2005

Digest of Cases

Pensions
OMBUDSMAN
Fear an Phobail um Pinsin

Digest of Cases of the Pensions Ombudsman 2005

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Introduction

The purpose of this document, which should be read in conjunction with my 2005 Annual Report, is to draw attention to some of the more interesting complaints that have been dealt with by my Office during the last year. During 2005 I issued 76 Final Determinations under Section 139 of the Pensions Act and I have included summaries of 17 of these cases below.

In addition, 146 cases were resolved during 2005 by the process of mediation or intervention and I have included summaries of eight of these cases.

I hope that these cases will be of practical benefit to those working in the industry, and particularly to trustees and others involved in dispute resolution. Copies of these summaries are available on my Office's website.

Paul Kenny
Pensions Ombudsman

May 2006

Final Determinations

POST-RETIREMENT INCREASES

CASE 1

Background

The complainant retired early from service in 1996 and started to receive a pension under the employer-sponsored private sector pension scheme.

Up to that time, it had been the employer's practice to pay pension increases in line with the rate of salary increases granted to active serving staff. The complainant understood this to be a contractual right, as this parity arrangement was one of the featured benefits in long-standing agreements that existed between Management and the Staff Representative Association.

When in 2001, the trustees advised him that the rate of pension increase was at their discretion and would not be granted on a parity basis he challenged this, to no avail.

In 2004 he requested and received a Determination from the scheme trustees under the Internal Dispute Resolution procedure, which did not uphold his complaint. In July 2004, he submitted a complaint form to this Office.

Outcome

On investigating this complaint I found that the scheme rules gave the trustees the power to determine the rate at which pension increases were paid. In my Determination I was unable to uphold the complainant's view that he had suffered a financial loss because the recent rates of pension increase were different from, or less than, those previously provided. Under the scheme rules, the retired members did not have a guaranteed right to parity increases, and the trustees could not be charged with a claim of maladministration for not providing such a scale of pension increases.

The question of an agreement that existed between the employer and the Staff Representative Association to provide more than the pension scheme rules permitted was not a matter within my remit, covered as it was by employment agreements and conditions.

CASE 2

Background

The complainant was a retired member of a defined benefit plan. He claimed that, after he joined the company in 1972, a pension plan was set up for him under which he was guaranteed an increase to his pension in retirement of 5% p.a. without qualification. The complainant retired in 1992 and a 5% increase was applied to his pension in 1993, 1994 and 1995. However, in 1996, without notice and without explanation, the payments to him were cut back and thereafter restricted by reference to the Consumer Price Index (CPI).

Outcome

There was a great deal of confusion about the setting up of this plan. By way of a Subscriber's Agreement form the employer was admitted to the Irish Pensions Trust (IPT) Retirement Benefits Trust with effect from 1 May 1973, and installed a scheme to be governed in accordance with the IPT Master Trust document dated 15 January 1975 and the Deed of Amendment dated 2 August 1977. A further Deed of Amendment and Appointment was made on 14 April 1994. However, the special rules for the plan were not finalised until 15 November 1996.

Special Rule 8 provided as follows:

> "The pension as computed under Special Rule 4 of a male member who attains Normal Pension Date on or after 1 May 1976 and of a female member who attains Normal Pension Date on or after 1 May 1990 and any pension as computed under Special Rule 7 of a spouse of a Member shall be increased while in course of payment by 5% per annum compound subject to such increases not exceeding the percentage increase in the official cost-of-living since the commencement of such pensions."

Pending the agreement of the special rules the plan was administered in accordance with the general rules of the IPT Retirement Benefits Trust and by way of instructions given to the administrators of the plan by the subscribers. Rule 14.9 of the IPT Retirement Benefit Trust provides for post-retirement increases in line with the maximum increases provided for under Revenue Commissioner rules. These rules can be summarised as follows:

- Discretionary increases may be made to maximum pensions up to the level of increases in CPI or similar agreed index.

- Guaranteed increases may be made by using either of the following formulae:

  (i) Fixed increases of not more than 3% p.a. compound (regardless of CPI levels)

  (ii) Increases linked to CPI or other agreed index.

  However, a combination of (i) and (ii) above is not permitted.

- Augmentation of existing pensions to put the recipients on a par with current holders of the same employment will normally be approved.

The complainant had argued that, as he had retired in 1992 under a pension plan established in 1973, the special rules for the plan, which were only finalised in 1996, could not apply to him. Unfortunately, it is all too common in the pensions industry in Ireland that there is an excessive delay between the establishment of pension plans and the finalisation of the detailed rules - in this case the delay was 23 years.

However, the Revenue Commissioners have, over the years, accepted special or detailed rules for a pension plan as being applicable from the dates on which they are expressed to apply, the scheme being operated in the meantime in accordance with the details communicated to members. In the current case the commencement date was deemed to have been 1 May 1973. In any event, pending the finalisation of these rules, the complainant would have been bound by the rules of the IPT Retirement Benefits Trust and by Revenue rules, neither of which would have allowed for an unqualified increase of 5% p.a. compound without a CPI cap. In addition there was no evidence to suggest that the employers ever intended that the complainant should receive such an increase on an individual basis. My Final Determination was that the complaint should be disallowed.

REINSTATEMENT OF SPOUSE'S PENSION – ARBITRARY CUT-OFF DATE

Background

The complainant had been in receipt of a spouse's pension under the pension scheme, following the death in 1988 of her first husband. She remarried in 1990 and acknowledged that, in accordance with the then pension scheme rules, her spouse's pension would cease on remarriage.

The pension scheme rules were amended in 2003 to the effect that spouses who remarried after 1 January 2003 would not have payment of their spouse's pension terminated.

The complainant had applied unsuccessfully to the scheme trustees to have the rule change applied to her and for payment of her spouse's pension to re-commence.

Outcome

On examining the scheme rules I found that the non-cessation of payment of a spouse's pension applied only in circumstances where a spouse remarried after 1 January 2003. This being the case, the rule change did not apply to the complainant as her remarriage had taken place before 1 January 2003.

I was satisfied that the trustees had correctly applied the scheme rules and that there was no maladministration on their part. In September 2005 I issued a Final Determination stating that the complaint could not be upheld as the complainant was not entitled under the scheme rules to have her spouse's pension reinstated.

Arbitrary cut-off dates of this kind are common. Such dates may be dictated by outside factors, such as European Directives and the dates of their transposition into Irish law. Sometimes, the dates are set by the end (or even the start) of negotiations leading to change. Inevitably, they give rise to inequities and complainants understandably feel aggrieved. However, I do not have the power to change the rules of a scheme and there is no remedy for the unfairness in these cases unless it amounts to oppression or unlawful discrimination.

RIGHT OF ENTRY TO DEPENDANTS' SCHEME

Background

The complainant had been employed by the principal employer for 14 years when she agreed to transfer to the employment of a new joint venture company, set up by them. She was assured that the terms and conditions of this employment would be no less favourable than they would be with her principal employer and was offered an opportunity to re-join her principal employer's service at a later date. She availed of this offer to re-join some three years later.

While in the service of the principal employer, the complainant had not been a member of the dependants' scheme, operated by them in tandem with their pension scheme. She had been given a 'once-off' opportunity to join but had not accepted this. Subsequently membership of this scheme was made compulsory for all new staff joining service.

When the complainant re-joined the principal employer's pay-roll, deductions for dependants' scheme contributions were erroneously taken from her salary. This error was not discovered until more than three years had elapsed. The complainant argued that, by virtue of contributing to the dependants' scheme she was entitled to its benefits. The trustees disagreed, stating that she had not satisfied the entry conditions and could not benefit from the clerical error that led to deductions starting when she re-joined the principal employer's service.

Outcome

On investigating this complaint I determined that the complainant's entitlement under the scheme was dictated by the trust deed and rules and not by the fact that contributions had been erroneously deducted from her salary.

While a charge of maladministration could be levelled against the principal employer for (a) wrongly commencing deductions for dependants' scheme contributions when the complainant re-joined service, and (b) taking three years to correct this error, I agreed with the trustees' determination that the error did not entitle her to benefits she would not otherwise have qualified for under the scheme rules. For this reason I disallowed her complaint.

NON-PAYMENT OF A SPOUSE'S PENSION – WOUND-UP SCHEME

Background

The complainant was a widow entitled to a spouse's pension under the pension scheme of which her late husband had been a member.

On retiring, the husband started to receive a pension that had a five-year minimum payment guarantee. In addition, there was an attaching spouse's pension, payable from the date of his death or, from the end of the five-year guaranteed period, if later.

Unfortunately the husband died after less than a year on pension and so the complainant qualified for two benefits under the pension scheme:–

(i) payment of the balance of the five-year pension guarantee on her husband's pension, and

(ii) a spouse's pension of £1,194.33 (€1,306.18) p.a., payable from the end of the five-year guaranteed period.

The complainant chose to receive the benefit referred to at (i) above in the form of an immediate lump sum settlement amount, with the spouse's pension, referred to at (ii) above, due to become payable from September 2003.

On contacting the scheme administrators in 2003 to request payment of her spouse's pension, the complainant was advised that the Irish employer had ceased to trade and that the pension scheme had been wound up without any provision being made for the payment of her pension. It was suggested to her that the payment of the pension was the legal liability of trustees.

The complainant was unsuccessful in her efforts to have the matter resolved and referred her complaint to this Office in November 2004.

Outcome

In the investigation of this complaint I considered the employer, the trustees and the administrators to be respondents. None of these disputed the fact that the complainant was entitled to a small pension under the pension scheme, yet she had to wait two years and go to the trouble of bringing her complaint to this Office before she received payment.

The scheme trustees had the responsibility of ensuring that all members received their entitlements. In this case the trustees were company-nominated individuals. As they were empowered under the trust to do, they delegated the administration role, including the keeping of the membership records under the scheme to a firm of professional consultants. As I understand it, the act of maladministration that led to the complainant not receiving her pension entitlement when the scheme was wound-up was done by the consultant company. The parent company in the United States was paid the surplus that existed under the scheme following its winding-up.

Until my Office became involved, none of the respondents appeared to be prepared to take responsibility for the problem or to make any genuine effort to resolve it. Not only had this elderly complainant been waiting since September 2003 to receive her small annual pension of €1,306.18, but she had been given scant consideration and little assistance by any of the responsible bodies, in her quest for payment. I would consider that the respondents failed in the duty of care which they all had, towards the complainant.

I was dismayed by the arrogant and legalistic approach I encountered from the administrators, particularly as the act of maladministration was done by them, and that it was abundantly clear that this was so.

The role of the Pensions Ombudsman is to investigate and adjudicate on certain types of complaint from pension scheme members and, in so doing, to offer members an alternative to going to law. The approach to dispute resolution that I have encouraged in this Office is an informal user-friendly one – aimed at establishing the facts and deciding on a remedy, if applicable. This Office has generally been successful in its efforts to resolve disputes by mediation and the application of common sense, while being mindful of the member's entitlement under the scheme rules and any overriding legislation.

I have to state that I found the overly legalistic stance adopted by the administrators in this case to be at odds with this approach and not at all conducive to solving the problem. Discussions about actual responsibility versus legal liability only served to create a tangle where there should have been none. The administrator's main priority seemed to lie in protecting their own position in relation to professional indemnity insurance cover, despite the blindingly obvious fact that the act of maladministration had been committed by them. The complainant was entitled to her pension under the scheme and the administrators were one of the parties directly involved and responsible for ensuring that she received it.

Following the first contact from this Office with the parent company in the United States – whose initial approach to the problem had been to refer the complainant to the consultant – they agreed to fund the bulk of the cost of the complainant's pension, which action effectively resolved the problem. (In the end, they paid almost 83% of the cost with the administrators paying the balance). However, it was unfortunate that such an agreement could not have been reached voluntarily at an earlier stage and that the complainant had to wait almost two years to have her pension secured.

In my Determination I found for the complainant and declared that the administrator's omission of her record from the membership listings and their reluctance and that of the trustees to voluntarily resolve the problem were all acts of maladministration that gave rise to financial loss to her. I consider that the way in which this elderly lady was treated was not only discourteous and a breach of the duty of care that the respondents should have exercised in her respect, but an exercise of almost cynical cruelty to someone in such a vulnerable position. It must have been abundantly clear that a person in her situation would be in no position to pursue her entitlements through the Courts; but that, in essence, is what she was being invited to do by the emphasis placed on the legal liability of trustees as opposed to the answerability of any person concerned in the conduct of a pension scheme for an act of maladministration perpetrated by that person.

I found it regrettable that I did not have the power to order a compensatory award to this complainant, for I believe she deserved one as compensation for the mean-spirited way she was dealt with under the pension scheme.

In fact, in a case such as this, punitive damages would not have been inappropriate. I regret to say that this is the sort of case which may cause me to review my policy of protecting the anonymity of respondents.

PRIORITIES ON THE WINDING-UP OF A PENSION SCHEME

CASE 1

Background

This case was not a complaint, but a dispute of law relating to the distribution of the assets of the pension scheme of which the complainant was a member.

The employer's business went into liquidation in 1994 but no action was taken to wind-up the pension scheme at that time.

On reaching retirement age of 65 in 2002, the complainant set about trying to obtain his benefit under the scheme. He was advised that the trustee, a body corporate, had ceased to exist and that new trustees would have to be appointed before matters could progress. He took steps to have three new trustees, including himself, appointed, as the insurers involved had a power of appointment. The scheme was documented only by an interim deed. Although a definitive trust deed and rules had been drafted, these were never executed.

These new trustees then started to wind up the scheme, whose assets were held under a group policy. The insurers suggested two different methods that could be used to determine the split of the scheme assets between the members. Under the first method, the complainant could receive a proportionately higher share of the fund, as he had attained retirement age. Under the second method, the fund could be divided amongst the members in proportion to their basic transfer value entitlements on winding-up.

The dispute therefore, related to the proportions in which the available assets were to be distributed between the eight scheme members and to what precisely were the protections afforded by the Pensions Act to the complainant, in particular.

Outcome

Following my investigation I was satisfied that the 'relevant employment', as defined in the Pensions Act, of all participants in the scheme ceased on 27 April 1994 and that benefits vested in them under the rules at that time.

The appropriate action in relation to the pension scheme, following the liquidation of the company, would have been to wind it up and purchase buyout bonds or pay out transfer values to other schemes for the members.

The pension scheme cannot be deemed to have been wound up, simply because the employer went into liquidation, even though that event might be a trigger for winding-up in most pension schemes. Nor is it sufficient for the members or trustees to declare that there was 'an intention' to wind-up the scheme in 1994 or at any time since then. For a scheme to be wound-up the trustees would have to declare their intention of winding it up, notify the members of this and arrange for the assets to be distributed and the trust dissolved. The fact that the Definitive Deed in this case had never been executed made it even more necessary for the proper formalities to be observed.

Had the scheme been wound up in 1994, the complainant would have had the same priority over the assets of the scheme as the other members had. However it was not wound up then, nor can it, as was suggested by certain of the scheme members, be 'considered' to have been wound up then.

The priorities on winding-up are set out under the Pensions Act 1990. As a result of the statutory order of priorities introduced by the Act, which overrides the provisions of the trust deed and rules of the scheme (which, in this case, did not exist), there is no discretion available to the trustees in the distribution of the scheme's assets. These confer a higher priority on the provision of benefits for the complainant, because of the fact that he would be of 'normal pensionable age' at the time the scheme was formally wound up. Persons who have reached that age, even if not actually retired, are accorded the same priority under the Act as pensioners whose benefits are already in payment.

In my Determination I found that the trustees had no discretion in the method of allocating the assets on the winding-up of the scheme. The complainant had a priority claim under the scheme by virtue of the fact that he had reached 'normal pensionable age' before it was wound up, and I instructed the trustees to proceed with the winding-up of the scheme and the distribution of the assets using the first method referred to above.

CASE 2

Background

I received three identical complaints in relation to one scheme. This involved the transfer of members from a scheme in winding-up to another scheme of the same employer. Both schemes were in surplus and the eventual winding-up yielded a large refund to the sponsoring employer. It was decided not to purchase annuities for the pensioners in this case, which was permitted under the rules of the scheme, but to transfer their liabilities into the second scheme, using the powers provided to do this under Section 48(3) of the Pensions Act. The assets transferred would not have been sufficient to purchase annuities for the pensioners concerned. The complainants maintained that the only way that they could be sure that their pension entitlements were secure was through the purchase of annuities and that they were at a financial risk because this had not been done.

Outcome

Section 48(3) of the Pensions Act contains a provision which enables trustees of a scheme in winding-up to make a transfer to another occupational pension scheme without the consent of the members. I believe that this section was originally intended to facilitate transfers in schemes whose rules did not contain any transfer power, and where the amendment of the rules might prove difficult in winding-up. I do not believe that they were designed to facilitate the actions taken by the trustees in the current situation. However, I could not uphold this complaint because no financial loss had yet been incurred by the complainants. In fact, because they rank first in order of priority if the second scheme was wound up, the pensioners are more secure than the active members and deferred beneficiaries of the second scheme. Although the complainants in question were not disadvantaged, the members of the receiving scheme are now in a less secure position than they were before the transfers. I consider that this was a use of the statutory, overriding power of transfer which was never intended. In the instant case, the waters were further muddied by the fact that a single individual acted as actuary to the scheme, consultant to the sponsoring employer and representative of the corporate trustee in respect of both schemes – a clear failure by the firm concerned to identify, let alone deal with, an obvious conflict of interest.

DEFINED BENEFIT *VERSUS* DEFINED CONTRIBUTION SCHEME

Background

In 1996 the complainant, a proprietary director, instructed his broker to set up and administer a defined benefit pension scheme in his respect, having agreed the cost basis with him. From 1996 to 2002, the scheme was referred to and dealt with by the broker/administrator as a defined benefit scheme, with regular actuarial valuations done and a rate of contribution paid in accordance with the actuary's recommendations.

In October 2002, the administrator advised the complainant that his scheme was in fact a defined contribution scheme, set up on a 'target benefit' basis, and not a defined benefit scheme. The complainant sought an explanation of how this had come about and was most displeased to find himself in this position and by the manner in which his enquiries were handled, culminating in the resignations of the corporate trustees and the administrators in July and August 2003 respectively.

He referred the complaint to this Office in June 2004.

Outcome

Following the investigation undertaken by this Office, it was found that there was maladministration on the part of trustees and administrators in setting up the scheme on a basis that was incorrect, but this had not in fact created a financial loss under the pension scheme. While the complainant did not have the type of scheme he requested and was given to believe he had, the value of benefits under his scheme was not less at the time the complaint was made than it would have been if the scheme had been set up as a defined benefit scheme, having been actuarially reviewed and valued. In light of this I could not find in my Determination that the complainant had suffered financial loss even though there had been maladministration on the part of the trustees and administrators.

Failure of the trustee/administrator to carry out instructions is a contractual issue between them and the employer and, unless it results in financial loss to the member, is not a matter which this Office can remedy.

PUBLIC SERVICE SCHEME – PARITY – RE-GRADING

Background

The complaint in this case related to a claim for parity with an increase in salary of the post from which the complainant retired from in 1994. The complainant was a retired Town Clerk and he contended that the re-grading of the post, effective from 1 January 2003, was simply the conclusion of negotiations under the *Programme for Competitiveness and Work* (PCW) and as such should be passed to him under the rules of pay parity for pensioners.

Outcome

Following an investigation of the matter, I concluded that the re-grading of the post was not an extension of the PCW and that the remuneration of Town Clerks under Clause 2 (iii) of Annex 1 of the PCW was settled on 27 February 1998. The increase granted to Town Clerks with effect from 1 January 2003 related to a separate claim made under the *Better Local Government* (BLG) initiative and involved a re-grading of the post. Public service pension policy generally, and the rules of the Local Government Superannuation Scheme, provide that all general pay increases are applied to pensioners as a matter of course. Special pay increases are also normally applicable to pensions subject to specific conditions. One of these conditions is that the increase must not have been awarded in consequence of a substantial restructuring or alteration of duties which, in effect, constitutes a re-grading of the posts or grades concerned. In this particular case I was satisfied that this increase was granted on the basis of a re-grading of the post. The complaint was therefore disallowed.

APPLICATION OF A MARKET VALUE ADJUSTMENT FACTOR TO RETIREMENT BENEFITS AND ALLOWANCE FOR LOW INTEREST RATE TO REFUND OF PREMIUM

This complaint was twofold.

(i) Background

The complainant was a member of a pension scheme set up with an insurance company and regular annual premiums were paid to the policy. When his policy reached maturity at his 70th birthday, a renewal notice was issued in error for an additional annual premium. A delay of over two years arose in dealing with the refund and when the premium was refunded, interest was allowed at 2% p.a. for the relevant period. The complainant was not satisfied with the amount of interest offered.

(i) Outcome

I found that the insurance company was guilty of maladministration and suggested to them that a more appropriate rate to apply instead of the 2% interest rate would be the increase in CPI for the relevant period. The insurance company agreed and a Determination was issued to this effect.

(ii) Background

The second part of the complaint related to the application of a market value adjustment (MVA) factor to the complainant's fund at retirement. The complainant's policy matured at 5 October 2000 but he did not receive any correspondence in relation to maturity options until 12 September 2002 – almost two years later. This was despite a provision in the policy conditions that contact would be made prior to the normal retirement date to advise of the options available.

It further transpired that all units attaching to the policy had been encashed at the maturity date and held on deposit. This action was taken contrary to the policy conditions which provided that units would only be encashed when all requirements of the insurance company had been met. As the insurance company had only written to the complainant two years after the maturity date, the requirements could not possibly have been met. A value was quoted to the complainant at 23 December 2003 made up of the encashment value at October 2000 together with interest added from October 2000 to December 2003.

When the insurance company realised their error in encashing the units at maturity date, a letter was issued to the complainant on 23 February 2004 to the effect that the units had been reinstated. However, an MVA factor of 15% was applied to the fund. The complainant was advised in the letter that while any MVA factor would not be applied on retirement at normal retirement age or on death, it would apply to the policy going forward. Since the complainant had now passed his normal retirement age and was never quoted options at that date he was not in a position to take benefits at normal retirement age. The information was provided to the complainant three and a half years too late.

While it was clear that the policy conditions permitted the application of an MVA to the fund it was reasonable to expect that, had the complainant been made aware of his options at the maturity date of the policy, including the impact of the application of an MVA factor, he would have taken a particular course of action.

(ii) Outcome

The case was put to the insurance company and, having reviewed all the issues, it agreed that an MVA factor should not be applied to the complainant's fund.

I issued a Determination that the insurance company was guilty of maladministration and directed it not to apply the MVA factor to the fund.

FAILURE BY INSURANCE COMPANY TO SET UP PENSION PAYMENTS CORRECTLY – NUMEROUS ERRORS BOTH IN AMOUNTS OF PENSION PAID AND TAX DEDUCTED.

Background

The complainant retired in March 2004 and expected his pension payments to commence immediately based on amounts already quoted and agreed between himself and the respondent.

From the outset the respondent, which in this case was an insurance company, set up incorrect monthly pension payments from March 2004 and only after protracted correspondence with the complainant's solicitor did they agree that the annuity was incorrect and attempted to rectify the situation by making back payments. This was compounded by further errors.

It became clear that when the complainant advised the respondent of his bank details to set up the pension payments, he gave details of a fixed term deposit account which could not accept regular payments over a prolonged period.

The respondent did not amend its records when advised on 9 November 2004 that future payments should be paid to the complainant's current account. This was the case despite reassurance to the contrary to the complainant's solicitor in a letter dated 23 December 2004. The respondent also maintained in its letter to this office of 11 March 2005 that the records had been updated. This was clearly not the case and, on receiving confirmation from the respondent, it was clear that payments continued to be made to the complainant's fixed term deposit account from November 2004 to April 2005.

The confusion between different bank accounts exacerbated an already difficult situation to the point where the complainant's trust in the respondent's ability to deal with his pension was seriously eroded.

However, the complainant did provide details of the fixed term deposit account in the first instance and was subsequently advised by his bank of the difficulties in accepting electronic transfer payments to this account. Therefore he had to bear some of the responsibility for the confusion between March and October 2004.

The respondent also issued an incorrect P60 for 2004 – this was an error in itself, but it also suggests that the respondent did not accurately transfer the details of the complainant's PPS number from the Retirement Advice form and thereby held incorrect tax details from the outset. Any details of tax credits received from Revenue would not have matched the incorrect PPS number. This may explain the complainant's insistence that tax details were provided and the respondent's insistence that no tax details were received by them. It does not however excuse the respondent's initial error in the setting up of the complainant's pension payments.

The fundamental administration errors which were at the root of this case should have been corrected promptly once the respondent was made aware that there was a problem. Proper checks should have been made of all the complainant's details once the initial problem arose. Instead the pension payment situation was allowed to get into such a state that the complainant felt he had no option but to contact his solicitor and eventually seek this Office's intervention.

Outcome

The complaint was upheld. The respondent agreed to issue a cheque in respect of the returned payments from the bank for the period November 2004 to April 2005. It had already paid a cheque to take into account the returned payments from March 2004 to October 2004. The respondent altered its records in respect of payments to the correct bank account and paid the correct net amount for June 2005 and committed to paying the correct amounts due in the future. It was in a position to repay the overpaid tax in respect of 2005 to the respondent and to issue a tax certificate which was acceptable to Revenue to enable the complainant to reclaim his tax for 2004.

The complainant had insisted that the liability for the tax rebate for 2004 lay with the respondent – his attitude was very much that they made the mistake in deducting the incorrect amount of tax; therefore they must repay it. However it was my opinion that only the individual concerned can claim tax that is owed to him. (This differs from the position in the case of an overpayment of benefits, where the scheme administrator must recover tax correctly deducted on amounts incorrectly paid.)

The complainant also felt that he should receive some compensation for the amount of frustration and hassle caused by the respondent in dealing with the situation. The respondent had offered an ex-gratia payment. However, the complainant was not happy with the amount offered. My powers in relation to awarding financial redress are limited to placing the person back into the financial position in which he should have been at outset. On payment of the tax rebate and on issue of the tax certificate for 2004 this would have been achieved. Any additional compensation awarded by me would simply take account of the loss in the value of money. I considered that the ex-gratia payment offered by the respondent in the circumstances was fair and reasonable and exceeded the amount of financial redress that could have been awarded by me.

LOCAL GOVERNMENT SUPERANNUATION SCHEME (LGSS) – PENSIONABILITY OF OVERTIME

Background

I received complaints during the year from a group of workers from a local council that, while they were working regular, rostered and mandatory overtime, they were not being allowed to pay their superannuation deductions on this overtime on a weekly basis. Instead they had to wait until they retired when a substantial amount of money is taken from their lump sums to pay the superannuation owed on these hours.

Outcome

Article 105, Subsection 2 of S.I. No. 455 of 1998 – Local Government (Superannuation) (Consolidation) Scheme 1998, provides that overtime may be included in the calculation of superannuation awards subject to certain conditions. These conditions are laid down in Circular Letter S. 12/91, dated 11 December 1991, as issued by the Department of the Environment, Heritage and Local Government. Paragraph 6 of that Circular states

> "Superannuation contributions will be payable in arrears on all overtime payments in respect of which a Ministerial direction is given. Such contributions should be recovered by the local authority by retaining the amount due out of the lump sum or gratuity payable to or in respect of the officer or employee at the time of cesser of office or employment. Where there is no lump sum or gratuity the amount due should be recovered by way of periodic deduction from the pension payable to the officer or employee. The amount of the periodic deduction should be equal to the amount of the pension payable in respect of the overtime payments which are taken into account in calculating the superannuation award."

Following my examination of the complaint I determined that the council had acted correctly in accordance with the rules of the LGSS as laid down in Circular S. 12/91, in not deducting superannuation contributions in respect of regular and recurring overtime on a current basis and I disallowed the complaint. Notwithstanding this I still examined the arguments put forward by the Department justifying their position and I publish these as a useful item of information for others who may encounter similar problems:

- Strict conditions must be met before overtime payments are reckonable for superannuation purposes, i.e. the overtime must be a feature of the employment, must not be optional, must be of a regular and recurring nature, and must not arise as a result of work volumes or staff shortages.

- Experience to date suggests that conditions/contracts of employment relating to 'non-officers', as they are described, do not generally contain a requirement for overtime to be worked, and the situation on the ground would appear to be that the working of overtime on a regular and recurring basis evolves over a number of years. Accordingly, decisions in relation to whether overtime is compulsory or optional and, if compulsory, the element of same which is regular and recurring can, in the majority of cases, only be made close to, or at, retirement. In previous Ministerial appeal cases that involved the reckoning of overtime payments, the same issue frequently occurred. It is also quite common for regular and recurring overtime to be accompanied by irregular overtime, e.g. callouts, providing emergency cover, etc., which could be problematic for the ongoing deduction of contributions.

- It can occur that, while regular and recurring overtime may be a feature of a person's ongoing employment, the position may change due to a variety of factors including, promotion, age, work/life balance, transfer request, physical condition, etc. In such situations, if ongoing contributions were levied on overtime earnings paid during earlier employment, an employee might receive no benefit, or a reduced benefit, if the overtime ceased prior to or during the last three years of service.

- It is for these reasons that it is deemed more appropriate to determine whether overtime is reckonable at retirement, and if so, to calculate the amount to be included as part of pensionable pay and levy the relevant contributions on the historic earnings.

CONSTRUCTIVE DISMISSAL

Background

The complainant, on enquiring about her right to a deferred pension, was told that the employer had advised the scheme trustees that she had left employment voluntarily and had no entitlement to benefit under the scheme. She had worked for a company for four and a half years from May 1991 to December 1995. On 5 December 1995, following a proposed re-organisation of the firm, she was presented with a new contract which, she claimed, contained elements of the work being undertaken by the Managing Director and the Operations Director of the company at that time. For various reasons the complainant was not happy with the new contract and refused to sign it. She claims that she then discussed with the Managing Director the reasons why she was unhappy with the contract but was informed that there was to be no discussion about it and she was to sign it or she would no longer have a job. Following this she claims that she was dismissed from the company because she refused to sign the new job specification, although the company claims that she left voluntarily. Following on from this the complainant took a case against the company to the Employment Appeals Tribunal. The case was settled before a ruling was given by the Tribunal and the complainant received a settlement of £18,000 plus her costs. The complainant maintained that the settlement amounted to an admission that she had been unfairly dismissed. She claimed that she had left the company "through no fault of her own" and she should therefore be entitled to a deferred pension under the rules of the pension scheme. The company, on the other hand, claimed that the payment made to the complainant was of a modest amount when considering the time the case had taken and was likely to take, and was made for practical commercial reasons, including the company's desire to avoid adverse publicity due to a possible sale of part of its operations.

Outcome

The explanatory booklet for the pension scheme provided that a member "will be entitled to a deferred pension payable from age 65 or such earlier date as the trustees may permit, in the following circumstances:

(a) if your employment is terminated through no fault of your own (e.g. redundancy);

(b) if you leave for any reason other than fraud, misconduct or any culpable reason and have completed at least five years' service as a Member."

Rule 11(b) of the scheme provided for the payment of a deferred pension –

> "in the event of any Member so leaving by reason of his service being terminated by the Employer for any reason other than fraud, misconduct or any culpable factor on the part of the Member, of which the employer will be the sole judge or if he leaves of his own free will having completed at least five years' continuous service ..."

At the time the complainant left the company she did not have five years' continuous service. The key issue to be decided, therefore, was whether the complainant could be deemed to have left the company "by reason of her service having been terminated by the Employer for any reason other than fraud, misconduct or any other culpable factor on the part of the member".

Effectively the issue to be considered was whether the complainant could be deemed to have been constructively dismissed by her employers. In this regard I obtained legal advice on constructive dismissal law in Ireland which I will briefly summarise. Constructive dismissal occurs where an employee feels that his/her employer has created conditions that are so intolerable and unreasonable that he/she feels compelled to resign. Therefore, it is the employee who terminates the contract of employment; however, such termination is not voluntary but is forced upon the employee by the employer's conduct. The term 'dismissal' is defined in the Unfair Dismissals Act 1977 as including constructive dismissal. The relevant part of the definition is:

> "the termination by the employee of his contract of employment with his employer, whether prior notice of termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer the employee was or would have been entitled, or it was or would have been reasonable for the employee to terminate the contract of employment without giving prior notice of termination to the employer."

In order to succeed in a claim for constructive dismissal, an employee must satisfy one of the two tests in the statutory definition quoted above. The first is known as the 'contract test'. In order to satisfy this test the employee must establish the necessity of terminating his/her employment by virtue of the employer having breached the contract of employment, either to a significant degree or at least to such an extent that it is clear that the employer no longer intends to be bound by one or more of the essential terms of the contract.

The second test requires the employee simply to establish that it was 'reasonable' for him/her to terminate the contract of employment without giving the employer prior notice of termination. It was the second test that needed to be considered in this case. Having reviewed all the evidence presented to me in relation to the case I concluded that the company had not acted reasonably in this situation. The complainant was being coerced, at short notice and under duress, into signing an unacceptable and unilateral variation of her contract of employment, a contract that she felt she could not fulfil with the resources that she was being given. Management accepted that she had legitimate concerns, yet continued to put pressure on her to sign the contract without properly addressing those concerns. Management accepted that the complainant was being offered the new position because of “her efficiency and attention to detail” and that she had made a major contribution to the company during her time there. Under the circumstances I concluded that it was not reasonable for the company to expect her to sign the new contract without properly addressing the issues she had raised, nor did I think it reasonable for the company to give her an ultimatum to sign the contract or she would be out of a job.

The second question to be addressed was whether it was ‘reasonable’ for the complainant to terminate her contract of employment without giving the employer prior notice of termination. Having considered all the facts of the case I concluded that the action that the complainant had taken was reasonable under the circumstances and that it was reasonable for her to terminate her contract of employment without giving the employer prior notice of termination. I therefore found that the complainant had been constructively dismissed.

The other important issues that arose out of this case were as follows:

- the trustees of the scheme could not rely on the agreement signed by the employer with the complainant, following the withdrawal of her complaint to the Employment Appeals Tribunal, as a defence against her claim that she had pension entitlements under the pension scheme;

- in the absence of a determination by the Employment Appeals Tribunal and in the absence of an admission of liability by the company, the complainant could not rely solely on the payment of £18,000 settlement of her claim as proof positive that she was constructively dismissed or that her employment was terminated by the employer for any reason other than fraud, misconduct or other culpable factor on the part of the member;

- As no finding had been made by the Employment Appeals Tribunal, since the case was settled before the final phase of the hearing, I determined, based on legal advice received, that I was entitled to find, as a matter of fact, that the complainant had been constructively dismissed.

In conclusion, I found that the trustees of the pension scheme were not correctly informed of the circumstances of the complainant’s termination of employment. This was complicated by the fact that the then Managing Director of the firm was one of the two trustees of the pension scheme. However, had the trustees been properly advised it is clear that they would have been obliged to grant the complainant a deferred pension entitlement under Rule 11(b) of the scheme.

My Final Determination, therefore, was that the complainant – as a matter of fact – had been constructively dismissed and should now be awarded a deferred pension entitlement, in accordance with Rule 11(b) of the scheme in respect of the period of her membership of the plan from 1 January 1992 to 31 December 1995.

CLAIM FOR A REFUND OF 'OVERPAID' CONTRIBUTIONS

Background

I received a complaint from a retired female member of a scheme regarding the operation of Section 17 of the scheme which provides for the cessation of contributions if a member becomes entitled to a full pension on a date after normal retirement date and before actual retirement date. The complainant's normal retirement date at age 60 was 1 February 1997, at which time she would have had 38 years' pensionable service. She had purchased two years' additional service over the period September 1984 to February 1997 which would have entitled her to a maximum pension of 40/60ths at her normal retirement date in February 1997. The complainant retired from the employment on 9 February 2002 under a voluntary programme, when she had 44 years' company service. The complainant maintained that, under the rules of the scheme, she should have been entitled to a refund of her excess pension contributions for the period February 1997 to February 2002. She also claimed that she should be entitled to a refund of overpaid additional voluntary contributions which were due to cease in February 1997 as per form of acceptance, that only part of the excess had been refunded and the balance was due.

Outcome

There were a number of complex issues that came to light in relation to this case. On 11 December 1992 a number of changes were made to the rules governing the operation of the pension scheme. These amendments were made to give effect to Part VII of the Pensions Act 1990 (which was due to come into force on 1 January 1993) which provided that pension schemes must comply with the principle of equal treatment and that there should be no discrimination on the basis of sex. Specifically, rules were put in place equalising the normal retirement age for men and women at the anniversary of joining the scheme after attaining 65 years of age. Under one of these rules the 'normal retiring date' was changed, in the case of a female member employed in the Republic of Ireland, from 60 to 65 years of age.

There were three key issues that I had to examine in relation to this complaint, as follows:

- Was the scheme rule change effected in 1992 actually required by the amendments to the Pensions Act?
- Was the amendment effected correctly and were the members properly informed of this change?
- If so what were the practical effects on the accrued rights of the members as at 11 December 1992?

In relation to the first issue I concluded that in December 1992 there was a legal obligation on employers and trustees under both Irish and European law to equalise retirement ages for males and females but with some uncertainty about the equalisation of benefits accrued prior to 17 May 1990 – the date of the European Court decision in relation to the *Barber** case. The decision of the European Court in relation

* Barber -v- Guardian Royal Exchange Assurance Group [1990] 2 CMLR 513

to this case concluded that pensions are part of 'pay' for the purposes of [the then] Article 119 of the Treaty of Rome, which requires each Member State to "apply the principle that men and women shall receive equal pay for equal work." At that point in time, therefore, the trustees and the employer did not have the option of retaining normal retirement ages of 60 for females and 65 for males. Either the age for females had to be increased to 65 or the age for males had to be reduced to 60 at least in respect of service from 17 May 1990 onwards. I further concluded that the trustees of the scheme were entitled to make the rule change to give effect to Part VII of the Pensions Act. While it could be argued that the increase in the normal retirement age to 65 was not strictly necessary to give effect to the equality provisions of Part VII of the Pensions Act, it was clearly necessary to give effect to the trustees' decision, which was to equalise the normal retirement age for men and women at the anniversary of joining the scheme and after attaining 65 years of age.

The second issue related to whether the amendment was effected correctly and whether the members were properly informed of this change. I had already concluded that, even if the rule change was not strictly required by the laws of Ireland or the European Community, it did 'relate' to them. As such the trustees were entitled to make the change in accordance with Part V, Rule 18(b) of the scheme, i.e. with the written consent of the employers and the pensions committee, but not of the members. In my view, therefore, the rule change was properly effected and the normal retiring age for female members of the scheme changed from 60 to 65 with effect from 11 December 1992. However, I noted that the complainant never received a letter from the employers varying, or even seeking consent to vary, her terms and conditions of employment and that she received updated financial statements at various dates between 1993 and when she retired in 2002, which continued to show her normal retirement date as being 1997, i.e. age 60. This, allied to the fact that there was no prior consultation regarding the rule change between the trustees and the members, led to a situation where there was considerable confusion among the members as to what their pension entitlements actually were. I concluded that it was reasonable for the complainant to believe, right up to the time of her actual retirement, that her contract of employment had not changed and that her normal retirement age remained at 60.

The last issue concerned what the practical effects were on the accrued rights of the members as at 11 December 1992 – the date of the rule change. I concluded that, at the time of the rule change on 11 December 1992 the complainant had not completed 40 years' service, nor had she attained age 60. As such she did not have a right to stop paying contributions. I therefore concluded that the complainant was not entitled to a refund of her scheme contributions in relation to the 1997 to 2002 period. However, the complainant was entitled to a refund of her scheme contributions for the period 1 February 2002 – her normal retirement date – and 9 February 2002 – her actual retirement date. I further concluded that the complainant was entitled to a refund of all of the fund representing the value at 1 February 1997 of the AVCs which she had paid, adjusted back to their original 'maturity' date in February 1997. The logic of this was that these contributions, which had remained invested in the fund in the meantime, had not been required to bring the complainant's pension to 40/60ths of salary, given that she had now made 'ordinary' contributions for the whole of her period of membership of the scheme, from 1959 to retirement.

In conclusion I noted that there still appeared to be considerable confusion on the part of the members and their representatives on the precise effects of the rule change made in 1992. I strongly recommended that serious efforts should be made to remedy this defect, a defect which owed its existence almost entirely to the complete failure of any party involved to communicate the matter properly at the time. This failure extended, not just to matters concerning the pension scheme, but equally to issues around the employment contracts of members as regards the age of retirement.

SECONDMENT ARRANGEMENTS

Background

The complainant joined the employer (described here as 'the Council') from a constituent college of the National University of Ireland ('the College'), where he had worked since February 1972 and was officially appointed to the post of Assistant Registrar to the Council with effect from 1 March 1975. The complainant retired from the Council on 31 December 2001 at age 62. Under an arrangement agreed between the College and the then *ad hoc* Council, for the purpose of protecting the pension position of himself and of another Council officer who had also come from the College, and in the absence of a scheme for the Council, his salary was paid by the College, he remained a member of the College pension scheme and the College recouped the cost of this arrangement quarterly from the Council. This arrangement lasted until 1 September 1987 when it was terminated by the Council following the setting up of the Council pension scheme in 1987. When the complainant retired his pension entitlements were calculated in accordance with the terms of the 1987 scheme.

The Council was put on a statutory basis under an Act of 1979, which provides that a person shall not, while in the service of the Council, be subject to less favourable conditions in relation to the grant of superannuation allowances (whether by way of lump sum, pension or gratuity or of compensation for loss of office) than the conditions which applied to him immediately before his transfer by virtue of the Act to the service of the Council. The complainant maintained that he was a transferred officer for the purposes of the 1979 Act and that he was thus entitled to the guarantee given under the Act concerning less favourable conditions. On this basis he claimed that he was entitled to have his pension entitlements calculated on the basis of the old College scheme, which he felt were more favourable to him, rather than on the basis of the 1987 pension scheme set up by the Council. The respondents to the complaint maintained that the complainant was not entitled to the guarantee as he was not a transferred officer but was still on secondment from the College and remained so until this arrangement was terminated in 1987.

Outcome

There were a number of aspects to this complaint. However, the most interesting was whether in fact the complainant should be regarded as somebody covered by Section 13(3) of the 1979 Act, i.e. whether he could be deemed to have been an employee of the Council before the commencement of the Act.

Following my investigation I came to the conclusion that it could be reasonably assumed that the complainant had in fact resigned from the College and had become a member of the staff of the Council with effect from 1 March 1975, and that the secondment arrangement put in place was seen as a temporary measure designed solely to facilitate the continued accrual of pension rights pending the establishment of a scheme for the Council. However, in my view it could not be considered a normal secondment arrangement for the following reasons:

- In a normal secondment arrangement, if employer A seconds an employee to employer B, the latter handles the payment of salary etc, even though it might reimburse superannuation costs. In this case the Council appointed the complainant as Assistant Registrar and operated what was in essence an agency agreement with the College to pay his salary and accrue superannuation entitlements, entering into a completely artificial arrangement regarding the complainant. Because it was an agency arrangement, the consent of the complainant was neither needed nor sought.
- One of the characteristics of secondment is that there is an expectation that the employee concerned will in due course return to the place of his original employment. The Revenue rules which apply to non-statutory schemes make it clear that this is a precondition to the approval of a secondment arrangement. It is evident that a return by the complainant to the College was never contemplated.
- According to the College there were no formal arrangements in place to protect the complainant's position in the event of the termination of his employment by the Council – there may have been some sort of understanding or gentleman's agreement, under which they "wouldn't see him stuck", although there was no very clear idea of what they could do with him if the contingency arose. Such an arrangement would be completely unenforceable at law and was essentially worthless.
- Another essential characteristic of secondment is that the original employer remains in control of the employee's movements and is in a position to recall him at any time. There was no evidence that this was the case in this instance.
- It is also clear that the complainant's rate of remuneration was decided at all relevant times by the Council and not by the College. In addition, although he was paid by the College he was obliged to forgo other benefits of being a College employee.
- It would appear also that the dismissal of the complainant from employment – another characteristic of secondment – would not have been within the power of the College.
- Another consideration is the inordinate length of the alleged secondment. In occupational pension schemes, Revenue require a submission to be made and permission to be obtained in cases where a secondment period is to exceed five years. If it is not at first anticipated that it will exceed that period, but in fact is about to do so, the submission must be made then. The concept of unsupervised indefinite secondment is out.
- There appeared to be a contradiction between, on the one hand, the complainant resigning and having his service to his date of resignation made reckonable under Section 4 of the Superannuation & Pensions Act 1963 and, on the other hand, having his service continued on the basis of secondment. (All the complainant's service from his commencement with the College on 1 February 1972 to the date he left the College scheme on 31 August 1987 – the date the 'secondment' ended – was deemed to be reckonable as pensionable service and to be transferable under the Superannuation & Pensions Act 1963.)

- There was no merit in the argument put forward that the complainant could not have received tax relief on contributions to the College scheme were he not employed by the College. Relief is routinely given throughout the State sector on contributions referable to employments other than those from which remuneration arises (when previous service is being bought back, for example), Revenue taking the pragmatic view that the State is the ultimate employer in all cases.

In essence what we were dealing with here was an unorthodox (though eminently practical) administrative arrangement which had no legal basis, whereby a transfer was regarded for some purposes, e.g., accrual of pension, as secondment, but not for other purposes. Had there been a superannuation scheme in place in the Council at the time of the complainant's appointment there would have been no question of a secondment arrangement being put in place. I concluded that it was clear that the intention was that the complainant was to be appointed as a full time employee with effect from 1 March 1975 and there was never any possibility of him returning to his former employment with the College.

For these reasons outlined above I concluded that the complainant should have been regarded, for the purposes of Section 13 (1) of the Act, as a person who, immediately before the commencement of the Act, was employed whole time by the Council and should also, as a result, have been regarded as a member of "the Council's transferred staff".

MEMBER ABSENT AND RECEIVING INCOME CONTINUANCE BENEFIT

Background

The complainant complained of "blatant discrimination by company management and scheme administrators" with regard to the interpretation of some of the rules of a pension scheme, which was then in transition – the scheme was to be wound up and its members transferred to the arrangements of a new owner (although steps were being taken to allow the preservation of certain entitlements for those transferring).

The complainant's complaint was that, while looking through his benefits statements for the years 2001, 2002 and 2003 he detected a marked discrepancy between the figures printed on the benefits statements and those of the rest of the process operators employed by the company. He claimed that he should be on the same rate of basic pay for pension purposes as that of the rest of the operators, even though he had been out of work on income continuance benefit for over three years. He could not see any rule of the scheme which stated that his pension benefits should be less.

In rejecting the claim, the trustees relied upon the governing documents of the scheme, whose temporary absence rule states that "in the event of temporary absence of an employed member during any period the provisions of Rule 14 hereof (leaving service) shall not apply and the trustees shall with consent of the employer decide to what extent (if any) the employed member shall be entitled to benefits during such period".

Outcome

It was clear that the complainant was most dissatisfied with the Determination of the trustees. In particular, he contested the question of temporary absence. He quoted Rule 23 (2) which says that:

> "an employed member should be treated as being on temporary absence under this rule if the trustees with the consent of both the employer and such employed member elect to treat such employed member as on temporary absence when he leaves the employment of the employer".

He maintained that he had never given his consent, either orally or in writing, to being treated as being on temporary absence. I found this rule most unusual, in requiring the consent of both the employer and the member. From correspondence with the complainant, it was clear that he felt that temporary absence implied that somehow he was not an employee of the company, which was not the case.

Examination of the rules bore out the contention of the complainant, that the position of members in receipt of income continuance benefit was not specifically dealt with under the terms of the rules of the pension scheme, but it was clear that the trustees and the employer used the temporary absence rule as a method of dealing with members who became claimants under the disability scheme, and who were promised under the terms of that scheme that their membership of the pension scheme would be maintained. The only available alternatives to 'temporary absence' were to treat him as having left service with a preserved benefit, or to treat him as an early retirement – neither was satisfactory.

It was also apparent that the complainant still had not accepted that his 'disability' commenced at the date of his injury, and not at the date of commencement of the income continuance benefit. This did make a difference to the calculation of his pensionable pay but I could not see any reason why a pay increase given after the date of his first absence could be taken into account.

I determined that the complainant was being correctly treated as a temporary absentee under the rules of the pension scheme to which his benefits and entitlements had been transferred. I do not know what provisions apply in the rules of the new pension scheme, but I would strongly urge that any rule requiring the consent of a member who is on income continuance benefit to be treated as a temporary absentee should be eliminated, as it serves no practical purpose. **I would also strongly urge employers and trustees to cater specifically under pension scheme rules for those on income continuance benefit, and not to rely on the *ad hoc* use of temporary absence provisions, which are sometimes vague and often discretionary, to deal with situations they were not designed for.**

CONSTRUCTION FEDERATION OPERATIVES PENSION SCHEME (CFOPS)

Background

The Construction Federation Operatives Pension Scheme (CFOPS) was set up in 1965 by employers who were registered with the Construction Industry Federation (CIF) to provide pension and mortality benefit for workers in the construction industry. The terms of the Registered Employment Agreement for the Construction Industry relating to Pensions, Assurance and Sick Pay were registered with the Labour Court on 7 March 1969, under the Industrial Relations Acts 1946-69. As a result of this Agreement it became compulsory for all employers in the construction industry to provide pension and mortality benefit for all manual workers. At that time the scheme was opened to all employers in the industry, whether they were members of the CIF or not.

All craft persons and general operatives between the ages of 20 and 65 years are legally bound to be entered into the scheme once their employing firm is covered by the Registered Employment Agreement for the construction industry. Other employees who are not compulsorily covered may be entered in the scheme by arrangement with their employer and the scheme. The CFOPS has been approved by the Revenue Commissioners as a bone fide pension scheme for the purposes of the Taxes Consolidation Act 1997 and is considered to be a defined benefit scheme within the meaning of the Pensions Act 1990.

I have received various complaints from workers in the construction industry alleging that their employer failed to register them in the scheme; registered them in the scheme but failed to deduct and remit contributions on their behalf to the scheme; or deducted contributions but failed to remit them to the scheme.

An employer who fails to register a qualifying employee who is entitled to the Pension, Assurance and Sick Pay Benefits of the Registered Agreement is in breach of the Agreement. In such cases the employer concerned is fully liable for the payment of all benefits due to the employee under the Pension, Assurance and Sick Pay Terms of the Registered Employment Agreement, including the payment of mortality benefit to the employee's dependants in the event of the death of the employee.

Since the Pensions (Amendment) Act 2002, it has been a criminal offence for an employer to fail to remit contributions deducted from the pay of employees to a pension scheme within 21 days of the end of the month in which those contributions have been deducted. If I find that this offence has occurred, I refer the case to the Pensions Board for prosecution. Penalties for criminal offences under the Pensions Act can be as high as fines of €12,700 and terms of imprisonment of up to two years.

More serious, however, is the possibility that contributions, which had been deducted from employees' pay and not remitted to the scheme, had been misappropriated. If that were the case, I would have no choice but to report the matter to the Garda Bureau of Fraud Investigations for further scrutiny.

In one particular complaint that I received, the complainant alleged that his former employer was guilty of maladministration in relation to the CFOPS in that:-

1. He failed to duly register him in the pension scheme when he first qualified for inclusion

2. Some of the pension scheme contributions deducted from his salary were not paid into the scheme.

Outcome

In the case in question it was established that the complainant's employment met the qualifying criteria for membership of the scheme during the period from August 1996 to 28 July 2005.

The scheme trustees confirmed that the employer was registered with the scheme but had failed to register the complainant or pay any contributions on his behalf under the scheme.

In November 2005 I issued a Final Determination, declaring that the employer was liable for all the outstanding contributions due to the scheme in respect of this employment, and instructed that the amount of €11,550 be settled, as soon as possible. Payment was received under the scheme shortly thereafter.

Unfortunately, cases like this are all too common and this complaint is typical of a large number received in relation to CFOPS.

Repayment of arrears – CFOPS

As I was beginning an investigation into one complaint of non-payment of contributions in CFOPS, I wrote to the employer concerned, advising him that I would be accessing Revenue and Social Welfare records for information concerning the employee who had complained. I had already been supplied by the Construction Industry Monitoring Agency (CIMA) with a copy of a recent form P 35L tax return for the employer. This revealed a large number of employees, about half of whom were registered in the scheme. I queried this with the employer, who contacted my office and asked for a suspension of the investigation, so that he could talk to CIMA. I was later advised by that organisation that the employer concerned paid arrears of contributions to the scheme in excess of €200,000.

Cases Solved by Mediation

HYBRID SCHEME – WINDING-UP – ABATEMENT OF DC MEMBERS

Background

The complaint related to the treatment of members of a defined contribution section of a hybrid scheme. A hybrid scheme in this instance was a pension scheme with two sections – a defined contribution (DC) and a defined benefit (DB) section. The complainant was a member of the scheme on a defined contribution basis. The scheme was in difficulty and the scheme actuary had recommended that, among other things, the employer should increase his contribution rate to 34% of payroll. The employer determined that he could not afford this and indicated he was terminating his liability to contribute to the scheme and was establishing a new DC scheme for all employees. The trustees were left with no alternative but to initiate a wind-up of the scheme. The trustees noted that if the DB section of the scheme was to be treated in isolation, transfer values for the DB members would be reduced by approximately 49%. However, if the assets and liabilities in respect of the DC section were included the abatements across all members would be 36%. The complainant considered it unfair that the assets of the DC section should be used in this way.

My concerns related to whether or not it was correct, having regard to the provisions of the Definitive Trust Deed and Rules, the Pensions Act and trust law generally, for the trustee to reduce benefits for active and deferred members in both the DB and the DC sections as opposed to limiting any adjustment to the DB members only and providing 100% of benefits to the DC members in the event of a wind-up.

Outcome

In general, the Pensions Act gives a member of a funded scheme the right to a transfer payment to another scheme or arrangement instead of preserved benefit. The transfer payment in respect of a preserved benefit or part of a preserved benefit which has been determined on a DB basis is the actuarial value of such preserved benefit. The Act also provides that such transfer payments must be calculated in accordance with any guidelines issued by the Society of Actuaries in Ireland (or with any other applicable guidelines) and specified in regulation. The transfer payment in respect of a preserved benefit or part of a preserved benefit which has been determined on a DC basis is the accumulated value of the appropriate contributions which relate thereto.

As can be seen, there are two distinct methods of calculating preserved benefits depending on the type of scheme involved. The trustees took legal advice on this issue and also sought advice from the Pensions Board. As a result of the advice received from both these sources, the trustees were of the opinion that the trust deed and the Pensions Act required them to treat the scheme as if it were a DB scheme and to abate equally the benefits of all members of the scheme in the event of a deficit on winding-up.

In my consideration of this approach I reviewed the trust deed and rules. Clause 17 of the trust deed dealt with winding-up of the scheme and refers to the “remaining assets comprising the Fund” being applied to secure benefits. The ‘Fund’ was defined in the Trust Deed and Rules as “... the assets held by the Trustees for the purpose of the Scheme.” A ‘member’ was defined as any person admitted to membership pursuant to Rule 2, which provides for entitlements to benefits “in accordance with the Schedule under which [the employee] qualifies as an Eligible Employee....” The related schedules are Schedule Two for DC members and Schedule Three for DB members.

Schedule Two of the trust deed and rules refers to a "Member's Account" which means in respect of a member, the amount credited to his account in accordance with the rules. Rule 3(d) of the Second Schedule provides that:

> "The Trustee shall keep an account in respect of each Member (to be called "the Member's Account") of the cash sum which in their opinion having regard to the advice of the Actuary is equal to that proportion of the value of the Fund attributable to the total interest of the Member (relative to all other Members) in the Scheme ..."

Under the Pensions Act, when a scheme is wound-up and not replaced, members still in employment who have met the qualifying condition become entitled to a preserved benefit at the date of winding-up as if there has been a termination of relevant employment. However, where a scheme is wound-up and replaced with a new scheme (e.g. a DB scheme replaced by a DC scheme) and the replacement scheme applies to such employees, no entitlement to a preserved benefit arises unless or until their relevant employment subsequently terminates.

In the event of a scheme winding up, however, the trustees are required to apply the resources of the scheme in accordance with Part IV of the Act. In particular, the trustees may secure benefits by making a transfer payment or payments to another scheme or to an approved insurance policy or contract. This scheme combined both DB and DC members. The DC members' accounts form part of the fund which in turn is applied to secure benefits for all the members.

I discussed this issue with the Pensions Board, and they confirmed to me that they are satisfied that a scheme established on this basis should be wound up as if the scheme is a DB scheme. The Board's view was that it is a hybrid scheme. The Pensions Act refers to 'hybrid schemes' as schemes where an element of retirement benefits is calculated on a DB basis and another element is calculated on a DC basis, the designated benefit in relation to each element being calculated separately on the appropriate basis. I considered this description to be intended to describe situations where an individual member's benefits were a mix of DB and DC basis and it did not therefore apply cleanly to the scheme in question.

However, this was an unusual situation whereby the scheme itself had two elements. While this type of scheme operates reasonably well when things are going well, difficulties clearly arise when the scheme goes into winding-up with a deficit. That said I could see no obstacle under the trust deed and rules, the Pensions Act or trust law generally, to the trustees abating the DC members in the same manner as the DB members and I was satisfied that the employer and the trustees were acting in good faith in dealing with the winding-up. In this regard, they informed me that the employer had agreed to make three additional special contributions over three years to make up the shortfall in the DC members transfer values should they opt to join the new DC scheme. For DB members, it is intended to pay an additional 1.5% of basic annual salary for each year of service over the shorter of the member's term to retirement, or five years.

Taking all of this into account, I could not see any merit in commencing an investigation under Section 131 of the Pensions Act and I instructed that the complainant and respondents be advised accordingly.

PUBLIC SERVICE SCHEME – CALCULATION OF ARREARS OF CONTRIBUTIONS – INSURABILITY OF EMPLOYMENT

Background

The complainant was employed in a part-time capacity by a public sector employer, to which the Local Government Superannuation Scheme (LGSS) applies, from 16 July 1986 to 16 February 2003 when she was appointed as a permanent officer. She retired in February 2004. The complainant argued that the employer erred in placing her on Class A social insurance on her appointment to a permanent and pensionable position and that this caused financial loss to her by way of (a) the calculation of her pension entitlements under the LGSS and (b) on the cost to her of her liability to reckon previous temporary service. She argued that as she was in continuous employment up to her appointment to a permanent and pensionable position she was entitled to have the modified rate of social insurance applied to her.

Outcome

On examination, it quickly became apparent that this was more a question as to the proper insurability of the employment than an occupational pensions issue *per se*. The individual in question had had a number of small 'breaks in service' during which she claimed unemployment benefit; and it appeared that, on the basis of these breaks, the employer decided that her contract had terminated, and treated her as a new entrant to the public service. As decisions as to insurability of employment are more appropriate to the Department of Social and Family Affairs, I referred the matter to Scope Section of that Department. Scope Section is the section of that Department responsible for deciding on insurability of employment issues in accordance with common and statute law and any decision they make is then open to appeal to the Social Welfare Appeals Office, which is an independent body. In making the referral, I asked about the definition of 'break in service' being used by Scope Section and queried whether the fact that a person simply had 'credits' on his or her social insurance record necessarily meant a break in service within the ordinary meaning of employment legislation.

Scope Section found that the complainant did not in fact have a break in service. The Deciding Officer explained that the reason behind his decision is that casual claims of unemployment benefit do not necessarily constitute a break in service under the Social Welfare (Consolidated Contributions & Insurability) Regulations, 1996 – S.I. No 312 of 1996, the governing Regulation. As a result of this decision, a revised pension and liability for pension contributions issued for the complainant which reflected the fact she was insurable under a modified class of social insurance.

This decision may well have implications for other cases in other public service employments which have similar provisions in their pension schemes.

Note: Another case relating to similar circumstances was also referred to Scope Section during 2005 for decision. Scope again found that the complainant was properly insurable at the modified rate of social insurance. A further case, with slightly different circumstances, was referred during the year, in which it was determined that there had been a valid break in service and that the complainant was therefore properly insurable at the full rate of social insurance. These cases are important in an occupational pensions context because of the knock-on effect which

the treatment of members for social insurance purposes has on their treatment for pension purposes within the schemes and can have a significant impact on the cost of buying back pre-scheme service.

PUBLIC SERVICE SCHEME – TRANSFER OF SERVICE – 'KNOCK FOR KNOCK' BASIS

Background

This case related to the transfer of service between the Local Government Superannuation Scheme (LGSS) and a university. The complainant had been employed in a public service organisation to which the LGSS applied and resigned to take up employment with a Dublin university. The complainant applied to transfer 32.858 years reckonable service to the university under the Local Government (Transfer of Service) Scheme, 1984. The university is a listed member of the scheme on a 'knock for knock' basis which means that the receiving authority or employer will take account of all transferred service without transfer values being involved. The organisation from which she resigned confirmed to the complainant that the service had been transferred on this basis, but the receiving authority, the university, refused to accept it on a 'knock for knock' basis and informed the complainant that the transfer between organisations on a 'knock for knock' basis was never automatic and that it was most likely that the transfer for the complainant would be based on a transfer amount which would purchase years in the university scheme.

Outcome

The Department of the Environment, Heritage & Local Government which is the Department responsible for policy matters on the LGSS, expressed surprise that an organisation which originally agreed to enter the transfer scheme on a 'knock for knock' basis would now attempt to move away from it. However, the Department pointed out that the system provided for a preferred option and that this is not set in stone. It was also pointed out that, under the scheme, each organisation is supposed to agree the actual method of transfer with the other – the transfer scheme is effectively an umbrella for a series of bilateral agreements. Following consultation with the trustees of the university scheme, they agreed to accept this transfer on a 'knock for knock' basis and informed me that they are reviewing their preferred membership option.

PUBLIC SERVICE SCHEME – REFUSAL TO ACCEPT A TRANSFER VALUE FROM A FUNDED SCHEME TO A NON-FUNDED SCHEME

Background

This complaint related to the refusal of a public sector organisation to accept a transfer value from a funded pension scheme in the United Kingdom. The complainant was advised by the organisation that there was no provision within the scheme to provide for the acceptance of a transfer value from the UK into their scheme and that there was no indication of any transfer arrangement being introduced in the near future.

Outcome

There appeared to be some confusion in the respondent organisation about this. Prior to 1996, a person entering public service employment from the private sector could use a transfer value from a private sector scheme to secure some service credit under the public service scheme. However, the Pensions (Amendment) Act 1996, introduced changes that effectively barred paying a transfer value from a funded scheme into a non-funded scheme. This meant that the majority of public sector schemes could not accept such transfers. This prohibition was later removed by Section 22 of the Pensions (Amendment) Act, 2002.

I contacted the organisation involved and informed them of this and requested that they review their decision not to accept the transfer value from the UK scheme.

This complaint again highlights the need for pension scheme administrators to be aware of technical changes to the Pensions Act, which are made almost every year. This applies especially to the administrators of public service schemes who, because they are administering schemes that are often exempt from certain parts of the Pensions Act, may not pay as much attention as they should to changes introduced in other parts of the Act.

PUBLIC SECTOR SCHEME – ILL-HEALTH PROVISIONS WHILE ON PRESERVED BENEFIT – REVISED DATE OF AWARD OF PENSION

Background

This complainant was made redundant by a local authority in November 2003 and left service with a preserved benefit entitlement. He initially claimed unemployment benefit and assistance but later became ill and claimed disability benefit. His initial complaint to me revolved around his attempt to get a refund of contributions from the scheme. He argued that the rules had changed during his employment, adjusting down from five years to two for compulsory preservation of benefits and that this was unfair.

Outcome

As the complainant had more than two years' actual service, there was nothing I could do regarding the refund of his pension contributions. However, given his medical circumstances I wondered why he was not getting an ill-health pension from the scheme if his disability was considered permanent and I advised his legal representative to this effect. As a result, he claimed an ill-health pension and this claim was successful, payable from the date on which the claim was made. However, this led to a second complaint – this time about the award date of the pension. I pointed out to the complainant that, to be fair to the trustees of the scheme, they could only consider an ill-health pension when they were made aware of the illness. However, if the complainant could provide medical evidence that he was permanently unfit for work from an earlier date, I would expect the trustees to give fair consideration to it. The complainant provided the medical evidence and the trustees revised the award date.

This complaint also raised issues relating to the provision of information to people with preserved benefit entitlements. It was clear that the complainant, and his legal representatives, had no idea that he might have been entitled to an ill-health pension payable immediately. The local authority concerned informed me that it is their practice to inform all employees leaving service of their entitlements and they presented a copy of a standard letter used for this purpose. This letter does indeed refer to the possibility of preserved benefits being paid early in the event of permanent infirmity. However, the local authority could not confirm that such a letter had, in fact, issued to the complainant. It is also clear that the local authority became aware of the complainant's general ill health when he originally applied for a refund of contributions. However, while they informed him that he was not entitled to any refund, they failed to inform him of the possibility of an ill-health pension, subject of course to his satisfying certain conditions.

PUBLIC SERVICE SCHEME – NOTIONAL SERVICE – MALADMINISTRATION LEADING TO UNDERPAYMENT

Background

This complaint related to a 'purchase of service' scheme (notional service scheme) operated in the Civil Service. The complainant was working on a job-sharing basis and agreed to purchase 9 years and 109 days in order to have maximum pensionable service of 40 years at age 65. The Department concerned wrote to her on 7 May 1996 informing her that, provided she continued in service and had no service without pay, she would have full service at age 65 by contributing an additional 6.51% of salary from 12 July 1996 to 11 July 2022. She was informed that the cost of buying one year of service based on her age at the time was 0.7% of salary and that the cost of buying the full period was therefore 6.51% (0.7% x 9.3 years). She replied in writing on 19 June 1996 agreeing to purchase the period of service concerned.

She was contacted by the Department in June 2003 and informed that a discrepancy in relation to her notional service deductions had come to their attention. The Department stated that, in order to purchase the 9 years and 109 days, she should have been paying 6.51% of the full-time salary and not her job-sharing salary. This had led to an underpayment of €7,748.78 at that time and she was asked to contact them with a view to arranging a suitable means of redressing the situation. The complainant was obviously dissatisfied and upset by this and initially sought to have the Department make good this shortfall which was, as she claimed, due to their error. The Department confirmed to her in November 2003 that they were not in a position to waive or negotiate the underpayment and offered a seven-year period in which to pay the arrears due (this reflected the period over which the incorrect deductions were made). The Department also indicated that it would have no objection in recouping the monies over a longer period provided that it is paid in advance of her reaching age 65 in 2022, or her actual retirement date, if earlier. The Department accepted that there was an administrative error on their part and regretted the inconvenience but clearly indicated that unless the complainant made good the shortfall she would be short service at normal retirement age.

The complaint then became subject to a long running exchange of correspondence between the Department and the complainant's trade union. Her trade union proposed that she be allowed repay the amount due by way of deduction from her lump sum at retirement. However, the Department refused this, stating that one of the core principles of the scheme was that it was self-financing, and that to allow her make any outstanding repayment by way of lump sum deduction (which at the earliest would be in 13 years time) would result in the purchase being made on 'reduced rates'. The Department then pointed out that there was in fact no 'underpayment' and that there was no obligation on the complainant to pay this money. Failure to pay would simply result in her having less service at retirement than intended, as she would benefit only from the value of the contributions actually paid. They also advised that if the complainant were to consider purchasing this shortfall of years, she would have to enter a further separate periodic agreement which would be based on a rate appropriate to her age next birthday (this would obviously be higher than the 0.7% quoted back in 1996).

Outcome

The complainant brought her complaint to me and I was immediately struck by the simplicity of the facts:

1. The Department had erred in the manner in which they implemented the complainant's agreement to purchase service and indeed had admitted this in June 2003.

2. The complainant had been copied with the relevant circular, dated June 1994, when she applied to purchase the years. This circular related to the extension of the purchase scheme to job-sharers and it clearly stated that 'salary' means twice the actual rate of the officer's job-sharing pay.

3. The offer to allow the complainant pay the outstanding amount over seven years appeared reasonable.

4. The apparent withdrawal of this offer by the Department appeared to be unreasonable.

Following consultations between the Department concerned, the Department of Finance and my Office, the employing Department agreed "on an exceptional basis" to allow the complainant the option of repaying the amount over a period no longer than seven years, on the understanding that the repayment would be commenced immediately. I considered this a fair and reasonable resolution of the matter.

PUBLIC SERVICE SCHEME – DATE OF ACTUAL RETIREMENT – AVC – SINGLE PREMIUM PAYMENT

Background

This complaint related to the manner in which a request for permanent ill-health pension was dealt with. The complainant was a nurse who had been out on sick leave since July 2002. She applied for retirement on ill-health grounds towards the end of 2002. During the period July 2002 to December 2003 the complainant attended for medical consultations on a number of occasions on the request of her employer. The last such consultation was on 5 December 2003. In the intervening period, the complainant also contacted the company administering her AVC scheme and made enquiries about making a single lump sum contribution in advance of retirement on ill-health grounds. She was advised to obtain details of what ill-health pension entitlements she would be entitled to and to provide an actual retirement date. While she received details of possible benefits, she did not forward them to the AVC administrators as she had no retirement date to work from.

The complainant then received a letter from the employer on 14 January 2004 informing her that her retirement on the grounds of ill health had been approved. When she contacted the employer by phone to request details of benefits and the date from which she would retire – as she was considering making a single premium payment in to her AVC scheme – she was informed that she had in fact been retired since 18 December 2003!

She was also informed that as there was no formal application for retirement on ill-health grounds from her, she would have to fill in an application and was advised to put a current date on this letter of application. She then submitted a written application for retirement on the grounds of ill health and requested a retirement date of either 20 January 2004 or 10 March 2004, the date on which her existing period of approved pension rate of pay would cease. However, even on appeal, the employer insisted that the date of retirement was 18 December 2003 as this was the date on which the medical professional had certified her as permanently unfit for work. The AVC administrators informed her that it was now too late to make any additional contributions to the AVC scheme as she had already retired.

Outcome

The scheme involved was a public service scheme. The date of retirement is important to the complainant, both from an AVC point of view and from the calculation of her lump sum, due to the fact that a benchmarking award had become payable in January 2004. I wrote to the employer informing them that my understanding of the scheme from which the complainant retired was that the effective date of cesser of office can be taken as the last day of paid service where sick pay (or pension rate of pay) was paid after the date of signing of a Certificate of Permanent Infirmity; provided that such payment was not recouped. I noted that the employer had approved a further three months of pension rate of pay for the complainant on 15 December 2003 covering the period 11 December 2003 to 10 March 2004. The employer conceded that they had erred on this and agreed that the effective date for retirement should be 14 January 2004 – the date to which she was last paid. As a result of this, I contacted the Revenue Commissioners on behalf of the complainant and indicated that the complainant had, through no fault of her own, fallen foul of a Revenue requirement that she make any additional contributions to her AVC scheme in advance of her retirement. Revenue agreed by special concession that they would be prepared to reconsider allowing her make a single premium payment to her AVC scheme. I wrote to the AVC administrators to inform them of this and pointed out my concerns that they appeared to have made no effort to intercede with Revenue on the complainant's behalf given the very specific circumstances of this case. The AVC administrators accepted that their service could have been better and agreed to waive their charges on the handling of the single premium and liaised with the complainant's local Inspector of Taxes to ensure that proper balancing statements issued and that relevant tax relief was applied.

Leaving aside the technical error made in relation to the retirement date in a scheme which is complicated at the best of times, I find it appalling that any employer could write to an employee and inform her that she had been retired, without her knowledge, since the previous month. It displays a lack of consideration and basic good manners which do no credit to the organisation concerned.

AVC – DELAY IN DEALING WITH BENEFITS – FALLING VALUES

Background

This case related to a person who retired in January 2002 and asked the scheme administrators to set up a spouse's pension using his AVCs. The request was not acted on in a timely manner due to the person dealing with the matter going on maternity leave. When action was finally taken, the complainant was offered a guaranteed spouse's pension of €3,352 p.a. in August 2002. The complainant signed and returned the offer without delay. However, due to further inaction on the part of the administrators, the complainant was informed in January 2003 that the spouse's pension benefits were now only valued at €2,118 p.a. This resulted from falling AVC values in the intervening period. The value of the AVC fund in February 2002 was €10,729. At August 2002 it had fallen to €9,586 and by January 2003 it had fallen to €8,542.

Outcome

The complainant was initially advised to put his complaint through the pension scheme's Internal Disputes Resolution procedure. I was later made aware by the complainant that the scheme administrators had failed to comply with the statutory requirement to issue a Notice of Determination within the specified time limits. As a result, I contacted the scheme administrators and informed them that failure to meet the requirements of Article 5(3)(b)(i) of the Pensions Ombudsman Regulations (S.I. No. 397 of 2003) was a breach of the Pensions Act. Following this intervention and a number of discussions on the complaint itself, the scheme administrators agreed to honour the original value of the AVC fund at the date of retirement.