

## Ombudsman's Determination

<b>Applicant</b>	Mr Timothy McLaughlin
<b>Scheme</b>	Principal Civil Service Pension Scheme (Northern Ireland) (the <b>Scheme</b> )
<b>Respondent(s)</b>	Department of Finance and Personnel (the <b>Department</b> )

### Complaint summary

Mr McLaughlin has complained that he was not informed in his award letter that his ill health pension was subject to a periodic review, there is no mention of the need for a periodic review in the booklet headed "Pensions Choices" (the **Booklet**) and the Department say they have not breached Rule D.5(2) (a) of the Scheme rules (the **Rules**).

### Summary of the Ombudsman's determination

I find that there was maladministration, but Mr McLaughlin has not suffered a financial loss as a consequence of it. Therefore the complaint should be upheld against the Department, but only to the extent of non-financial injustice he has suffered.

## **Detailed Determination**

### **The Rules and the Booklet**

Rule D.5 of the Rules headed “Periodical review of ill-health awards” says:

“(1) This rule applies where a member is entitled to an upper tier top up pension under rule D.4(3).

(2) The Scheme medical adviser must review the question whether as a result of the breakdown in the member’s health the member is incapable of gainful employment at any time if the Department so directs, and in any event –

(a) before the fifth anniversary of the day on which the member became entitled to the pension, and

(b) subsequently at intervals not exceeding five years.”

There is no mention in the Booklet of a periodic review of ill health awards. However, I am unsure as to when the Booklet was issued because it is not dated. In addition, at the bottom of the “Introduction” page it says that nothing in the Booklet replaces the Rules.

### **Material facts**

1. Mr McLaughlin retired early on grounds of ill health on 21 February 2006 and started to receive a pension from the Scheme.
2. In June 2013 the Department wrote to Mr McLaughlin telling him that in his award letter he was informed that as his pension was being paid at the higher, upper tier, rate, it would be reviewed by the medical adviser at least every five years. This review was mandatory under the Rules and is a condition of accepting upper tier ill health retirement benefits.
3. Mr McLaughlin responded saying that the Department had confirmed that they did not have the standard award letter on their records. Therefore, this is in conflict with their letter of June 2013. He had no recollection of any reference, in any Civil Service Pension documentation, regarding a mandatory/periodic review by a Scheme medical adviser. The Department had made reference to the mandatory review taking place “before the fifth anniversary of the day on which the member became entitled to an upper tier top up pension”. Therefore, why have they raised this issue some seven and a half years after the date he actually retired.
4. The Department wrote back to Mr McLaughlin acknowledging that he was not issued with an award letter explaining the need for a periodic review of his medical condition and they had not arranged for the review until now. They enclosed a copy of a leaflet titled “classic plus and premium ill-health retirement benefits” which would have been issued along with his upper tier ill health benefits. They pointed out that the periodic review of an upper tier award is contained in the Rules.

5. Correspondence on the matter continued between Mr McLaughlin's brother and the Department.
6. Mr McLaughlin made a complaint to the Department and the matter was dealt with under the Scheme's internal dispute resolution procedures (**IDRP**).
7. The guide (the **Guide**) titled "If you have a complaint about your pension" issued by the Department outlines the Scheme's IDRP. It states under the section headed "The complaints procedures":

**"First stage** – the right to receive from us a written explanation of a decision made in response to a decision which you disagree with.

**Second stage** – you have the right to appeal to the Scheme Manager (Head of Civil Service Branch) against our decision. The Scheme Manager will issue a written determination of the complaint.

**Q How does the complaint procedure work?**

**A** If you are in dispute with us, you can ask for a written explanation of the decision that we have made. We call this written explanation a first stage decision.

You have the right to appeal to us against the first stage decision. We will give you the forms you need to fill in if you want to appeal. The Scheme Manager will then make a second stage decision."

8. The matter was considered under both stages one and two of IDRP. The Department's decision was as follows:
  - They acknowledge that the literature issued at the time he retired did not refer to the review period and apologised for this omission.
  - His case was identified as part of a report which was extracted from their systems on all those cases that required a review of upper tier ill health benefits. He was sent a standard letter to inform him of the review. There was no reference to any breach in the letter that was sent. He did not breach rule D.5. However, all awards of upper tier benefits are subject to a review under rule D.5.
  - The delay in reviewing his case was because the internal process to undertake periodic reviews for ill health retirement awards had not been implemented at the time his review was due.
  - The fact that his review was not carried out before the fifth anniversary of the day on which he first started to receive a pension is not a breach under the Rules. Their power to carry out a periodic review may be operated no earlier than four years after the ill health pension was awarded, but this does not preclude the exercise of that power at a later stage.

- In his letter of 11 July 2013 he said that unless they could provide evidence that he was informed of the periodic review of his upper tier benefits, and had his signature accepting this condition, then the matter should be closed. The requirement for a periodic review of an upper tier award is clearly outlined in the Rules which are the legal basis of the Scheme and as such, further entitlement to the upper tier benefit is dependent upon the approval of the Scheme's medical adviser.
  - Under the Scheme, they can only pay benefits which are properly payable to an individual. The internal process for continuing to pay the upper tier benefit involves the Scheme's medical adviser to complete a form for the individual. In the event that this information is not provided they can direct the medical adviser to review the case based on the information held at the time the upper tier benefit was granted.
  - Based on the findings of the Scheme's medical adviser if an individual is no longer incapable of gainful employment, the member ceases to be entitled to the upper tier benefit. In this event they have the power to revise the benefits payable to the lower tier level.
9. On 18 February 2014 the Permanent Secretary wrote to Mr McLaughlin's brother saying that the standard of service they offered to his brother was poorer than he would have expected. He apologised for the distress caused and in recognition of that distress confirmed that Mr McLaughlin would not be required to undergo a further medical review in five years' time.

### **Summary of Mr McLaughlin's position**

10. The Department had initially refused to accept that he had not received written notification that his pension award would be subject to a periodic review. Having adopted such a position, they continued to coerce him into undergoing a medical review, against his wishes, under the threat of suspending or removing his upper tier pension. The Department have consistently maintained that they have not breached the Rules.
11. The Department's initial letter informing him of the periodic review was issued some seven and a half years after the date of his actual retirement. Since then, the Department have, nonetheless, consistently and without any form of explanation refused to acknowledge that such a delay was in breach of Rule D.5(2)(a).
12. The Booklet failed to highlight the requirement of an ongoing periodic review.
13. If it is accepted that the periodic review is a requirement laid down in the Rules, then the question must inevitably be which powers were the Permanent Secretary relying upon when the requirement to undergo a further medical review in five years' time was waived. He feels that this is a discretionary decision which could be overturned if

a new Permanent Secretary was appointed. He does not wish to go through the stress of having to make another complaint.

14. He is being denied both the right to receive a written explanation from and to appeal against the Department, as provided for in the Guide.
15. He elected to join the Classic Plus section of the Scheme based on the information in the Booklet. The Booklet was issued at some stage in 2004. At that point in time, the Rules only related to the Classic section of the Scheme and not the Classic Plus section. Therefore, the reference in the Booklet, that nothing in it replaces the Rules, is in relation to the Classic and not the Classic Plus section. He duly signed the Choice Form on 28 October 2004, and, having done so, this decision became irreversible.
16. He accepts that because his pension has not been reduced, he has not suffered a financial loss.

### **Summary of Department's position**

17. They acknowledge that Mr McLaughlin was not notified when he retired that his upper tier benefits would be subject to review. The need for a review was only introduced due to changes in the tax legislation implemented in April 2006 'Tax Simplification'. This change occurred after Mr McLaughlin retired, so it was not possible to inform him of the requirement when he retired in February 2006.
18. They also acknowledge that there was a delay in implementing Mr McLaughlin's periodic review and this was due to the fact that they had not put in place any internal process to undertake the reviews.
19. The periodic review is a requirement laid out in the Rules. It is not an issue that they had coerced Mr McLaughlin to undergo a review, against his wishes, as it was part of the Rules.

### **Conclusions**

20. Mr McLaughlin refers to the Guide and says that he was denied both the right to receive a written explanation from and to appeal against the Department. The Guide states that, if a member of the Scheme is in dispute with the Department, the written explanation is the first stage decision under IDRP. It goes on to say that the member has the right to appeal against the first stage decision. By the fact that Mr McLaughlin's complaint was dealt with under both stages one and two of IDRP, he was given a written explanation and he did appeal the stage one decision.
21. Under rule D.5(2)(a) of the Rules a periodic review has to be carried out before the fifth anniversary of the day the member became entitled to the upper tier pension. As Mr McLaughlin retired on 21 February 2006, the review of his pension should have been carried out before 21 February 2011. However he was first informed that his

pension would be reviewed in June 2013, over two years after the date the review should have been carried out.

22. The Department say that the delay in carrying out the review was because their internal process to undertake the review had not been implemented. This is not a reasonable excuse. The Department should have set up the necessary internal process to undertake the review, before the due date.
23. I find that the Department's failure to carry out the review within the time specified in the Rules to be maladministration. The fact that they had failed to implement the necessary internal process to carry out the review only adds to that maladministration.
24. I now need to consider what injustice, if any, Mr McLaughlin has suffered as a consequence of the Department's maladministration.
25. Mr McLaughlin was not informed at the time he retired that his pension would be reviewed. Initially the Department told him that he was informed of this in his award letter, but they subsequently acknowledged that he was not. The Department say that the need for a review was only introduced in April 2006. As he retired in February 2006, it was not possible to inform him of this requirement at the time he retired.
26. Mr McLaughlin says that the Booklet makes no mention of a periodical review. As the Booklet is not dated, it is difficult to say when it was issued and therefore whether it should have referred to a periodic review. However, the Booklet does state that it does not replace the Rules.
27. I do not dispute that Mr McLaughlin had made his decision to join the Classic Plus section of the Scheme based on the information in the Booklet. However, I cannot imagine that any reference to the Rules in the Booklet would be restricted to one particular section of the Scheme, unless it specifically says so.
28. The Rules clearly say that if a member is in receipt of an upper tier ill health pension, it needs to be periodically reviewed. Therefore irrespective of what Mr McLaughlin may or may not have been told about a review of his pension at the time he retired, under the Rules his pension had to be reviewed.
29. Mr McLaughlin has questioned the Permanent Secretary's powers to waive the need for a review of his pension in five years' time. I can see nothing in the Rules which gives the Department, or the Permanent Secretary, discretion to waive a periodic review of an upper tier ill health pension. However while the delay to periodically review a pension is maladministration, I cannot see that waiving the need for one is. Even if it is, it cannot be said that he has suffered an injustice as a consequence of the decision to waive it.
30. I appreciate Mr McLaughlin's concerns that a new Permanent Secretary may overturn the decision not to review his pension in five years' time. However, I cannot make a decision on what may or may not happen in the future.

31. Mr McLaughlin's pension has been reviewed and remains unchanged. He accepts that he has suffered no financial loss. However he has undoubtedly suffered distress in learning that his pension needed to be reviewed, with the possibility of it being reduced. I have therefore awarded him an appropriate level of compensation for this.

**Directions**

32. Within 14 days of this determination the Department will pay Mr McLaughlin £150 for the non-financial loss he has suffered.

**Jane Irvine**

Deputy Pensions Ombudsman  
7<sup>th</sup> May 2015