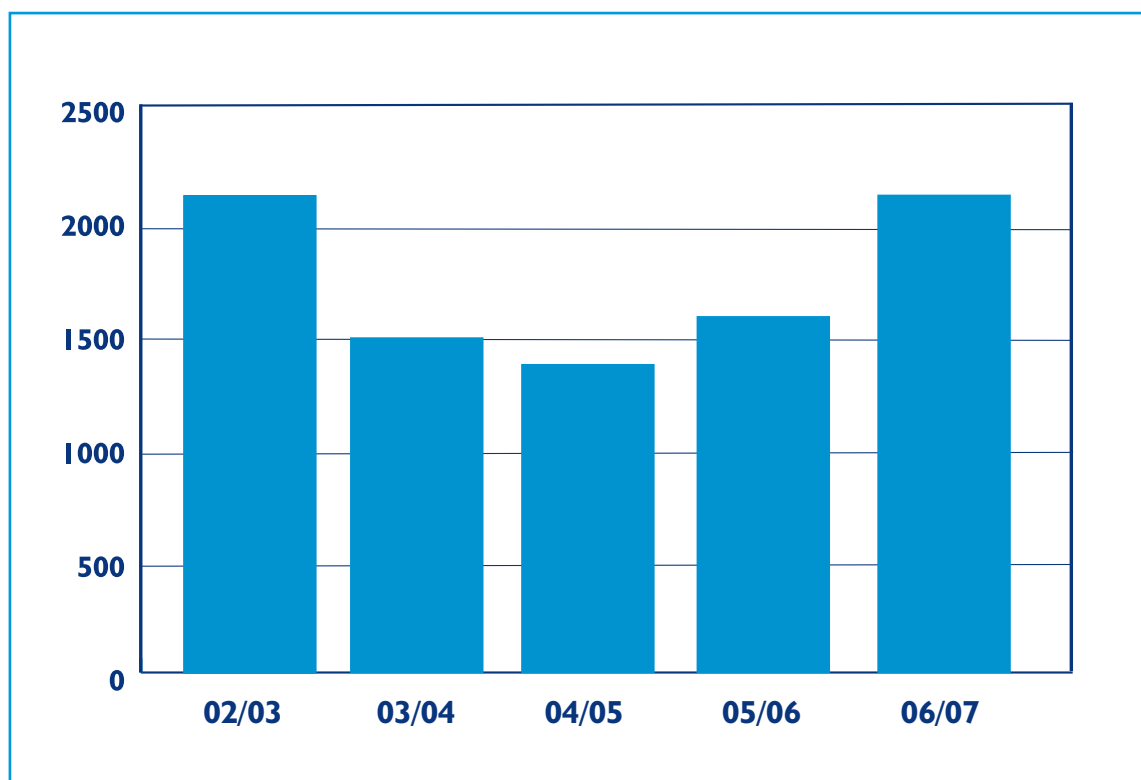
Figure 1 - Office Expenditure (last two years)

	2006/07	2005/06
	£'000	£'000
Staff*	2,142	1,748
Telecoms/IT	141	63
Printing/Stationery/Postage	56	44
Legal Costs	26	30
Other	148	232
Total Expenditure	2,513	2,117

* Staff figure again includes the cost of staff recruited primarily to deal with PPF and FAS work. As those staff have overwhelmingly been used for PO casework the cost has been taken into account in calculating the cost per investigation figures for the PO.

The average cost per determined investigation for 2006/07 was £2,218. That cost is derived from dividing the total direct expenditure of the office by the number of investigations determined. The increase over the previous year reflects additional staffing costs which have been incurred as well as a slight fall in the number of investigations closed in the course of the year.

Figure 2 - Average cost per closed investigation (last five years)



“ There is a somewhat lengthy process to be undertaken before I can consider what the legislation refers to as a ‘reviewable matter’. ”

Pension Protection Fund and Financial Assistance Scheme

As the Ombudsman for the Pension Protection Fund, I have three functions:

- To review decisions made by the PPF Board of a kind specified in a Schedule to the Pensions Act 2004;
- To investigate and determine complaints that injustice has been caused by maladministration on the part of the PPF; and
- To determine appeals against decisions made by the Manager of the Financial Assistance Scheme.

The last workstream has nothing at all to do with the PPF but has been added as one of the responsibilities of the Ombudsman for the Pension Protection Fund.

Pension Protection Fund (PPF)

Reviewable Decisions

There is a somewhat lengthy process to be undertaken before I can consider what the legislation refers to as a “reviewable matter”. Regulations provide for an interested person to require the PPF Board to make what is called a review decision and then to request a Reconsideration Committee to reconsider the matter and issue a reconsideration decision.

During the year I received four requests to review decisions of the PPF Board. One of these was premature as the Board had not itself had an opportunity to review its decision before the matter was referred to me.

The remaining three referrals, relating to decisions made by the PPF in relation to the levy that it imposes on pension schemes, were received only toward the end of the financial year and are still under consideration.

I have noted that, toward the end of the financial year, the PPF was beginning itself to assume responsibility for the payment from the Fund to members of qualifying schemes. That activity, which will increase as time goes by, is likely to generate some disputes and complaints of the kind which I receive as the Pension Ombudsman, for example about whether benefits have been properly calculated. It will be interesting to see how successful (in terms of avoiding such complaints arising) the assessment process has been, which takes place before the PPF assumes responsibility for a particular scheme.

Complaints of maladministration

I am pleased to say that I have only received one complaint alleging maladministration on the part of the PPF, which is still under investigation.

Financial Assistance Scheme (FAS)

During the year I received five appeals against decisions made by the Manager of the Financial Assistance Scheme. Two, both relating to decisions as to whether particular pension schemes fell within the remit of the Financial Assistance Scheme, remain under consideration.

At the request of the particular appellant I have delayed my consideration of one further appeal.

The remaining two were not duly made, as required by the Regulations.



11 Belgrave Road
London
SW1V 1RB

Tel: 0207 834 9144
Fax: 020 7821 0065

www.pensions-ombudsman.org.uk