DIGEST OF CASES 2010

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INTRODUCTION

As has been my practice since the establishment of the Office of the Pensions Ombudsman, I have prepared a Digest of Cases to accompany my Annual Report for the 2010 year.

The intention of the Digest is to give an indication of the range of cases that my Office deals with and the various methods we employ to bring these cases to resolution. I would hope that it proves informative and of interest to the parties involved in pension scheme management as well as to the general public.

I am granted the authority under the terms of Part X1 of the Pensions Act 1990 to issue legally binding determinations on complaint cases that are submitted to me. The process of formally investigating and determining cases within this authority is a detailed and lengthy one.

It has been my experience that this formal process does not always need to be employed in the cases put before me. Very often, early intervention, or a mediated approach can help to prevent the escalation of a dispute and bring matters more swiftly and informally to resolution. Where possible, I would actively encourage the parties involved in a complaint to first consider availing of such approaches. However, I have to acknowledge that by the time some complaints are put before me, the involved parties have become entrenched in their views and the trust has broken down between them. In such instances nothing but a formal investigation and the issuance of a legally binding determination will suffice.

I continue to find that poor communication or a lack of information and explanation lie at the root of many complaints. Another complaint aspect that tends to crop up is the disparity that can exist between a member's pension expectation and his entitlement under the scheme rules. Where possible, my Office can liaise with the pension scheme authorities with a view to breaching the communication/information deficit and resolving the complainant's issue.

I appreciate the level of co-operation that my Office is generally granted and the common sense approach that has been adopted by many of the complaint participants with a view to achieving a mediated resolution of the complaint issues. This allows my Office to function more effectively in assisting members with their pension related complaints.

Paul Kenny
Pensions Ombudsman
October, 2011

DIGEST OF CASES 2010

1. Problems with inclusion in Public Sector Schemes

(a) I cannot change the rules – unfortunately!

The rules governing participation in Public Sector schemes can result in rather silly anomalies. This is one of a large number of cases involving Spouses' and Children's Schemes.

The case concerned a woman who had been a permanent officer of the former Health Board. However, while on a career break, she was employed in a temporary capacity by another Health Board. This could not be construed as a continuation of pensionable employment since, at the time, temporary officers could not be members of the pension scheme.

She subsequently resigned her post with the original employer and consequently gave up her pensionable office. She continued with the new employer in a temporary capacity until she was later appointed to a permanent position with them.

She had opted out of the Spouses' and Children's Scheme in the first employment. However, because she was regarded as a "new entrant" with the second employer following her break in service, membership of the Spouses' and Children's Scheme was mandatory, as it had become a condition of employment that all new officers join that scheme.

She was entitled to preserved benefits in relation to her earlier service, based on her old job, without any liability for contributions for spouses and children's benefits. If, however, she opted to transfer that service to her new job, she would become liable for contribution arrears under the Spouses & Childrens' Scheme based on the old service.

I wrote to the HSE to ask them to ensure that all officers in such a position be fully advised of this situation. I still consider it unfair that they should be put in this position, but I do not have the power to change the rules. As I said to the HSE, all I can do is draw these matters to the attention of those who have the power to change the rules, and hope that they will be sensible about it. I am not, however, optimistic.

(b) The other side of the coin…

This was a complaint from a school secretary, regarding the continued refusal of the Department of Education & Science to allow her to participate in the pension scheme for clerical staff, because she had previously chosen to opt out of that scheme.

Her letter was typical of quite a number that I have received over the past few years. I wrote to her explaining the situation as best I could and I can readily see why a policy is necessary to preclude "opters-out" from changing their minds at a later date.

In particular, a huge number of those who opted out of schemes in the public service over the years are people who have opted out, not from the main superannuation scheme, but from a Spouses' & Children's Scheme. As many of those who opted out of the Spouses' & Children's arrangements will already have died, it is understandable that certain opt-out rules should not be relaxed.

In the case of the clerical staff who opted out of this particular scheme, it does appear that some of them were young and inexperienced, while many of them relied on advice given to them locally in the schools where they worked. Often, details of their opt-out decisions were not well documented or properly reported. In cases where there is no evidence that they did opt out, the Department (quite rightly) gives them the benefit of the doubt, and allows them to join the scheme now.

Quite aside from considerations of equity, I really do not believe that there is a good reason why these people should be denied a further chance to join the schemes, even if for future service only. Keeping them out of pension schemes would appear to be at odds with Government's stated policy of trying to get as many people as possible into some form of second-tier pension arrangement.

For good and sufficient reasons, the Pensions Act explicitly forbids me from making any Determination that has the effect of changing the rules of a pension scheme. All I can do, therefore, is suggest that some sort of review of people in this situation might be appropriate. I wrote to the then Minister for Social and Family Affairs. I did not bother to write to the then Minister for Education & Science, as he had never so much as acknowledged previous correspondence from this Office.

2. *Complaints from Trustees*

This complaint was submitted on behalf of the trustees of a scheme. They queried the amount of a transfer payment made by an insurance company and the time taken to pay it across, alleging that this resulted in a loss of investment income to the scheme as a whole.

A quick check revealed that the timescale involved appeared to accord with Article 23 of Chapter 5 of the Consumer Protection Code issued by the Financial Regulator. There was no argument as to whether the conditions required by the Code were satisfied. Moreover, the transfer value appeared to have been calculated in accordance with the policy conditions.

On this basis, I did not see how I could pursue the complaint further.
There is, in fact, a technical issue surrounding this matter as the Pensions Act at present does not envisage my taking complaints from trustees. There are situations such as this, in which trustees may legitimately wish to make complaints, and where direct financial loss cannot be attributed to any single member of a scheme.

I hope that the law could be changed to enable trustee complaints to be received by this Office, but at present there is that technical difficulty. That said, however, I was satisfied that the policy conditions in this case had been met and that the Consumer Protection Code been adhered to, and I could not therefore see an investigation going very far, even if it were technically possible to conduct one.

3. A member's right to scheme information

In occupational pension schemes, providers normally operate through the trustees, issuing information for members to the trustees – or, even more indirectly, they may send it through a broker or administrator. This does not necessarily ensure that the information gets to the members. Companies acting as trustees of their own pension schemes are often unaware of their obligations as trustees, whether in trust law or under the Pensions Act.

I received a complaint from a former employee of a small company who had found it impossible to get any details of his pension arrangements from that company acting in the capacity of trustee of its Group Pension Plan.

The regulations on Disclosure of Information made under the Pensions Acts 1990 – 2011 clearly require the trustee to notify the member of his leaving service options within four weeks of its becoming aware that he was leaving service. As the complainant was made redundant, it is clear that the employer was well aware, before the complainant himself was, that he was going to leave service. Despite numerous attempts on his part to get it, the member had not succeeded in obtaining the leaving service information to which he was entitled in law.

Among the papers presented to me in respect of the complaint, I received copy payslips. These did not show the deduction of employee contributions and it was clear from a letter written to the complainant by the insurance company involved that the scheme was a contributory one. The employer is required by law to show the pension contribution amount deducted from the employee's wages. Moreover, it was also required to notify him formally, either on the payslip or on a separate sheet, that the contributions deducted from his wages, plus those being paid by the employer, had been remitted to the trustees of the pension scheme for investment.

I wrote to the employer reminding it of its obligations and in this case, instructed the insurance company to deal directly with the complainant in any matter concerning his pension.

4. Investment of PRSA Contributions

This complaint was submitted by a Government Minister, on behalf of a constituent. The complaint concerned the equity weighted funds in which the complainant's money had been invested, whose value had fallen considerably. The complainant was from the Baltic States and it appeared that his English was poor.

I referred the matter to the insurance company concerned and asked them to consider this matter under the Internal Disputes Resolution procedure appropriate to the PRSA and to issue a Notice of Determination, or to solve the problem, for preference. Firstly, I pointed out that while the documentation the complainant had received was very detailed, it was not likely to be comprehensible to someone whose English was poor. In particular, I believed that Statements of Reasonable Projection might give the wrong impression.

Secondly, I was very concerned about the fact that a pension age of 75 was written into the contract as the "*chosen*" pension age. Clearly, 75 is the latest age at which a PRSA becomes payable and I noted that the complainant was about 59 years old when he started the contract. One cannot, however, but wonder if the pension age of 75 was written in because any commission payable would be based on term to maturity. However, unless a high pension age was specifically chosen in this case, there was absolutely no way that a 59 year old should have been put into a fund that was highly exposed to equity markets.

The matter was dealt with under the Internal Dispute Resolution process to the complainant's satisfaction.

In commenting to the insurance company on this case, I referred to the default option, which under this policy was a "lifestyling" arrangement. It appeared that people who go into this are dealt with as a cohort based on the term to normal pension age and their investment profile is tailored accordingly. Clearly, if age 75 is written into the contract as retirement age but is not actually the age at which the individual intends to retire, this "lifestyling" arrangement simply will not work as it is supposed to. The complainant in this case did not go into the default arrangement, so this point did not apply specifically to him, but it is a consideration which should be borne in mind by salespersons when boxes are being ticked. Unless the pension age chosen is genuine, it will give rise to complaints in the future when people find that their investment did not behave as they thought it was going to.

I also made some comments to the insurer regarding the whole question of dealing with persons for whom the first spoken language is not English.

5. Delay in processing application for and making payment of Injury Grant

This complaint by a Health Service worker concerned delay in dealing with her application for an Injury Grant under Section 49 of the Local Government Superannuation Scheme. Her application turned out to have been delayed by the processing of retirements, under the various Early Retirement & Redundancy Schemes offered in 2010 by the Health Service Executive (HSE).

The matter of this application was somewhat complicated and prolonged by the fact that the people who do the calculations and the people who actually approve the Section 49 application are two separate sections of the HSE. In addition, even though the Department of the Environment did not actually delay this application, the fact that she had applied to them in the first place did add a little bit of time to the whole process. The Section 49 application was further complicated by the fact that the record of her injury was held locally in the institution where she worked.

If an application for a Section 49 Injury Grant is approved in principle by the HSE, the rate at which it is paid mirrors the employee's degree of disability, as determined by the Department of Social Protection. The verification of the Social Welfare situation took some time in this particular case because initially, the Department advised that she was 24 per cent disabled and subsequently revised this to 30 per cent.

Naturally enough, the HSE queried this, and found that the Department has a system of rounding up and rounding down. If an applicant was less than 24 per cent disabled, they would round that down to 20 per cent. If she was 24 per cent or more disabled, they rounded it up to 30 per cent, which explained the two separate figures given to the HSE.

Following intervention by my Office, I received assurances that the matter of this lady's calculations was being progressed and payments dating back to 2005 would be made – five years after the injury was sustained!

6. A humane response

I received a complaint from a lady who had retired many years earlier from a private members' club and had been in receipt of a small pension from there. She had been notified by the Secretary that her pension was being discontinued. It was not clear that she had been a member of an occupational pension scheme, so my first task was to ascertain the nature of the pension arrangement.

I discovered that it was an ex gratia arrangement established many years ago and funded by the purchase of a security outside of the club's operating accounts for the benefit of the lady concerned. The money made available for that purpose had now run out and the Finance Committee had instructed that the payment to her was to be discontinued. Essentially, the lady had lived too long!

As the arrangement did not comply with the 1990 Act's definition of a pension scheme, this case fell outside of my jurisdiction and I could neither investigate nor make a determination on the matter. However, I felt that something should be done.

I established contact with the Club's President, who had not been made aware of the position. He undertook to investigate with a view to determining, insofar as he could, the intentions of those involved at the time and to ensure that the Club met both the letter and the spirit of what was then intended and communicated to the former employee. In the meantime, the Club would continue to make the regular monthly payment to her.

7. Consultation required

Three separate complaints were received from deferred members of a single scheme, all of whom resided outside Ireland. The complaint was that the employer and the trustees intended to make an application to the Pensions Board under Section 50 of the Pensions Act in respect of the scheme, which was insolvent. The intention was to make changes in the benefit structure for all members – retired, deferred and active.

The overseas members had received nothing in writing about this proposal, but were invited by phone to attend a meeting in Dublin at very short notice. They attended the meeting, and were given details of what was proposed. Each member complained that the trustees' proposals were wrong for their personal circumstance, and that they had been given no right to discuss the issue.

It later transpired that one of the trustees also wore a HR hat, and took the view that former employees did not have any negotiating rights! Only the active members were consulted.

The Pensions Act requires consultation with all scheme members – active, deferred and pensioners – before an application under Section 50 can be considered. The Chief Executive of the Pensions Board had indicated that, although it had not been thought necessary to make Regulations to cover this, the Board would not take an application if there was any doubt as to the matter of consultation. I made this clear to the trustees, who were not very happy, and misinterpreted the reason for my intervention. They felt they were doing their best to save a defined benefit scheme and that they were just being criticised for their efforts.

Eventually, however, a proper consultation process did take place, following which solutions tailored to fit each member's circumstances were agreed.

8. Discontinued Injury Grant – Discretion fettered

A public service trade union submitted a complaint on behalf of a retired nurse because an Injury Grant awarded to her had been discontinued on her attaining age 65. This was considered to be contrary to a document from the Department of the Environment which stated that such an award should be payable for the lifetime of the individual concerned. Accompanying the submission was a letter from the Superannuation Section of HSE in Dublin, which stated that their decision to discontinue the award had been based upon a determination the Pensions Ombudsman made on 8th December 2006 in what they deemed to be a similar case involving the HSE. Also enclosed was a copy of a letter from HSE Employers Agency (HSEEA) which enclosed an extract from that determination.

I did not consider that the extract given told the full story. It is of note that the earlier case concerned a person who, had the injury grant been continued, would have been in a better position compared to a colleague who had served with the authority for a full career. The maximum injury grant being 5/6ths of salary, while the maximum pension payable is ½ of salary.

At first glance, it did not appear to me that the cases were similar. I further noted that, in the final paragraph of the earlier determination I had opined that, in certain exceptional circumstances, there might be justification from the payment of the allowance beyond the age of 65.

In the course of the new investigation, it was clear that the relevant Article of the Local Government Superannuation Scheme stated that an Injury Grant was payable for life, or for such shorter period as the [Authority] deemed appropriate. Clearly it was intended that the circumstances of each case should be considered before arriving at a decision.

The HSEEA had issued a Circular in August 2006 on the matter before I reached my Determination in the earlier case referred to above. However, they sought to use that determination to justify the circular.

I can only assume that the imperative of saving money at any cost (in this case, to a former employee) is what persuaded the HSE personnel in Dublin to ignore this anomaly between the dates and also to ignore the fact (as I have pointed out on a number of occasions) that it is not lawful to fetter in advance a discretionary power by laying down a blanket instruction limiting the exercise of the power. Alternatively it may just be an unwillingness to accept that their instruction was quite simply wrong. There had been no attempt to explain why the circular referred to above appeared to ignore completely the crucial phrase from the Article: "shall be payable **for life** or…" The fact that this was ignored would appear to be completely irrational, if not actually perverse.

The payment of an Injury Grant renders subsequent periods of service non-pensionable. To that extent, it was neither fair nor reasonable to discontinue the grant *in toto* upon the attainment of pensionable age by the grantee. I therefore directed that the Injury Grant to the complainant be continued **for her lifetime,** to the extent of an amount equal to the additional pension which would have been earned by her, had her service from 22nd June 2001 until her 65th birthday been reckonable for pension purposes.

I found that the issuance of the Circular on 22nd August 2006 was of itself an act of gross maladministration. I therefore directed the HSEEA to withdraw formally the instruction in relation to the discontinuance of an Injury Grant at age 65; and that it forthwith inform all units which received that circular that it is incorrect; and that all cases of Injury Grants which come up for review on the attainment by the relevant officer of age 65 should be submitted for consideration upon the merits of each case.

I also directed that the HSE and the HSEEA, which has no formal functions in relation to the scheme, should henceforth desist from issuing any instruction which purports to fetter in advance the exercise of a discretionary power, whether that power is given to a Minister or to an Authority under the terms of the Local Government Superannuation Scheme.

9. New Administrator relied on defective records

The complainant in this case stated that she was being denied a benefit under the pension plan of a former employer (she had left some nineteen years previously), despite having been advised over the past ten years that she had an entitlement.

In the course of our examination it came to light that the employer had at some stage taken the pension scheme administration "in house" from the former professional administrators. When new professional administrators were appointed some years later, it transpired that the records passed to that firm were defective.

Our examination uncovered that the employee concerned had received a refund of contributions when she left service and so had no entitlement to future benefit. The employer is now engaged in cleaning up the defective records but, as the employee had not lost any benefit to which she was entitled under the scheme rules, I could make no award. She suggested that I might impose some sanction on the employer, but it is beyond my power to do so.

10. No entitlement to contributions beyond Normal Pension Date

This complaint was brought by a trade union official on behalf of a scheme member who had remained in employment after his Normal Pension Date.

The employer was not sure whether it was bound to continue pension contributions on his behalf after his Normal Pension Date, and queried this with the scheme administrator (an insurance company). Meantime, pending clarification, it continued to remit pension contributions on a precautionary basis.

During the investigation, the employer advised that he had been told that the dispute had been remitted to the Labour Court. I advised the Labour Court of my involvement, but the trade union official represented to me that the submission to the Court concerned a different matter. It later emerged that this was not so – it was precisely the same issue.

The rules of the scheme were clear that contributions ceased at Normal Pension Date, so I had to make a determination against the scheme member, and notified the Labour Court appropriately.

11. Problem with benefit payment because of the lack of a Trustee

In this case the complainant's husband, who had died, had been a member of the employer's pension scheme, but had left the employment some years previously. Enquiries had been made during his illness about drawing down his pension but this was not done before his death.

Solicitors on behalf of his estate contacted the provider, to be told that the employer, which had been the trustee of the scheme, had been dissolved and, despite serious efforts, no-one could be found to act as trustee with a view to asking the Pensions Board to appoint one. Thus, there was no-one to appoint the destination of payment of the benefit (to dependants, estate, etc).

I instructed the insurance company to pay to the deceased husband's estate the amount of the death benefit. I proposed also to instruct them to wind up the scheme and secure bonds for the other members. However, this presented a practical difficulty, as some of the members, for technical reasons, would lose considerably if their benefits were surrendered on winding-up.

The insurance company co-operated in devising a method of assigning the policies to the members, so that they would have the choice of early surrender or of allowing their benefits to mature in the ordinary way.

12. Refusal of unreduced Early Retirement Benefit

The Complainant sought to receive an early retirement pension calculated without any reduction for payment before his normal retirement date, because he had already completed more than 40 years of service and he alleged that others had received such preferential treatment under earlier redundancy programmes.

On investigation, it was found that the scheme rules did not grant credit for service completed in excess of 40 years and stipulated that a reduction should apply in the calculation of retirement benefits to be paid before normal retirement date.

The fact that other members may have received discretionary enhancement of their scheme benefits under earlier redundancy programmes did not oblige the scheme to provide such enhancement for the complainant. The complainant was found to have received his entitlement in accordance with the scheme rules and his complaint was not upheld.

13. Financial loss in group "Trust RAC" alleged

The complainant in this case was a member of a “Trust RAC”:- a group contract for the self-employed, held under trust. It was alleged that he suffered financial loss due to the maladministration failure of the trustees to switch investment to less volatile assets. The complaint was also made against the provider, an insurance company. There was also a subsidiary complaint about the subsequent handling of an AMRF.

On investigation, it became clear that on the original proposal form the member had selected a "managed fund" and that he was effectively in control of the investments. The trustees had no function in relation to the management of the investments under such individual policies.

It was not within the remit of this Office to adjudicate in relation to the AMRF, which is a personal investment, and not a pension scheme, as defined under the Pensions Act 1990-2011.

14. Complainant alleges she was not properly advised on investment strategy

Generally, this Office does not investigate complaints concerning financial *advice*, as such. However, examination of this complaint showed that there were other factors in play which made an investigation appropriate.

The Complainant's AVC assets were invested in an actively managed fund. At age 61, she met with the plan administrator and expressed a desire to safeguard her AVC assets in the lead-up to retirement at age 65. She was assured that there was no need to move her assets.
Six months later she met again with the administrator and expressed her concern at the falling value of her fund and re-stated her aversion to risk. She also cited the recommendation given to her at a pre-retirement course to the effect that she should consider moving to more secure funds as she approached retirement. The administrator’s advice remained the same and he did not acknowledge that there was any need to move from the actively managed fund.

The Complainant subsequently instructed that her assets be moved to a Cash Fund, but by then the fund value was c. €4,000 less than it had been at her 61st birthday.

On investigation, it was found that the Plan's *declared investment strategy* was for a phased move to secure investments in the lead-up to normal retirement date – and this had not been made known to the complainant or implemented in her respect. Had it been, the value of her AVC Fund would have been €3,917 higher. As redress in this case, I directed that this amount be added to the Complainant's AVC Fund.

15. Post Retirement Increases - Allegation of break with pay parity

This complainant, a retired teacher, sought to receive an increase in her pension based on a supervision allowance that had become payable to serving teachers. She claimed an entitlement to this under the pay parity conditions.

On investigation it was found that this allowance was introduced only after the complainant had retired, and was not automatically payable to all serving teachers, only to those who contracted to undertake supervision duties. In line with established public service practice, the allowance was not passed on to teachers who had already retired and had not been in receipt of it while employed.

I did not uphold the complaint and determined that (a) pay parity was not an entitlement under the scheme, but a basis adopted at the Minister's discretion to determine the rate of post retirement increases and (b) it was established practice not to pass on to pensioners the benefit of allowances they had not been in receipt of while employed.

16. Allegation of financial loss - Failure to benefit from a mistake

This complainant alleged financial loss because she had not benefited from a mistake made by an insurance company in relation to her colleague. In the colleague's case, the company did not effect a fund switch in accordance with instructions received and in the manner that was intended.

The insurers received identical switch requests in respect of the complainant, her business partner and a number of other clients of a particular intermediary, on different days. It transpired that these were implemented differently by various administrators within the insurance company. It is worth remarking here that the advice given to clients by the intermediary was considered odd in the circumstances – to switch traditional with-profits policies to cash, without any mention being made of switching other scheme assets held under managed fund investments.

On investigation it was determined that the switch request was properly carried out in the complainant's respect, while acknowledging that errors were made in some of the other cases - including that of the business partner.

The insurance company conceded that errors had occurred but undertook to stand over them, as the outcome had been to the clients' advantage. They argued that no error had occurred in the complainant's respect and that she was not entitled to the benefit of an error that had not applied to her. I accepted this submission and did not uphold the complainant's case that she was entitled to be treated in the same manner as her business partner and fellow scheme member.

17. Failure to wind up a scheme

A complaint was received that (a) a scheme was not being wound up following the liquidation of the employer and the member could not gain control of his benefits, and (b) the insurers refused to pay a "terminal bonus".

The employer had been the trustee. The investigation revealed that the reason for deferring the winding-up was the application by the insurance company of an MVA, or Market Value Adjustment, designed to reduce any surrender values payable to reflect the lower asset values underlying a with-profit fund.

The broker involved considered that the realisation by surrender of the members' benefits to purchase buy-out bonds was the only option on winding-up. I thought that, since this was a with profits arrangement, it should be possible for the insurer to convert the assets into individual policies in the members' own names. I therefore suggested to the insurer that the way to avoid forced surrender of the policies at this stage would be to assign them individually to each member. It would be then up to the individual member whether to accept the MVA and surrender the policy immediately (if he was over 50) and take whatever benefits were there, or to keep the policy in place until maturity.

In relation to the enquiry regarding the terminal bonus – this is something which is generally only payable at the maturity date of the policy – i.e., at normal pension date, and therefore the question of such bonuses did not and would not arise on early surrender.

18. Non-resident and non-compliant

I received five complaints about a particular employer who had made his workforce redundant approximately a year previously.

The complaints concerned the deduction and non-remittance of pension contributions, and in one particular case, Additional Voluntary Contributions (AVCs) to the Construction Workers Pension Scheme (CWPS). This is, regrettably, an all too frequent occurrence.

At first glance, this appeared to be a very straightforward case as the records I obtained showed that the number of weeks worked did not match the number of pension contributions paid, along with the fact that there were also AVCs unaccounted for.

Enquiries by this office established that the Complainants were employed by the Respondent. The employment dates varied between 1989 and 2009. During this time, the Respondent did not make all of the required contributions to the Pension Scheme. However, when I reviewed all the documentation on the case file, along with additional documents submitted from various parties, I became aware of what turned out to be a very significant problem.

The Employer was incorporated in Northern Ireland with a branch in the Republic, as permitted under EU rules. The branch was listed on the Companies Register Office as an "External Company" and had ceased in November 2009.

The lead complainant (who was also the first to contact my office) advised me that the employer had set up a second company and alleged that it had the same directors who had shut down the first one, that the new business had the same clients and contracts. However, my examination proved that this was not actually the case.

Within the Irish construction industry it is the employer's responsibility to ensure that all of its qualifying employees are fully protected in terms of coverage under the Registered Employment Agreement on Pensions, Assurance and Sick Pay

With an Irish registered company, it would be the normal process for this Office to investigate the complaint, with the objective of having the unpaid deductions remitted to the scheme. In the event of liquidation of the employing company, I or the Pensions Board would try to pursue the directors in a personal capacity. However, given that the former employing company has no legal status here, I did not have jurisdiction in this matter.

The Pensions Ombudsman in the United Kingdom, whom I consulted, would have a similar problem:- as the pension scheme was set up in the Republic of Ireland he had no jurisdiction over this matter. The case has since been brought to the notice of the Office of the Director of Corporate Enforcement.

I am frustrated that this kind of anomaly arose. While there is not much we can do about EU freedom to trade across borders, perhaps some sort of bonding system could be put into place to ensure that non-resident employers cannot just cut and run in this manner.

19. Maladministration but no financial loss

This was a complaint of unfair treatment and financial loss under a private sector occupational pension scheme. The investigation undertaken at my Office found that there was maladministration in the incorrect reporting of pension scheme entitlements to the complainant, and that this caused him concern and inconvenience.

However, as his correct entitlements under the scheme were later advised to him and came into payment effective from the date of his retirement, he was not deemed to have suffered any financial loss.

20. Liable for Spouses' and Children's contributions, or not?

This complaint was made by a public servant who had a large deduction made from her retirement gratuity in respect of arrears of contributions deemed due under the Spouses' and Children's Scheme (S&C).

The deduction made from her retirement gratuity was in respect of S&C arrears for her total career:- split between pre'2003 arrears and post 2003 arrears. It was found that the amount deducted for the arrears relating to pre'2003 service was less than she would have paid had she been advised in 2003 about the arrears and exercised the option to clear them between 2003 and 2010.

This assumed that she became permanent only in 2003 and that it was then compulsory for her to be admitted to the S&C and to pay contribution arrears relating to her prior service. She challenged this assumption, alleging that she had been permanent since 1981. It emerged that the status of her pre'2003 employment was unusual and was not as clearly defined as it might have been. Following a Labour Court Recommendation in July 1982, her salary and that of some colleagues was aligned to a recognised payscale and they were admitted into the Local Government Superannuation Scheme. While she was then considered to be a pensionable employee there was no formal permanency granted to her until she took up a designated post in 2003.

My Office argued that it would have been the public service norm in 1982 to make pension provision only for permanent employees and suggested that if an employee was considered pensionable in 1982 they were, by definition, permanent. The employer confirmed that in 1982 it was not compulsory for female employees to join the Spouses' & Children's Scheme, although they could opt to join – which she did not do.

Following discussions it was agreed that:-

- It was more correct that the start of her permanent employment should date from the 1982 Labour Court Recommendation.
- In 1982 it was not compulsory for female employees to join the Spouses & Childrens Scheme and she did not exercise an option to join then.
- It should not be compulsory for her to join the Spouses & Childrens Scheme in 2003 and pay contribution arrears, as she was not a "new entrant" at that time. If she wished not to avail of the benefits provided under this Scheme and withdraw from membership now she could apply for a refund of the deduction made from her retirement gratuity in respect of arrears of S&C contributions.
- She could allow the deduction made from her retirement gratuity stand and remain a member of the Spouses' & Children's Scheme, thereby providing benefits for her spouse and any dependent children, in the event of her death.

21. Delay in Paying Death Benefit

The scheme member died on 25th December 2007. Notice of his death was sent to the employer's adviser on 17th January 2008 and acknowledged by them on 22nd January. They stated that to process the death claim they would require sight of the Death Certificate and the Grant of Probate. At that date, the value of his scheme benefit stood at €148,678.

In September 2008, the administrator issued a Benefit Statement, addressed to the late member. This showed that, as at 1st August 2008, his benefit was invested in the Bank of Ireland Managed Fund and valued at €136,201.91.

In March 2009, his widow's solicitor submitted copies of the late member's Grant of Probate and Death Certificate.

In April 2009 the adviser issued a death benefit settlement cheque for €105,716.65. This was queried and the cheque returned.

In June 2009, the adviser explained that the Trustees had acted properly in the matter and that €105,716.65 represented the full and final settlement of the scheme benefit. The matter was considered under the scheme's Internal Dispute Resolution procedure (IDR), with the trustees not upholding the complaint.

In the course of the investigation the scheme's administrator and the trustees were joined in the complaint. Before the investigation was concluded, however, they recognised that steps should have been taken, once notice of the death had been received, to protect the fund from depreciation, and a settlement was made to bring the total payment up to the fund value as it had been on 22nd January 2008.

22. Trustee Responsibility

In this case a complaint was brought by a solicitor on behalf of his client regarding the depreciation of the invested assets of the pension scheme. Following a preliminary review, my Office explained that the trustee has duties and responsibilities in the management of the pension plan and in matters of its "proper" investment. If the client was dissatisfied with the nature of the investment entered into under the plan then it would appear that his complaint lay against the Trustee in the first instance.

Trustees entering into an investment would be duty bound to familiarise themselves with the nature of and conditions applying to such an investment as well as satisfying themselves that it was appropriate for purpose. If the investment manager was acting within those conditions in matters such as currency conversion and the non-acquisition of property then we could not see that the client or the Trustees had grounds to complain. If the investment manager was acting outside the agreed terms then it would appear that the Trustees might have grounds to bring him to court for breach of contract.

In this instance the trustees of the scheme were the company of which the complainant was a 20% Director. Having received no response to our preliminary report, it was assumed that the scheme member did not wish to proceed with an investigation of the complaint against the trustees and closed the file.

23. Financial loss is measured against entitlement and not expectation

A member of a defined contribution scheme complained that her benefit was less than the amount previously notified to her.

An insurance company had issued an incorrect quotation in April 2009, showing her expected scheme retirement benefit to be €94,713.39:- which proved to be far in excess of its true value. In several years prior to this, valuations plus Annual Benefit Statements were produced by the insurer, showing the correct lesser values of her plan entitlement. (For example a value of €66,184.43 was quoted in February'09). .

The issuing of an incorrect valuation would be considered by this Office to be an act of maladministration. However, I could only uphold a complaint if satisfied that this maladministration led to the complainant receiving less than her proper entitlement under the pension scheme. This was not found to be the case in this instance.

It was my opinion that the incorrect quotation/maladministration merely confused the issue and gave the complainant an excessive expectation before retiring, - it did not have the effect of reducing her true entitlement. Furthermore, I considered that she could not rely on this excessive quotation to the exclusion of all the historic correct valuations she had received

I could not grant her the benefit of that mistaken expectation, as it exceeds the true value of what she was entitled to from the pension scheme, nor have I the power to award compensation for any inconvenience and annoyance experienced.