Pensions
OMBUDSMAN

Digest of Cases 2008

Mission Statement

To investigate and decide, in an independent and impartial manner, on complaints and disputes concerning occupational pension schemes, Personal Retirement Savings Accounts (PRSAs) and Trust RACs.

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DIGEST OF CASES

Introduction

As has been my practice since the establishment of my Office in 2003, I am publishing a Digest of Cases, to be read in conjunction with my Annual Report for 2008. The reasons for publishing the Digest are twofold. Firstly it allows those involved in the administration of pension schemes to see the range of complaints with which I have to deal. Secondly, the Digest gives the wider public a clearer picture of the type of work undertaken in my Office and fleshes out the more stark statistical information contained in the Annual Report.

Of course the overall objective is to increase the general knowledge base in relation to an area which at times can be very complex.

What follows are details of more than 30 cases drawn from the total of 639 cases which I closed last year. They give a flavour of the wide range of issues dealt with, ranging from the simple errors, misunderstandings, through misinterpretation of rules, to complex legal and actuarial issues. Provided that confidentiality is not breached or privacy endangered, my Office is pleased to discuss in principle the factors involved in any particular case.

Paul Kenny
Pensions Ombudsman

June 2009

Revenue restrictions on Death Benefit

This complaint concerned the alleged non payment of part of a death in service benefit. It was made by the son of a deceased scheme member, who was also the executor of the estate. A part of the insured death benefit had been paid to the estate of the deceased member but a very large balance remained unpaid. Following preliminary examination, it emerged that there had been an exchange of correspondence between solicitors for the employer and the executor. The matter was referred for Internal Disputes Resolution. Unfortunately, the trustees did not comply with the statutory time limit of three months for the issue of the Notice of Determination. However, when it was eventually issued, it became clear that the restriction on the payment of the death benefit arose from Revenue regulations. Under these, the maximum amount which can be paid tax-free as a lump sum under an occupational pension scheme is four times the final remuneration of the deceased member, plus a refund of the value of his/her own contributions. Anything in excess of this amount must be applied to the purchase of annuities for dependants. As there were no dependants in this case, the Revenue required that the balance of the proceeds of the insured benefit should revert to the employer, to be taxed in its hands as a trading receipt.

I considered that no further action was necessary, other than an explanation to the complainant, and the file was closed.

Transfer of AVCs to purchase Notional Service

In this complaint, it was alleged that an instruction given by a member of a public service AVC scheme to transfer his money to Notional Service Purchase (NSP) under the main scheme had not been acted upon by the trustees.

Upon investigation, it emerged that the instruction to make the transfer had been given by the employer at the request of the member, not by the member himself. The trustees required the specific instructions of the member as beneficial owner of the funds. They also had a requirement for a document to be signed by the member, so that they could be satisfied that the decision was made in the clear knowledge of the implications. The form asks if the matters of tax-free cash, Approved Retirement Funds, etc, have been explained and queries whether the member took financial advice before making the decision.

The reason for this requirement is that a transfer to NSP is irrevocable-once it is made, there is no going back.

As the complainant made allegations that the trustees had failed to co-operate with a projected transfer, the investigation looked at the records of the trustees, which documented a significant number of such transfers. It was clear that, where the member co-operates with the trustees' requirements for written instructions, the instructions to transfer have been routinely transmitted to investment managers on a same or next day basis.

Records furnished by the administrator revealed that the complainant had been in touch with them and had eventually decided not to make the transfer, as market conditions at the time would probably have crystallised a loss if he realised his AVC fund at that stage.

I rejected the complaint and remarked that I could not understand why, some six weeks after a decision was made not to move the money, a complaint was made to this Office. I was reluctant to believe that the complainant himself was responsible for such apparently irrational behaviour and could only conclude that the complaint was made at the urging of a third party.

COMMENT: Since the decision to transfer to NSP is a "*one way street*", trustees are amply justified in requiring the paper trail that they do, since they should not be required to take responsibility for personal decisions of members, whether made with or without a clear understanding of the implications of the decision, Revenue limits on tax-free cash and the right to invest AVCs as Approved Retirement Funds. Trustees making such transfers also need to be certain that funds being transferred are not in excess of the member's capacity

to purchase additional service under the NSP arrangement, as excess funds are of no further benefit to the member if they are transferred.

The purchase of notional service is an extremely valuable option available to members but it is not suitable for everyone's requirements, and in some cases may not even be available as an option. I am very disquieted by the possibility that scheme members could be misled into a transfer which is not to their benefit.

In this particular case, I did find that the administrators had given incorrect advice to the member, because they had not received a particular Circular which changed the rules on the purchase of added years by lump sum. It is not satisfactory that the rules of the main scheme in matters such as this can be altered without any notice to the trustees or administrators of AVC arrangements that live alongside the main scheme, as this is bound to cause problems. This is a matter which affects the whole public service, and not only the particular scheme involved in this complaint.

Annuity Rates Errors

Approximately one month prior to her 65th birthday, the complainant arranged for the administrators to be informed of her imminent retirement. She received her options and advised that she would take €22,515 as a tax free lump sum, with an annuity amount of €2,485.56 per annum (the maturity options were sent to the brokers on 20/07/07). This included a 50% widower's pension payable on death after retirement. She was advised that her first payment would be made on 1st September 2007 and was given the rate payable per month. She then got a letter some three months later from the administrators which quoted her pension at a rate that was 3.24% lower than was initially advised.

This office made enquiries of the administrators and was informed that the annuity quote offered was guaranteed for 10 days. The administrators did not receive the salary and service information required from the employers until 18/10/07. It was confirmed that the annuity rates then in force were less favourable than those quoted in July 2007.

Although this complainant initiated the retirement process in July 2007, due to poor communication between the companies involved and a lack of cross referencing, she suffered financial loss.

My office proposed to the administrators that they stand over the higher annuity rate and thereby restore her pension to an amount of €2,486 backdated to Sept 2007. They agreed with this proposal.

Investment of Transferred-in Benefits - DC assets in a DB Fund

This case took four years to resolve, partly because of the complexity of the issues, partly because of the number of parties involved, but to a very significant degree because of the lack of co-operation received by this Office, initially from the trustees of the scheme concerned, and throughout from the professional administrators of the scheme.

The complainant had transferred to an Irish employer from the United Kingdom, where he had retained pension benefits. Membership of the Irish defined benefit plan was compulsory. He decided to transfer his retained benefits to the Irish pension scheme, but did not discuss the implications of this or the terms and conditions of such a transfer with either the employer, the plan administrator or the trustees before effecting the transfer. When he received a benefit statement for the 2001 year there was no mention in this of the transferred funds. He queried this and later received a revised statement, showing the same plan benefits but with a footnote to the effect that a transfer value had been paid in at August 2000. On seeking further clarification, he was advised:

"The transfers in from your previous pension schemes will provide for additional pension benefits under the [new] plan. In the event of death in service the amount of the transfer in value representing employee contributions will be refunded…."

The complainant stated: "*From this I gathered the funds were tied in with the normal pension scheme and thought everything was ok*."

He assumed that, as the money was invested in a defined benefit plan, where the employer takes the investment risk, his transferred benefits would be safe. Only in 2004 did it emerge that, while the transfer value was certainly invested in the fund of a DB scheme, it was invested on a defined contribution (DC) basis (where the risk is taken by the member), and that the complainant had no say in how it was invested. He brought his complaint after learning that the value of these benefits had been considerably eroded.

I will not go into the details of the investigation which, particularly in its earlier stages, was hampered by delayed, incomplete responses from the trustees and administrators and in some cases none at all. The level of communication from the trustees improved once the professional trustee (who was not the administrator) became involved. However, the following emerged from the investigation:

- I accepted that in delegating the administration role to the administrator, the trustees acted within their powers and should have been able to rely on such professional providers to fully comply with the statutory requirements relating to such matters as disclosure and records maintenance. That said, the trustees could not delegate their *responsibility* for such matters.

- The administrator's failure to provide clear and sufficient information and to answer queries raised by the complainant led to his remaining in ignorance of the true nature of his transfer value investment under the scheme. He was thereby unaware of its exposure to risk and the need to monitor and perhaps address this matter.

- The administrator had been remiss in not raising with the trustees, until 2004, the implications and pitfalls of holding DC benefits within a DB plan. I had concerns that the existence of the DC module within the DB plan was not properly recorded in the Annual Reports and possibly proper account was not taken of its existence in the actuarial reviews. However, in the absence of a response from the administrator to enquiries raised by my Office on such matters during our investigation I could not know whether my concern was justified or not.

- A notification from the administrator sent to the plan members with transfers-in, inviting them to switch their transferred-in benefits into a DC arrangement used for additional voluntary contributions, was an appalling piece of communication, stating that this would ensure priority for these transferred benefits in the event of the scheme being wound up – which was quite simply untrue.

- I accepted that the trustees considered that they had been hampered in responding to some queries raised by my Office by their inability to obtain various documents from the administrator and by the fact that most of the then current trustees were not in office when the decision was taken in 2000 to invest the complainant's transfer value under the investment strategy applying to the defined benefit plan. In truth, there was no evidence that it was an actual decision, but it seems to have happened by default. That did not, however, absolve the trustees from the duty to be familiar with the plan and responsible for its proper management.

- There was no evidence that the trustees properly considered the question of how transfers-in should be invested. I would expect that this was a matter that the administrator (which was also the pension consultant to the employer), should have raised and consulted with the trustees on, but neither party has shown that this matter was given any consideration. I did not find fault with the investment strategy *per se* – but with the apparent lack of a process to consider and adopt an investment strategy that was suitable to the membership and the nature of the liabilities to be managed.

- I also considered that the trustees were remiss in their 2004 review of the management of transfers-in. When they were alerted in 2004 to the "problem" that existed in holding defined contributions within the defined benefit plan, action was taken to rectify it for the future. However, there was no evidence that the trustees considered the possibility that members had suffered financially because of the way their transferred-in benefits had been administered up to then.

It was my Final Determination in this case that the complainant had suffered financial loss under the Plan due to maladministration and was entitled to receive redress and I outlined a method for calculating this. The eventual loss was of the order of €17,500. However, I felt that the complainant should accept some responsibility for the problems that arose as he arranged for the transfer to be made without seeking clarification of the basis on which it would be accepted. I directed that the redress to be made to him should stand at €15,000, the settlement to be shared equally by the trustees of the plan and the administrator.

Application of benchmarking increase to former Civil Servant

The complainant had retired from the Civil Service. Following his retirement, his branch of the Civil Service had been transferred to a State-owned company. The company was requested to take on the administration and payment of all pensioners paid by the Department at that time. Liability for the payments remained with the Minister for Finance. Acting on written instruction from the relevant Department the company had increased the complainant's pension over the years in line with salary increases to serving staff within the company. That was the historic practice which was being disputed by the complainant, who contended that his pension should be increased by reference to movements in pay within the Civil Service itself.

He realised fully that he might have been overpaid in his pension relative to the Civil Service pay rates over a long period, but felt that his pension should be in line with Civil Service pay. It would therefore qualify for the 2003 "*Benchmarking*" award.

Following a lengthy investigation, the Department of Finance made a determination that the complainant was indeed entitled to be paid as a Civil Servant, as he had never transferred to the employment of the Company before he retired.

By that time, the arrears of the benchmarking payments due, and the overpayments made by the Company over the years, were almost the same. I made a determination that the scheme should pay the complainant the difference between the aggregate payments received since retirement and the total he should have received and increase his regular pension appropriately.

I was conscious that this increase for the complainant had financial implications for the Scheme and was likely to aggravate the position of insolvency in which it then found itself. I therefore required the Departments involved to put into place whatever arrangements might be required to ensure that the payment of this increase to the complainant did not increase the deficit between the actuarial liabilities and the total assets of the fund.

As I understand it, this case was unique, in that the complainant had consistently maintained at all times that he should have been paid in line with Civil Service grades, even when it was to his advantage to be paid otherwise.

Integrated versus Non-Integrated benefit entitlement

The complainant alleged that during the job interview process, he was advised by his prospective employer that the company operated a defined benefit non-integrated pension scheme. He was successful in his job application and joined the employer's service some months later.

However, in the interim the basis of the pension scheme had been altered for new entrants, to an integrated one. The complainant stated that when he joined service he was not advised that this alteration had occurred and assumed that his pension entitlement was on a non-integrated basis.

The complainant alleged that it was not until some years later, when he received a benefit statement, that he discovered he was included in the plan on an integrated basis. He argued that at his interview he was given an expectation of a non-integrated pension benefit and that this took place before the basis change under the pension scheme, and that the fact that he was credited with additional back service meant that his start date preceded the change date.

My Office reviewed the complaint and concluded that it was out of time, as the date of joining the pension scheme was earlier than the earliest date to which the Pensions Act permits me to look back.

In declining to take jurisdiction, my official explained to the complainant that the addition of a notional service credit did not alter his date of joining the scheme; that the employer had given no instructions to the trustees to augment his benefits beyond what the rules provided; that his contributions to the scheme had been calculated on an integrated salary basis; and that he had received annual benefit statements over the years which clearly showed his entitlements on that basis. Even if the complaint had not been out of time, I did not believe I could have upheld it.

Contributions paid for more than 40 years but benefit restricted to 40 years

The complainant started working in the Civil Service at the age of 17. At about 21 years of age he moved to another public sector organisation that had a contributory pension scheme. He contributed to that scheme for over nine years before rejoining the Civil Service. At this time, on the advice of the organisation, he transferred his service from the contributory scheme. By the time he retired in 2007 at the age of 65 the area of the Civil Service in which he was employed had become a commercial state-sponsored company and he had a total of 48 years and 45 days of reckonable service.

As the maximum reckonable service for pension computation was 40 years the complainant sought a refund of 8 years and 45 days worth of the contributions he had made to the contributory public sector scheme. The Trustees of the contributory pension scheme would not entertain his request. They maintained, rightly, that when he transferred his service on resignation they were no longer liable for any pension-related benefits. The commercial state-sponsored company claimed that their pension scheme did not have any provision for a refund of contribution to the public sector contributory scheme.

There was nothing that I could do for the complainant in this case. The rules of the scheme clearly place a maximum cap of 40 years service on which benefits will be calculated and there is no provision for refunding of contributions in excess of the 40 years.

This case does raise an important issue though. It is not uncommon for employees in the public service who retire at 65 to have over 40 years of service. These employees do not have the option of suspending contributions when they reach the level of service that will provide the maximum pension. Contributions must continue to be paid while the employee is still working in the public service. These contributions are not refundable and the employee will not receive any benefit from the excess contributions.

The public service superannuation schemes are widely considered to be generous and the contributions that public service employees make are thought of as good value for money. Public service pension schemes are generally unfunded schemes and the contributions that public service employees make do not directly fund the benefits that become available at retirement. However, the significant cost of providing the generous benefits is one reason for the mandatory payment of excess contributions in the public service.

Pensions and retirement gratuities in the public service at large are based on pay at point of retirement and, for most people, this tends to be the highest pay rates of their whole career. It is right that the employee will pay contributions based on the pay that is actually pensionable. In principle, if an employee has contributed for more than forty years, it is the contributions that were made at the start of the employee's career that are the "excess contributions", and these are likely to be tiny compared with those made at the end of a career.

Having said that the policy of limiting credited service to 40 years gives rise to the situation of public servants who retire on full pension and subsequently return to work in the public service, often in a part-time, temporary or substitute capacity, and who must pay a pension contribution from which they can never receive any entitlement.

As the health and life expectancy of the population generally is improving there are more and more people who, although retired, are willing and able to continue to provide the benefit of their experience and knowledge to the workforce. The mandatory payment of excess contributions does not act as incentive for those who could continue working as they get older. This situation may have to change in the future if we need to encourage older people to remain in or rejoin the workforce.

Delay in paying benefits

This complaint concerned the delay in paying pension benefits resulting in financial loss. The complainant retired at the end of May 2007 and had advised the administrator ahead of that date as to how he wished to receive his retirement benefits and had submitted all the necessary certificates and bank details to them.

He received his tax free lump sum in July 2007, but was not informed that the amount he received included Additional Voluntary Contributions (AVCs). His monthly pension payment was then delayed.

My office received his complaint in October 2007 and we made contact with the administrators of the scheme in order to gain some perspective on this complaint. The initial request for information was made in October 2007. However, it was September 2008 (and many reminders in between) before I received the information requested. This is an unacceptable delay in getting a response from administrators, but it reinforced what the complainant had said about the delays and inefficiencies of the administrator.

The response that was finally received from the administrator claimed that the initial pension payment quoted was lower than the actual pension that was secured for him. They acknowledged a delay in setting up the pension and gave an outline of how this had happened.

They contended that the pension could not have been paid any earlier due to the time involved in processing his last contribution, purchasing units and then disinvesting the pension fund. They stated that the rise in the actual pension was because the remaining retirement fund was reinvested with the investment manager.

The administrators then made an offer as a full and final settlement on this case, which the complainant accepted.

In future cases involving this particular administrator – which is a very large firm – prosecution will be considered for failure to comply with statutory requests for information, within the time limits allowed by the Pensions Act.

Delay in setting up pension

This complaint was received in October 2007. The complainant had retired in November 2000. He advised the scheme administrator that he wanted a single life pension with no escalation, payable monthly in advance and guaranteed for 5 years.

He got his Tax Free Lump Sum in 2001, and maintained that he was advised that the remaining money would be "invested". He contacted the administrator in 2005 and was told by them that a number of letters had been sent to him over the years, which he claims he did not receive. He was informed that he was entitled to €32 per week for the previous 6 years which had gone unpaid.

A cheque for €28,353.60 (the balance of the fund) had been sent to the scheme administrator in June 2004, which included late payment interest.

In May 2006 – almost two years later – the administrator returned the cheque and asked for the monies to be reinvested in the complainant's pension. As the balance of the fund was processed as part of a retirement claim the insurance company were unable to reinvest monies and subsequently reissued the cheque to the administrator.

The insurance company involved advised this office that they had reviewed the complainant's case and were not happy with the calculations. They carried out a comprehensive review of the case.

In August 2007 the administrator contacted the insurance company to request confirmation of the level of late payment interest that had been added to the balance of the complainant's fund. In an additional letter the administrator explained that it felt the insurance company was responsible for paying the annuity payment that the member had not received between 2001 and 2004. The administrator confirmed that the second cheque of May 2006 had not been cashed and no annuity had been set up for the complainant. The insurance company advised that they appreciated that they were partially responsible for the delay in the complainant's annuity payments being set up and as a result had increased the late payment interest that they paid. A cheque for €31,254 was sent to the administrator in October 2007 and included €4,625 in late payment interest. This enabled the complainant's pension of €32 per week to be set up and backdated to November 2000. With interest added to the earlier instalments, this resulted in a payment to the complainant of €13,500 gross (€10,750 after tax).

This Office was of the opinion that the insurance company in this case actively co-operated with this query and took immediate charge of resolving the matter. The conduct of the administrator, which was also the broker in this case, was careless to the point of being disgraceful.

Dispute over early retirement decision

This case was the subject of a very lengthy investigation leading to a Final Determination.

The complainant alleged that he had been pressured into a decision to take early retirement in the course of a redundancy programme of his employer and that, in hindsight, he would have been better off to have left employment and deferred his benefits. This was because the early retirement pension was "co-ordinated" with State Pension, while a deferred benefit would become unco-ordinated. He claimed that the scheme had failed to give him information he had requested prior to making his decision.

In the course of the investigation it emerged that the complainant had retired about 16 months into a voluntary redundancy programme that was scheduled to be open for three full years, that he had a very sophisticated AVC arrangement, designed to maximize his scheme pension, and that his primary reason for choosing the date of his retirement was to prevent any further increases in State Pension from affecting his scheme pension.

The eventual determination noted that he had received considerable amounts of benefit over the period for which his pension would have been deferred, and that he had benefited from statutory redundancy payments which he would not have received if he simply left the employment, as he now alleged he would have done.

I determined that it was not possible to deal in entirely speculative situations – "*What if*" scenarios - as to what might have happened, had different decisions been made. I found that there was no pressure on him to retire when he did, and that two "*comparators*" cited by his representatives were actually employed by a different company which did not participate in the scheme concerned.

The complaint was not upheld.

COMMENT: This case was notable for the intervention on the complainant's behalf of a retired colleague, who had in the past been a trustee of the scheme in question. He chose to respond to the preliminary view which I issued, and it was clear that he had raised the matter with his co-trustees in the past. I had to point out that he was bound by the decision to which, as a trustee, he was a party, even if he did not agree with it at the time, and he could not seek to repudiate it later. The intervention was entirely inappropriate.

Distribution of Death-in-Service benefits

In this case the pension scheme member died while still in employment. A Death-in-Service benefit was payable.

The complainant had been in a long term relationship with the deceased member and was the mother of his daughter. At the time of his death the relationship had ended and he was living with his own mother. However, he had remained in his daughter's life and they had a close relationship.

The trustees exercised their discretionary power to distribute the Death-in-Service benefit. They awarded 50% of the benefit to the member's mother and 50% to his daughter.

The complainant felt that the decision of the trustees was biased. She felt that the trustees made a decision on the distribution of the death benefit without any attempt to consult her, the legal guardian of the child of the deceased member, or to obtain any information other than from a third party.

I do not have power to substitute a decision of mine for a decision of the trustees taken under the terms of a discretionary power. I am, however, obliged to decide whether that discretionary power was properly used and whether the decision arrived at by the trustees was arrived at in a procedurally correct manner. If the trustees had not followed proper procedures, my power would be limited to remitting the matter back to them for review, employing whatever safeguards I might recommend to them.

In considering this case I consulted the Scheme Rules. These indicated that, in the absence of a will or of a written communication to the trustees identifying persons he would wish them to consider as recipients of his benefits (commonly called a "wishes" letter), the benefits should be paid to *dependants* of the member. As there was no will or wishes letter in this case the trustees decided to distribute the benefit to the member's dependants.

The trustees were entitled to assume co-dependency of the mother with whom the deceased member was living at the time of his death. Although the trustees had not consulted the complainant, who was the mother of the dependent child, they nevertheless ascertained that the deceased member had in fact been contributing to the child's maintenance. Provided that the trustees had some means of satisfying themselves as to the dependency of the child they were under no explicit obligation to consult with the complainant.

In the circumstances, I was satisfied that the trustees had exercised due care and diligence in coming to their decision and I did not uphold the complaint.

Early retirement does not breach rules of special retirement initiative

Some employees in the health sector have had access to a special scheme called the Pre-retirement Initiative. Eligible employees must be over 55 and have at least 20 years of pensionable service completed. Access to the scheme was limited. At the time of its introduction in 1997 the scheme was limited to 600 employees over a three year period.

Employees who were accepted for the scheme worked on a job-sharing basis for a maximum of five years prior to retirement and must retire on completion of the job-sharing period and not later than attaining the age of 60. Under the scheme the job-sharing period is treated as full-time service for superannuation purposes.

The complainant in this case was accepted into the scheme with effect from her 55th birthday. She was informed that she would have to retire on reaching the age of 60 and that if she returned to full-time employment or remained in employment after 60 the service given under the initiative would only count as job-sharing service, as opposed to full time service, for superannuation purposes.

Due to unforeseen circumstances the employee had to retire before reaching the age of 60. Her employer in the health sector informed her that this invalidated the terms of the Pre-retirement Initiative and that her service under the scheme would have to be treated as job-sharing service when calculating her retirement benefits.

She was unhappy about this and appealed the decision to her employer. The employer told her that the Department of Health and Children had confirmed that she had invalidated the terms of the scheme by retiring before 60, although I am not sure that the Department fully appreciated the question asked. At this point the complainant contacted my Office and was asked to submit all of the relevant documentation for examination.

As there was nothing in the documentation or the terms of the scheme that would indicate that retirement before 60 would invalidate the terms of the scheme my Office contacted the Department of Health and Children on the matter. The Department revisited the matter and subsequently confirmed that where an employee has service under the Pre-retirement initiative and retires before completing the programme (i.e. before reaching 60) the job-sharing service given will count as full-time service.

The complainant and her employer were notified accordingly and the matter was resolved before I needed to initiate a formal investigation.

Failure to notify options

The complainant left her employment and contacted the scheme administrator at that time requesting a pension entitlement statement and was advised that she had three options (deferred benefit, transfer to a new employer scheme or transfer to a buy out bond). When her first statement was received a few days later it showed three options and suggested there might be a fourth option open to persons over age 50. As she was in this category she asked for details of the fourth option – i.e. immediate early retirement. A second statement issued a month later did not show any early retirement option.

The insurance company with which the money was invested sent out her immediate pension/lump sum options in a statement dated two weeks later and issued this with an attaching maturity option form to the administrator. The total fund value at this time was €19,018. The statement made no mention of the taxable cash "*triviality*"⋆ option, but this was one of the options listed on the maturity form. It appears that the administrator sent the complainant the statement but not the option form and did not alert her to the possibility of taking a taxable lump sum on triviality grounds.

⋆ An option available under Revenue rules, which enables small pensions to be encashed, subject to tax where appropriate.

The complainant alleged that, as she was not having much success in getting direction or assistance from the administrator, she contacted the insurer directly and advised that she wished to avail of the immediate lump sum and reduced pension option. At this time she was unaware that she had the option of receiving a taxable lump sum instead of the residual pension. She supplied the insurers with a copy of her birth certificate and they undertook to get any other details required directly from the employer. They sent a request for information and maturity option form to the employer within a week. It is not clear if the administrator was advised of the contact between the other parties.

It transpired that, rather than responding to the insurer, the employer responded promptly to the administrator, who appeared to be unaware of the complainant's exercise of her retirement option. It is alleged that the administrator took no action on the matter for two months. The administrator then declared that they had not received confirmation of the complainant's option choice and went on to advise her that she had a further option to consider – the trivial pension option listed on the original maturity form. The complainant then accepted this option and the trustees signed the maturity option form four days later. The administrator submitted it to the insurer who paid out the benefit, at which time its total value was €16,600.

After raising numerous issues with the administrator and the insurer in this case, I received comprehensive responses. The insurer made an offer of €800 as compensation. The basis of the offer was not explained so this Office could not comment on whether it could be regarded as being reasonable.

My view on this case was that as the complainant was over age 50 at time of leaving service and her immediate fund value was less than €20,000, she should have been given early retirement options (to include taxable lump sum on triviality grounds from the start of the process). It should not have taken more than six weeks to notify her of these. She had proved that she acted promptly in making her choice of benefit and having trustee approval forms completed. As a result of the foregoing, I believed it reasonable to assume that the benefit payment could have paid to her more promptly had she received full disclosure of her options in the first place.

The amount of financial loss here was the difference between the fund value in mid-November 2007 value and the €16,600 value paid at the end of January 2008. An enhanced settlement offer was made by the insurers and the complainant was happy to accept it.

Wrongful inclusion in pension Scheme – intervention of Preservation Rule

A complaint was received from a trade union official on behalf of three employees, alleging that they had been wrongly included in a pension scheme. It was deposed that the employees had been told in error that membership of the plan was a condition of their employment. It was further alleged that, when another group of employees later contested the compulsory nature of scheme membership, it was admitted that membership was voluntary. The complainants then requested a refund of the contributions deducted from their pay. But by this time, more than two years had elapsed since their induction into the scheme, and they were told that, because of preservation requirements under the Pensions Act, the contributions in question could not be refunded; while they could now leave the scheme, benefits already accrued would have to stand as preserved. The employees concerned were migrant workers.

I determined that the complaint made should not be formally investigated, as it was clear from the papers supplied that a mistake had been made by the employer, and that this had been admitted. The problem was that the employer and the trustees could not see how the consequences of the error could be undone, as the Pensions Act intervened, given that the complainants has been in membership of the scheme for a period exceeding two years, which required that benefits be preserved even if they subsequently ceased to be members of the scheme.

Having reviewed the papers provided with the complaints, I decided, as a matter of law, that the complainants could not properly be included as members of a pension scheme without their express consent. There was no evidence that they had completed application forms for membership of a pension scheme, so that consent appeared to be lacking. There was evidence, moreover, that the complainants had contested their original induction into the scheme, and acquiesced in it only following representations from the employer that such membership was a condition of employment, a contention now admitted by the employer to have been incorrect.

I further concluded that, as a matter of law, the employer could not and should not have deducted contributions from the pay of the complainants without their express consent. There was no evidence that such consent was given. Even if it was, it would have been obtained as a result of misrepresentation.

It appeared probable that the employer was already aware, prior to the end of 2006, that membership of the scheme was not a condition of employment for the complainants. That being the case, if contributions had been suspended prior to the end of December 2006, the question of preservation of benefits under the Pensions Act would not have arisen, and the matter could have been sorted out to the extent, at least, that contributions could have been refunded to the complainants when they left employment. I directed the employer to refund the contributions through the payroll.

Failure to permit opt-out

This case involved another migrant worker in the same employment as in the previous case. The issue here was that, at a time when some of her colleagues were allowed to opt out of the pension scheme, this complainant was on leave and therefore did not receive a refund of her contributions at the same time as the others.

A message sent from one company executive to another referred to the fact that "*one or two employees [were] on holidays and [a named individual] will speak to these about their options to waive on their return*".

This was apparently never done and, when the complainant made an approach for her entitled payment to be paid, it appears that the company refused, on the basis that the matter "*had been closed*".

The earlier e-mail also stated "*I have also attached a list of the total contributions paid by each applicable employee and will be requesting that this is disinvested from the fund and refunded to each employee less tax.*" Payroll was to be instructed to cease pension deductions immediately. Clearly this was not done in the case of the complainant, as contributions continued to be deducted from her.

I wrote to the employer, expressing my view that this complainant should be treated in the same way as her colleagues, and not be penalised for the fact that she was missing at the time when the option to waive membership of the pension scheme was afforded to them.

The employer agreed to proceed on this basis and also undertook to ensure that future contracts of employment will have membership of the company's pension scheme stated as a condition of employment where appropriate.

Comment: In this context, I have a great deal of sympathy with the employees concerned and believe that it is unfortunate that the present requirements of the Pensions Act mean that they will opt out of a pension scheme where they can, or in some cases even leave the employment within two years in order to ensure that they get a refund of contributions. This is not particularly productive and I am worried that, in some cases employees will opt out of pension schemes which carry Death in Service benefits and that their dependants will have no entitlement in the event of their death.

In my submission on the Pensions Green Paper, I proposed that there should be an exception made for persons who are not nationals of a state in the European Economic Area and that preservation should not apply to such people until they have been five years in membership of pension schemes. Under this proposal, anyone leaving in less than five years would be entitled to take a refund of the contributions made by and for them, subject to tax, provided that they were permanently leaving Ireland and did not retain any right of residence.

I do not know how this proposal is likely to be regarded by the authorities but, personally I would prefer to see migrant workers covered by pension schemes

while they are here, without necessarily having to preserve benefits when they leave. The problems with preserving small benefits are that ultimately they may never be claimed; that, even if they are claimed, they will have to be paid in to a country where we have no double taxation agreement; and there will be added cost to the pensioner of converting into local currency on a regular basis.

Ill health early retirement

The complainant suffered a heart attack in June 2002 and as a result of this and other on-going medical problems went out on sick leave. He was in receipt of sick leave pay up to 30th September 2003. In August 2003 he applied for payment of an ill-health early retirement pension from the pension scheme.

In November 2003 he was advised by the Employer that his request for ill-health early retirement pension was not to be granted. The complainant, with support from his Union and with legal representation, challenged this decision.

Ten months later, the Employer agreed to grant him an ill-health early retirement pension from the Scheme, effective from then. The complainant maintained that payment of the ill-health early retirement pension should be back-dated to September 2003 to coincide with his request for same and the termination of the sick pay arrangements and continued to seek this benefit.

In February 2005 the Employer advised that they had "*decided that the appropriate date from which to make your early retirement on grounds of ill-health effective is 1st October 2003.*"

An ill-health early retirement benefit is not a Scheme entitlement that a member can lay claim to and allege financial loss if it is not paid in accordance with his expectation. The granting of an ill-health early retirement benefit under the Scheme is subject to the consent of the Employer. The granting of consent is not merely contingent on the submission of medical evidence or settlement of any costs involved – it is a broader power than that.

Following investigation, I acknowledged that the complainant had an arduous journey to get to the position of being granted the employer's consent for payment of ill-health early retirement benefit. I accepted that this caused him anxiety and stress and that he incurred expense in the making of his representations to the employer during this process. However my remit does not empower me to compensate him for such matters – the only award I can make is to ensure that he receives his correct entitlement under the Scheme Rules. The complainant did not have an automatic entitlement under the Scheme Rules to an ill-health early retirement benefit, and the only benefit payable to him is that which the employer, at its discretion, may grant him.

In exercising its discretion, the employer had a duty to satisfy itself that there was sufficient medical evidence to support a claim, that the provision of such a benefit would not jeopardise the funding of the Scheme or the provision of entitlements for the other scheme members and that it was prepared to consent to grant the complainant an ill-health early retirement benefit under the Scheme. In February 2005 the employer made its final decision on the matter and consented to pay the complainant an ill-health early retirement pension from the Scheme, backdated to October 2003. It was not within my power to alter, amend or substitute a decision of my own for this one.

While it is apparent that there were difficulties experienced in bringing the consent process to a timely conclusion I could not uphold this complaint or offer the complainant any redress in relation to his treatment under this process. However I did direct the employer to establish and declare a transparent procedure for dealing with future requests for ill-health early retirement, in the hope of avoiding a repeat of the sort of problems that occurred in this case.

There was a subsidiary complaint relating to additional voluntary contributions, in which the employer conceded that there had been maladministration and offered compensation. With a view to ensuring that such maladministration does not recur, I directed the trustees and administrator to look to the administrative procedures that applied under the Scheme, particularly those concerned with informing members of their AVC entitlements, and to ensure they are complied with.

The Disclosure requirements under Part V of the Pensions Act and the trustees' responsibilities as set out in Section 59 of the Act stipulate that the trustees must inform members of their scheme entitlements at various times, including at retirement. Good administrative practice would dictate that this includes valuing the AVC Fund, indicating the portion payable as a tax-free lump sum and outlining the annuity/ARF options. I did not consider that the trustees were fully complying with these requirements and properly fulfilling their responsibilities by merely quantifying the value of a member's AVC Fund and referring him to an independent financial advisor. The practice of referring a member to an independent financial advisor is actually a commendable one – but should only be done after the member has been properly informed by the trustees of his benefit entitlements and options under the main and the AVC schemes.

Part of the dispute centred on the act of disinvestment of the complainant's AVC Fund:-with the scheme administrator stating that he received the complainant's verbal agreement to take this action, while the latter vehemently denied giving such approval. While I understood why the complainant felt that this was a high-handed action, the trustees were acting within their powers to dis-invest the AVC monies–on the understanding that they had to get the funds under their control in preparation for maturing them. However, it would have been be a better administrative practice for them to obtain the member's written agreement before taking such action - thereby ensuring that no misunderstandings occurred and that the member was fully aware that his AVC fund had been dis-invested. I directed the trustees to adopt this practice for the future.

It is worth noting here that the employer also offered a payment of €300 to enable the complainant to take financial advice.

Maintenance of benefits following company merger

In this case the complainant's employer had been merged with another company. Members were promised at the time that the benefit structure which they had in the first employment would be maintained and that the pension they would receive in the new employment would be no less than what they would have been entitled to in the old. Maladministration was alleged, in that the calculation of the final retirement benefit received when the complainant retired early did not honour the promise originally made.

The whole issue centred on the manner in which Final Pensionable Salary was determined (an average over three years) and the fact that pensionable service was not "*capped*" at 40 years in the new scheme. The failure to cap service means that when a deferred benefit is calculated on the basis of a fraction – service completed divided by potential service- the result is a lower amount in proportion to service actually completed.⋆

In this case I issued a preliminary view. I rejected the complaint about averaging, but was inclined to find for the complainant on the calculation of deferred pension, which was the starting point for the early retirement calculation.

A very detailed submission was then received from the employer and the trustees, which addressed a number of matters mentioned in the preliminary view in great detail. It emerged that, following the transfer of the members of the old scheme to the new one, the rate at which future service benefits accrue had been increased. When that was taken into account, the resulting pension was in fact greater than the pension the complainant would have received had he remained in the old scheme.

Tracking of old deferred benefit entitlement

On the closure of the employer's business and pension scheme, the Complainant had been advised that his pension scheme entitlement would be transferred to an individual buy-out bond, but he never received full details of this. He contacted my Office in 2008 for assistance in tracing this bond, as both the employer and the broker who had dealt with his withdrawal were no longer trading.

⋆ An employee who joins at age 18 has potential service to age 65 of 47 years. If he leaves aged 53, his formula is 35/47 of pension expectation. If he had joined at age 25, it would be 28/40.

I could acknowledge that there appeared to be maladministration by the trustee and broker, in that the member was not given full details of his buy-out bond and that he had suffered financial loss as a result of the non-payment of his retirement benefits on reaching age 65. However, this case would have proved difficult to formally investigate in light of the lack of evidence and the absence of respondents.

Thus, I adopted a less formal approach and made enquiries of the major insurance companies that were offering buy-out bonds at the time the pension scheme terminated. Thanks to the co-operation afforded to us by the insurers in this process, the bond was located and payment made to the complainant.

This case highlighted two things:-

- The level of assistance given to this Office and the co-operation shown to us by insurers generally – which is much appreciated.
- The need for insurers to consider being more pro-active in contacting the holders of pension policies or bonds. I was given to understand that some insurers do not write to the holders of individual policies such as buy-out bonds, in advance of their maturity dates. While I can accept that with the passage of time, difficulties can arise in making contact, I believe an effort should be made to alert the policyholder to the existence of what might otherwise become a forgotten benefit.

Misappropriation of benefits

The essence of this complaint was that the benefits held under the AVC Plan in which the complainant participated were not settled at the same time as his main scheme benefits when he retired due to ill health in 1993. The Complainant had been incorrectly advised to leave his AVCs invested and he received regular updates from the scheme's administrator in relation to the value of the fund. However, in latter years he noticed that the fund was dropping in value and he queried the reasons for this. He had a number of meetings with an employee of the administrator over a two-year period but he believed that he was no closer to resolving the problem and felt that more issues were raised than were resolved. He believed that he could no longer trust the firm concerned to address the issues and referred the complaint to my Office.

In the course of an extremely lengthy and painstaking investigation it became clear that money was moved out of the complainant's fund and an attempt to reinstate these funds was made a number of years later. It appeared that this was done by a particular employee of the administrator, who was no longer in its employment. This employee was interviewed by me and my Investigator.

It became apparent that this employee had diverted funds from the complainant's fund to another AVC policy, also handled by the employee. A pension scheme member had died and who, as a result of a mistake by the employee, had no life cover. On discovering this, the employee panicked and felt that if it was brought to the attention of management, dismissal was likely. The employee decided to pay the life cover due from the complainant's account. At the time the complainant's policy was paid up and there were no further contributions going into the fund. The complainant's benefits were not paid out at the time of retirement and the employee admitted that the complainant was somehow persuaded that his funds would be better off if he left them invested. Over the following years, when fund values were requested, the employee "*made them up, pulling figures out of nowhere*".

Having taken into account the details of the case and the value of the funds involved, I directed the administrator to increase the complainant's AVC fund to the correct value and to consult with the insurer involved and the trustees of the AVC Plan with the intention of organising the payment of this amount as a tax free cash lump sum to the complainant before the 31^{st} July 2008. Although I could not direct them to do so, I considered it appropriate that the administrator should also honour an earlier offer of an ex-gratia addition to this fund.

As it appeared likely, from the evidence which came to light in the course of this investigation, that this might not be a completely isolated case, I was concerned that other cases of a like nature might surface in the future. Clearly, it would be better from the point of view of any scheme members likely to be affected, as well as from the standpoint of the likely cost of compensation, that these cases were discovered quickly, and I directed the administrator to conduct an investigation into the cases formerly handled by the same employee with a view to having any such matters corrected quickly.

I further directed the ex-employee, upon whom a copy of this Determination was served, to co-operate in full with any such investigations and to provide the administrator with any material of which the employee possessed, which might be of relevance to such investigation.

To the extent that this issue appears to have arisen, or been made possible, due to a failure of controls within the administrator and/or its predecessor companies, I directed them to undertake an audit of its systems to ensure that such misappropriation is unlikely to recur in the future. I also invited them to consider whether they, the current trustee of the scheme or any former trustee and/or administrator (which description applies also to any insurer involved, under the Pensions Ombudsman Regulations, 2003), might have any obligations in terms of reporting to the Pensions Board under Section 83 of the Pensions Act, 1990, as amended.

COMMENT: I understand that both the trustee and the administrator made reports to the Board.

This is a very rare instance of misappropriation of pension scheme benefits by a professional administrator, but it serves to demonstrate the need for proper controls. Incidentally, failure to administer the AVC fund when the main scheme benefits were paid was also a breach of Revenue rules.

Mistaken expectation

This complaint had several elements.
Firstly, a dispute in relation to post retirement pension growth rate. The complainant stated that his Trust Deed and Rules of the scheme provided for increases in excess of three per cent while the trustee claimed that this was two per cent.

Secondly, non-disclosure of pension information to him to help him make an informed decision regarding early retirement.

Thirdly, the employer claimed that the complainant had joined their employment in 1975 and the pension scheme in 1976, whereas he stated that he had joined the company in 1973, but was not included in the pension scheme until 1976. In another area of the complaint form he alleged that the company failed to disclose all relevant pension information to him since 2006 "*and before*".

There followed a long investigation, which was marked particularly by a lack of co-operation from the employer, despite the efforts of the employer's broker to obtain better co-operation.

Having reviewed all the documentation, I could only come to the conclusion that the complainant had misinterpreted provision of the Trust Deed & Rules as they related to post-retirement increases. The copy which he had of the Trust Deed & Rules made no reference whatever to such increases, but only contained an overall limitation on such increases, if they were to be paid. The Revenue rule on post-retirement increases is that increases may be given at a fixed rate not exceeding three per cent per annum. If increases are to be given at any higher rate than that, the rate of increase must be limited to a figure based on the maximum approvable pension for any individual, increased by no more than the increase in the Consumer Price Index from the date of retirement. The rule of the scheme simply implemented this limitation and was not intended to, nor did it, confer any entitlement to post-retirement increases.

The dispute in relation to post-retirement increases was clearly based on a misinterpretation of the Trust Deed & Rules and I was satisfied that there was never any entitlement to increases above the rate of two per cent.

The issues regarding the date of joining service and the date of joining the scheme were resolved in the course of the investigation.

Although not specifically referred to in the original complaint, it was clear that the benefit statement of 1st January 2007 was the cause of some dissatisfaction in the light of what actually became payable on early retirement. However, I was satisfied that any confusion here was caused by the complainant's own failure to interpret properly the contents of that document, which clearly stated that it referred to benefits payable on retirement *at normal retirement date*, and not earlier.

Although I was satisfied that every effort has been made by the broker in this case to supply the complainant with the information he required, I was not entirely happy that the company in its capacity as trustee was quite as active as it should have been in honouring requests made under the terms of the Disclosure of Information Regulations under the Pensions Act.

While it was understandable that, if a dispute exists between an employer and an employee regarding a pension matter the employer might feel no particular urge to co-operate with the employee concerned, nevertheless the employer in its capacity as trustee had clear and specific duties, both in trust law and under the Pensions Act, and the scheme member had clear and specific rights under that Act. No dispute between employer and employee could justify failure to comply in full with the provisions of the Act and failure to do so leaves trustees open to criminal prosecution or, at best, to "*on the spot*" fines levied by the Pensions Board. I rejected the complaint.

Payment of supplementary pension

In this mediated case the Public Service employer made an assumption in calculating the complainant's pension that she was a contributor to PRSI at the modified rate, which would not entitle her to a State Pension at age 65. Therefore they paid her pension at the rate appropriate to employees in that situation. They discovered the mistake after her pension had been in payment for some time, and demanded repayment of the difference between the pension which she was paid and the "*co-ordinated*" pension she should have been paid. However, they were not aware that she was entitled in these circumstances to a supplementary pension which, when paid, would have given her the same total income as a non-coordinated colleague would have, until her State Pension came into payment. They finally agreed, following intervention by my Investigator, to rescind the demand for repayment. The combined occupational and supplementary pensions enabled continued payment of the same total as the complainant had been receiving since retirement.

Spouse's Pension payable to separated widow

In this case my Office was approached by the daughter of a man who had died at a very advanced age. Her parents had separated many years previously, and her father was living with another partner. Following enquiries by my Investigator it was agreed that there was, in fact, a pension payable on his death and, since the rules of the relevant pension scheme expressly provided for a spouse's pension rather than a dependant's pension, the only person who could receive it was the complainant's mother. The spouse's pension was unclaimed since the member's death and it was put into payment. All arrears due were also paid.

Fast accrual in the public sector

Most public sector employees need 40 years of service to receive the benefit of a maximum pension on retirement. However, some employees in the public sector are entitled to benefit from fast accrual rates of service which allow them to retire with full pension after less than 40 years' actual service. The Garda Síochána and Prison Officers are examples of public sector employees who benefit from fast accrual. Typically, each year of service after 20 is reckoned as two years of pensionable service thus allowing these employees to retire on full pension after 30 years of service.

The 1945 Mental Treatment Act (the Act) extended fast accrual to certain employees in designated mental health institutions. The complainant in this case maintained that she was working in a designated institution but was not receiving the benefit of fast accrual. Although there is a common perception that the benefit of fast accrual under the Act is confined to Psychiatric Nurses the complainant's representative pointed out, correctly, that this was not the case and was able to provide examples of former employees who were not Psychiatric Nurses and who received the benefit.

It emerged from the investigation, however, that although the institution in which the complainant was employed was a designated institution, the unit within the institution where the complainant was permanently assigned was not designated by the relevant authorities. Furthermore, the supervisor with overall responsibility for assigning duties to the complainant stated that the complainant had never cared for or been in charge of psychiatric patients and that she had never been assigned to work in a psychiatric ward of the institution. The Act states that employees must be:

- employed in designated institutions, and;
- directly and personally responsible for the care or charge of patients of the designated institution and not merely working with or near patients who are not in her direct care.

In this case the complainant did not fulfil any of these requirements and it was not possible for me to uphold the complaint.

Purchase of notional service – errors in calculations

The complainant indicated that she had agreed to purchase notional service of 2 years in 1997, 2 years in 1998 and 3.5068 years in 2001. The cost was determined by the employer and was deducted from her salary. The complainant advised that:

> *"a pension review 2005 showed that on [date in 2007] my pension would be based on 35 years 52 days. Based on this I took early retirement. A letter from the employer two weeks later stated that due to their errors on the three occasions I bought service, my pension would be based on 31.974 yrs. An error in 1997 was not corrected on 2 further occasions nor detected during the review. I should not have to bear the consequences of this series of errors. My retirement decision would have been different if I had been told this in time to correct it."*

The investigation revealed that the requirements of the Superannuation Section had at all times been met by the complainant, but that her instructions were misinterpreted by the Payroll Section and resulted in under-deduction. It also emerged that deductions had been made on several occasions in respect of a Spouses' and Children's scheme, of which the complainant was not a member.

The employer made a proposal which I considered reasonable – to calculate the cost of the shortfall in service credit on the basis of historic salaries, without charging interest. This meant she would have to fund this in the amount of €24,000 out of her retirement gratuity. As there was a possibility that her ability to obtain tax relief on this might be restricted (possibly to about one-third of the cost) on account of the contributions she had already been making in her final two years, I directed that the employer negotiate with Revenue to see if that could be solved; otherwise, the employer should also compensate for the lost tax relief.

Reckonability of "ex-quota" service in the public sector

Some sectors of the Public Service are subject to employment quotas. When a public sector institution is faced with the situation of having to employ staff that will bring the institution over its allocated quota, the employee will usually be paid directly by the institution itself from its own funds, rather than from payroll funds provided by the Exchequer. Such employees did not pay pension contributions and, consequently, the service given was not pensionable. It was often the case that such service was given on a part-time basis.

The Programme for Competitiveness and Work (PCW) Agreement provided for the reckoning of part-time service that was given before the agreement was made, subject to the payment of the appropriate contributions. However, the PCW Agreement only provided for part-time service to be purchased at the rate of half of the comparable whole-time service regardless of the proportion of the actual part-time service given in comparison to whole-time service. That is, if a part-time employee worked 80% of the hours of a whole-time employee the amount of service that could be purchased under PCW would only be 50%.

The complainant in this case applied to purchase her "*ex-quota*" service and was informed that she could only purchase half of the relevant service. However, she maintained that she was working the same number of hours as a whole-time employee even though she was an "*ex-quota*" employee and that her service should be treated as whole-time instead of part-time. At my request the parent Department re-examined their records in relation to the complainant and ultimately came to the conclusion that her service should be treated as whole-time and that she should be allowed to purchase the full amount of her "*ex-quota*" service.

Refusal of admission to Defined Benefit scheme

This case involved a large public organisation with a defined benefit (DB) pension scheme. The DB was closed to new entrants in April 1990 and the organisation set up a defined contribution (DC) scheme for staff that commenced employment after that date.

The complainant maintained that she had been employed by the organisation prior to 1990 and consequently she should be entitled to membership of the DB scheme. The organisation stated that although the complainant had worked for them since 1986 she was not an employee of the organisation at that time because she was working under contracts for services, as against contracts of service.

The investigation revealed that the organisation had kept detailed employment records and was able to provide me with copies of the contracts under which the complainant had worked for the organisation from 1986 to July 1990. These contracts explicitly stated that the complainant was not an employee of the organisation and explicitly excluded her from membership of the DB scheme.

In August 1990 the complainant became an employee of the organisation under a contract of service. By this time the DB scheme was no longer available to new employees. Subsequently, in 1991, the complainant signed a further contract of service with the organisation that made the DC scheme available to her.

I was not able to uphold this complaint because the complainant had never had a contract with the organisation that allowed her access to the DB scheme.

Refusal of scheme to pay benefit for 20 years membership

The complainant had worked in the private sector for over 20 years before becoming a public sector employee. He had joined his private sector employer's pension scheme at 16 years of age and remained a member of the scheme until his employment with the company terminated. As he was approaching retirement age he had contacted the administrators of the private company pension scheme to ascertain his retirement benefits.

According to the complainant both the administrators of the scheme and the company denied that there was any record of his employment at the company. The complainant provided a copy of his social welfare contribution record which confirmed that he was employed during the period in question but, as was normal at the time, did not identify his employer.

The complainant had indicated that the reason for the termination of his private sector employment was because he had been made redundant. On foot of this my Office contacted the Department of Enterprise, Trade and Employment to find out if there was any record of a redundancy settlement between the company and the complainant. Although the redundancy would have been a long time previous (28 years) the Department did have records from the period relating to the company but could not locate any reference to the complainant.

My Office contacted the company directly and they were able to confirm that complainant had been employed by them and were able to provide exact employment dates but were not able to confirm that the complainant was a member of the pension scheme. The company undertook to raise the matter directly with the scheme administrators.

The administrators of the scheme were able to provide full documentary evidence that the complainant had received a full refund of his contributions on termination of his employment and, consequently, he had no entitlement to any benefit from the scheme on retirement.

Repayment of subvention paid in respect of non-pensionability of allowance

The complainant was the employee of a State Board. He was employed at a senior level in an acting capacity. His salary consisted of the full salary of his substantive grade plus an allowance to bring his remuneration into line with the grade he was "*acting up*" to.

The allowance he received was not pensionable. However, in lieu of pensionability, a subvention amounting to 12% of the allowance was paid. This arrangement existed for over 10 years until the complainant's retirement in 2004. During this time unsuccessful attempts were made to have the allowance declared pensionable. On his retirement the complainant's pension was based solely on the salary of his substantive grade.

In 2007 an arrangement was introduced that would make the allowance pensionable if the 12% subvention was repaid with interest. The complainant had no difficulty repaying the subvention but was disappointed at having to pay interest on the repayment, given that attempts had been made prior to his retirement to have the allowance made pensionable. He felt that it was the failure of others to deal properly with the issue when it had been raised previously that put him in the position of having to pay interest on the repayment of the subvention.

I shared his disappointment in this case. On repayment of the subvention with interest the allowance that the complainant received would become pensionable and his benefits would have to be recalculated. This would lead to a significant amount of arrears dating back to 2004. However, there would be no interest payable to the complainant on these arrears.

I considered it to be inequitable that interest would be charged on the refund of the 12% subvention but interest would not be payable on the arrears that would become due as a result. It was my view on the matter that interest should be generated by the arrears and the interest due on the repayment of the subvention should be offset against the interest generated by the arrears.

Following consideration of my comments on the issue the relevant authorities in this case agreed not to charge the complainant interest on the repayment of the subvention.

The remit of the Pensions Ombudsman does not include the award of compensation

The complainant was in receipt of a spouse's pension for over 18 years. She received correspondence from the scheme administrators stating that, due to the incorrect application of an escalation rule, her pension had been underpaid. The total amount of the underpayment was just under €50,000. The scheme administrators stated that they would repay the total underpayment along with 4% interest. The interest amounted to almost €8,000.

The complainant was not happy with the way the matter was handled by the scheme administrators. She pointed out that she had to support a young family on the pension for many years and felt that the 4% interest was totally inadequate compensation for having to do this. She was also unhappy because the scheme administrators did not involve her in discussions to decide an appropriate level of compensation.

The scheme administrator was clearly guilty of maladministration in this case. The maladministration had caused the complainant financial loss. However, the scheme administrator had attempted redress for the financial loss and paid interest at the rate of 4% over the period from the commencement of the error to the date that the loss was made good.

What the scheme administrator had failed to do in this case was to offer any form of compensation to the complainant for the added financial burden that arose because of the error in the pension payments. The scheme administrator did not even meet with the complainant to discuss the issue of compensation even though the complainant made it clear to the administrator that she wished for this to happen. This added to the distress that she felt.

In this case, as in all cases, I must operate within the legislation and Regulations that govern this office (Part XI of the Pensions Act 1990 and Pensions Ombudsman Regulations - Statutory Instrument 397 of 2003). These give me the power to:

- Investigate allegations that a pension scheme member has suffered a financial loss, due to maladministration by those responsible for the management of the plan and
- Adjudicate on any dispute of fact or law that arises in relation to an act done by or on behalf of a person responsible for the management of the plan.

For me to accept a member's complaint and, following an investigation, to make an award in their favour, the case must involve both "*financial loss*" and "*maladministration*".

In assessing whether a pension scheme member has suffered financial loss, I must first determine what the member's entitlement was under the rules of the pension scheme and ascertain if they received that entitlement. If so, I may not make any award to the member. If not, however, I can uphold the complaint and direct that the member's benefit be brought up to the level they were entitled to under the plan rules. I cannot offer any compensation or award to a member who has suffered maladministration, if this is not found to have resulted in financial loss. In essence, I cannot make an award of compensation for stress, inconvenience, time and effort in pursuing the complaint etc. Complainants often expect such awards to be made. In some cases they seek what might be called punitive damages. The Pensions Act is very clear – the maximum compensation that can be given is the "*loss of scheme benefit*". That said, respondents sometimes do offer additional payments to aggrieved parties on a voluntary basis.

Thus the whole process is strictly limited by what the member's entitlement is under the rules of the particular pension scheme. I cannot ignore, over-ride or change the

Rules of any pension scheme, nor can I alter any properly taken discretionary decision that the trustees or the sponsoring employer are empowered to make under the Rules.

This was a clear case of maladministration on the part of the scheme administrators. However, the financial loss that the complainant suffered was redressed in full with interest (at a rate I felt to be reasonable) before the complaint was made to my Office and, as it is not within my remit to award additional compensation, I was not able to uphold the complaint.

CONSTRUCTION INDUSTRY CASES

The vast majority of employers are not legally required to provide a pension scheme for employees, although they must recommend a PRSA provider and make deductions if necessary. However, under the terms of a Registered Employment Agreement (REA), employers in the construction industry are required to enrol construction workers in a pension scheme (normally the Construction Workers Pension Scheme - CWPS), make deductions from wages and pay this deduction together with the employer's contribution to the scheme. The mandatory nature of the pension scheme within the construction industry is due to the high degree of employee mobility in this sector.

As I indicated in my Annual Report, there are an increasing number of complaints from workers in the construction industry regarding non payment of contributions to the CWPS. These range from relatively straightforward cases where the employer did not register employees or make deductions, through more serious cases where deductions were made but not remitted to the pension scheme, to the most serious cases where a death has occurred with no mortality benefit being payable to dependants. While I appreciate the difficulties facing the industry at present, many of these cases relate to a time when the industry was particularly buoyant. Various "*devices*" have been attempted to circumvent my investigations-see my Annual Report for 2008-but these will not work. For example, where an attempt to avoid liability is made by putting a company into

liquidation or ceasing to trade, I will seek to make the Directors and/or Managers personally liable for the debt.

In addition, some have sought to ignore my requests for information/documentation and in my foreword to the 2008 Annual Report, I point to the degree of litigation undertaken in 2008, with 16 cases being brought to Court (District and Circuit). I have never lost a case, fines have been imposed, warrants for arrest have issued, the required information/documentation has eventually been produced, sometimes under threat of a jail sentence and I have received my costs.

While what I call CWPS cases are relatively straightforward in that there are no particularly new lessons to be learned from them, the following are typical of the cases I dealt with in 2008.

Employee forced into "self-employment"

In a mediated case, the complainant was unable to receive his State Pension (Contributory), as well as being short of contributions due to the Construction Workers' Pension Scheme.

It emerged that, although he had been an employee all his life, his employer had put pressure on him to become a sub-contractor (technically self-employed) for the last three years, and there were unsettled tax and PRSI liabilities.

Following considerable pressure from this Office, the employer finally paid up the three years' contributions, and regularized the tax and PRSI situations, so the complainant also got his State Pension in the end.

Unpaid Mortality Benefit – Employer fails to comply

In this case, a worker died who was not registered in the scheme. I made a Determination in favour of the complainant that the employer in question was made liable for the mortality benefit that the scheme would otherwise have paid. Although the determination was not appealed, the employer simply ignored it, and did not pay. The complainant has now sought legal aid in order to enforce the determination. In this case the amount involved was €63,500.

Unpaid Mortality Benefit – Employer pays

In this case, the death benefit outstanding was only €20,000, as the death of the employee had occurred before the scheme benefit was increased, following my Determination, the employer paid the benefit.

Employer reneges on promise to pay – Enforcement needed

In this case, the employer owed a substantial amount in respect of pension contributions for the employee. Following contact from my Office, the employer agreed that he would pay the outstanding amount. A formal Determination was drawn up to reflect this agreement. It was not appealed to the High Court within 21 days and I certainly did not expect that it would, given the employer's earlier agreement.

However, the employer decided that his best option was to cease to trade (even though it appeared that he was not insolvent). Enforcement proceedings were commenced by the Minister for Social and Family Affairs. The employer paid the outstanding amount prior to the hearing.