DIGEST OF CASES 2006

Pensions
OMBUDSMAN
Fear an Phobail um Pinsin

Summary of Determinations made by the Pensions Ombudsman in 2006

June 2007

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Introduction

This document should be read in conjunction with my 2006 Annual Report. Its purpose is to draw attention to some of the more interesting complaints that have been dealt with by my Office during the last year.

During 2006 I issued 61 Determinations under Section 139 of the Pensions Act. Twenty-eight of these cases are included in this document which will, I hope, be of practical benefit to those working in the industry, and particularly to trustees and others involved in dispute resolution.

Most of the cases involve complaints that affect only the person making the complaint. However, certain complaints have wider implications. This is particularly the case in the public service, where a single decision can affect hundreds of individuals.

Paul Kenny
Pensions Ombudsman

June 2007

Summary of Determinations made by the Pensions Ombudsman in 2006

DEFINITION OF FINAL RETIRING SALARY UNDER A SUPERANNUATION SCHEME

The complainant challenged the trustees' interpretation of Final Retiring Salary (FRS), as applied in the calculation of his retirement benefits and alleged that as a result, the scheme benefits offered to him at retirement in 2001 were less than they should have been. It was his understanding that FRS should have been the annual rate of basic salary payable to an employee at his date of retirement whereas the trustees contended that FRS was the total of the employee's basic earnings in the 12 months up to retirement date.

After my investigation I was satisfied that the trustees and administrators had calculated the complainant's retirement benefits in accordance with the scheme rules and in line with the interpretation they were entitled to apply and had consistently applied under the scheme. I could not therefore find that any maladministration or financial loss had occurred in the calculation of the complainant's retirement benefits under the superannuation scheme.

This Determination has since been appealed to the High Court.

CONDITIONS AGREED IN ADDITION TO RULES OF SUPERANNUATION SCHEME

The essence of the case being put forward by the complainant was that her pension entitlement should be based, not solely on the conditions of the superannuation scheme of which she was a member, but rather on that scheme in conjunction with additional conditions agreed with her employer. The complainant worked for a local authority but was then seconded to a government agency on a fixed contract basis. The complainant stated that she had accepted employment with an organisation at a time when a superannuation scheme had not yet been put in place for directors. In the absence of such a scheme she claimed that she was given an undertaking by her employers which would set out the principles which would underpin such a scheme when established. One of these principles was that:

> *"Pension and gratuity from the Agency will be calculated on the basis of the existing calculation provisions of the Local Authority Superannuation Scheme (with an accrual rate of 40/24 for Agency service) where they are more beneficial."*

The complainant claimed that she accepted employment on the basis of this and regarded the understanding as having formed part of her contract of employment with the agency. She believed that the terms of the agency scheme under which her superannuation entitlements were calculated, taken by themselves, were less favourable in her case than the terms of the scheme as supplemented by the undertaking given to her by her employer. In particular she believed that, in the calculation of her pension entitlements, she should also have been entitled to professional added years which were provided for in the Local Government Superannuation Scheme (LGSS) but not in the agency scheme. When her period of tenure with the agency was completed the complainant subsequently resigned from the local authority aged 47 years.

I concluded that the employers were in fact bound by the undertaking that they had given her in writing when she accepted the position with the agency and was on this basis entitled to have her pension and gratuity from the agency calculated on the basis of the existing calculation provisions of the LGSS where they were more beneficial. However, I ruled that she was not entitled to professional added years, as she had resigned aged 47. Under the rules of the LGSS there is no professional added years entitlement if a person ceases to hold office before minimum retirement age – age 60 in the complainant's case – otherwise than on ill-health grounds. It was on this basis that I disallowed the complaint.

GRATUITY ON RETIREMENT

The complainant stated he did not receive a gratuity on retirement in respect of additional hours worked by him with a local authority fire service between 1973 and 1979. He retired from the local authority as a fireman in February 2003 on the grounds of ill-health. He received a pension and a gratuity from the Local Government (Superannuation) (Consolidation) Scheme, 1998 (LGSS) in respect of his service from February 1973 to the date of retirement. This period included service as a trainee fireman from February 1973 to May 1975 and as a *full-time* fireman from 1975 to 2003. In his appeal form to the Department of Environment and Local Government ('the Department') the complainant stated that he was unhappy with "the gratuity payment for simultaneous service from 3/2/73 to 5/6/79 in the part-time fire service."

Following investigation I found that the complainant was employed on a trainee basis from 8 February 1973 to 7 May 1975 and from the 8 May 1975 until 22 February 2003 as a fireman, but that he was never employed as a Retained Fire-fighter. The position of Retained Fire-fighter is a part-time position that is filled by persons who would usually have substantive full-time employment elsewhere, e.g. as a carpenter, traffic warden, shop assistant, etc. and who leave their place of employment to respond to call-outs when required. A Retained Fire-fighter is not eligible to become a member of the LGSS but receives a gratuity on retirement in respect of this service, which is not paid from the LGSS. The complainant had indeed worked extra hours as a trainee fireman which was equivalent to working overtime and for which he was paid accordingly. This was provided for in his contract of employment as a trainee fireman. However, as he had never worked as a Retained Fire-fighter he was not eligible for a Retained Fire-fighter gratuity on retirement. On retirement he received a pension and a gratuity in accordance with the terms of the LGSS in respect of his total service with the local authority including his service as a trainee fireman. The extra hours worked between 1973 and 1979 were deemed by the local authority to be overtime, for which the complainant was paid the appropriate rate and were not taken into account in the calculation of the complainant's benefits under the LGSS. In accordance with Articles 105 and 106 of the LGSS these extra hours could only be taken into account if the local authority deemed such overtime to be pensionable and if the overtime had been worked in the three years immediately prior to retirement. I disallowed the complaint on this basis.

MATURITY VALUE OF AVC PLAN

The complainant contended that the maturity value of his AVC policy with an assurance company should have been higher than that quoted by the company. In August 2002 the AVC policy matured. The complainant was initially advised by the company that the maturity value of the policy was €66,546, which subsequently proved to be correct. However, a further letter was issued in which an incorrect maturity value of €61,866.89 was quoted. The complainant queried the difference in the two values and estimated that the correct value of his policy was €69,266.56. This figure was submitted to the company together with supporting calculations set out in a letter in October 2002.

Following investigation of the complaint I found that both the assurance company and the brokers responsible for the administration of the scheme were guilty of maladministration. This arose when the respondents attempted to deal with the issues and concerns raised by the complainant in relation to the maturity value of the policy. While the original maturity value quoted by the company was correct, the respondents did not adequately address the complainant's questions and the problem was allowed to continue for over two and a half years without resolution. I directed the assurance company to value the complainant's policy using the maturity value at August 2002 increased by the growth in the Exempt Cash Fund from August 2002 to the date of payment. I also directed the assurance company and the complainant to co-operate with each other to settle the benefits due from the policy within two months of the date of the Final Determination. I considered this to be a fair and reasonable approach in combating the erosion of the fund and in finally resolving the issues which had arisen over the relevant period. I also noted that the brokers had offered to rebate the commission earned on the policy, and the complainant had advised that he wished to accept this rebate. I therefore directed the brokers to pay this rebate within 30 days of the date of the Final Determination.

PRESERVATION RIGHTS – RETURN OF CONTRIBUTIONS

When this complainant left her employer in June 2003 she said she was misinformed regarding her entitlement to a refund of contributions. She contended that the trustees of the pension plan did not provide her with relevant information on legislative changes which affected both her entitlement and the decision she made regarding the level of contributions she was making to the plan and this had resulted in financial loss.

In June 2003 the complainant left the service of her employer and on the same day contacted the HR Department and requested a refund of her contributions to the pension plan. An explanation of the refund process was provided and she was specifically advised that "we can lodge the money into your account if you wish as you will be travelling". The complainant was subsequently advised that due to legislation which had recently been introduced she would not be entitled to a refund of contributions from the pension plan.

Following an investigation it transpired that the complainant was given incorrect information on at least two occasions relating to her entitlement to a refund of contributions. The implementation of Section 20 of the Pensions (Amendment) Act 2002 resulted in changes to the preservation of benefits on leaving service which meant that, on or after 1 June 2002, a member of a pension scheme would be entitled to a refund of his/her own contributions only if he/she had completed less than 2 years' qualifying service. The complainant, having left with 2 years and 9 months' service completed, would not be entitled to a refund.

In accordance with the Disclosure of Information Regulations under Part V of the Pensions Act 1990 (as amended), members are entitled within one month of a material alteration to the provisions of the pension scheme to information relating to the alteration. While in this case the employer contended that the legislative change was overriding and that a member's consent to it was not required, the trustees are still required to inform members of the change and the complainant should have been informed of the change in legislation in accordance with the disclosure requirements.

My Final Determination was that this complaint should not be upheld. The complainant was not at a financial loss, as her benefit which is made up of both employer and employee contributions will remain preserved in the pension plan until normal retirement date. However, there was certainly maladministration on the part of the trustees. The complainant was provided with incorrect information on two occasions in relation to her leaving service entitlement and was not given any information in relation to the change in legislation affecting leaving service benefits despite the fact that the change had occurred over a year before she left service. I understand that the trustees have since issued an updated booklet to all the members which makes reference to this legislative change.

ESTABLISHMENT OF PENSION FUND – 'PROPER' INVESTMENT

In this case the complainant made a complaint of maladministration on the part of her former employer and the trustees of the pension fund, alleging that the fund of the scheme had never properly been established and had been simply left on deposit with a bank. She further claimed that she had been trying to get information from the sponsoring employer and trustees and had been met with delay, procrastination and lack of response and that the trustees had failed to give her the full facts and information sought.

The complainant was employed during the period 1992 to 1998. A retirement benefits scheme was established under irrevocable trust in December 1996 for the purpose of providing retirement benefits for her. A professional trustee company was appointed to act as sole trustee to the scheme. It appears, though it is not clear why, that the scheme was to be established as a 'Small Self-Administered Scheme' (SSAS) and the professional trustee company was to act as pensioneer trustee, to satisfy Revenue requirements in respect of a SSAS.

Following an investigation of the complaint I was satisfied that the pension fund had been properly established by Definitive Trust Deed and Rules in December 1996, effective from 1 September 1992, by the employer, who had appointed a professional trustee company as the

trustee. The fund had also been properly approved by the Revenue Commissioners as an exempt approved scheme and was established for the purposes of providing relevant retirement benefits for and in respect of the complainant. It was registered as a defined contribution scheme with the Pensions Board. Although the complainant alleged that the fund was established with little or no consultation with her and was perhaps not the scheme she would have wished for, this nevertheless did not invalidate or taint the establishment and subsequent Revenue approval of the scheme.

In relation to the complaint that the trustees had failed to invest the fund properly, I found that the trustees were guilty of maladministration in that they should have been more pro-active in relation to their investment decisions. I concluded that to leave the fund permanently on deposit from December 1996 – on the basis that the member failed to advise her suggested investment strategy – was not a reasonable defence and that the obligation for the 'proper' investment of the fund (as required by Section 59(b) of the Pensions Act, among other things) fell solely upon the trustees. I also rejected the defence offered by the trustees, that bank deposits were an investment permitted by the trust instrument. It was at all times clear that the placing of monies on deposit had been envisaged as a short-term arrangement, to be reviewed before long. I noted that the trustees had wide discretion – subject to the consent of the employer (who does not appear to have been consulted) – and could, and *should*, have considered alternative investment strategies within their investment powers. I could see no evidence of such consideration or of any effort to set an investment performance objective for the fund; or any monitoring of investment performance. In fact, I accepted the complainant's evidence that the file was in effect forgotten. I concluded that this constituted negligence amounting to maladministration on the part of the trustees.

On this basis I instructed the trustees to determine the value of the fund at 1 May 2006, and to add to this whatever amount would be necessary, so that its value would be increased by 80% of the difference between that and the amount at which the fund value would stand at the same date, had it been invested in the Irish Life Consensus Fund (as representing what would have been a 'reasonable' return in the circumstances). The 80% award took account of the fact that some element of the delay and inaction was attributable to neglect on the part of the complainant herself. I instructed the trustees, taking into account the complainant's current age and circumstances and distance from projected retirement age, to consider what would be proper investment media for the future and to provide her with sufficient information upon which to make an informed choice between the various available investment media, at the same time outlining to her a default investment strategy which would apply if no directions were given. The trustees were to take account of the complainant's wishes in this regard and invest as they thought appropriate. In the event of failure by the complainant to make a choice within six weeks of receipt by her of the said information, I directed that the trustees should invest immediately in accordance with the default strategy.

REFUSAL TO GRANT A SPECIAL PENSION UNDER GARDA SÍOCHÁNA PENSIONS ORDER

The complainant had alleged maladministration by the Department of Justice, Equality and Law Reform and the Garda Commissioner in their refusal to grant him a special pension under the Garda Síochána Pensions Order, 1925 (as amended).

The complainant was appointed to An Garda Síochána in October 1994, went on extended sick leave in July 1998 and did not return to active service. The Garda Chief Medical Officer (CMO) certified in July 2001 that the complainant was suffering from chronic ineffectivity, secondary to generalised anxiety and panic attacks and that he was unlikely to be capable of resumption of Garda duties. The complainant was retired from An Garda Síochána by order of the Garda Commissioner on ill-health grounds in August 2001. He had only 4 years and 9 months' service (excluding training which is non-pensionable service) at this time and, as a minimum of five years' service is needed under the Garda Síochána Pensions Orders for payment of an ill-health pension, no pension was payable and he received a short service gratuity. He applied in September 2001 to the

Department of Justice, Equality and Law Reform for a special pension under Article 4(1) of the Garda Síochána Pensions Order 1925.

The Department of Justice, Equality and Law Reform referred the matter to the Garda Commissioner who refused the request in December 2002 on the advice of the Garda CMO. The complainant contended that his illness was not disputed, but rather the cause of it was. His contention was that his illness resulted from a complaint made against him to An Garda Síochána by his in-laws which, he stated, was accepted because he was a Garda and the incident affected An Garda Síochána.

Although this complaint was investigated within An Garda Síochána, the member was never officially informed of the outcome, which was in his favour. Meantime, the complainant maintains that behaviour in the force towards him had changed, and he alleges that he was subjected to behaviour which was discriminatory and bullying.

I was not concerned with all of this, except insofar as it impacted on any possible pension entitlement for the complainant. While the Garda authorities had maintained that the complaint that they were investigating was not for alleged assault by the complainant, he most certainly perceived that it was. I failed to understand why the complainant was never informed of these conclusions, and was of the opinion that this failure contributed greatly to an already deteriorating situation.

Regulation 4(1)(e) of An Garda Síochána Pensions Order, 1925, provides: *"if at any time* [a Garda] *is incapacitated for the performance of his duty by infirmity of mind or body occasioned by an injury received in the execution of his duty without his own default,* [he] *shall be entitled on a medical certificate to retire and receive a special, pension for life".* Regulation 10(2) of the Garda Síochána Pensions Order, 1925 provides for the granting of a special pension where the Minister [for Justice, Equality & Law Reform] and the Minister for Finance are satisfied that *"the injury was received in the execution of duty..."*

In order to assist me in determining how to interpret the "injury received in the execution of his duty" test, I sought out previous guidance that might exist. The Department of Justice, Equality and Law Reform confirmed to me that there were no administrative guidelines for the granting of special pensions apart from the statutory regulations. I referred to decisions my counterpart, the British Pensions Ombudsman, might have considered in this regard and noted some cases which were similar to this one, which highlighted some English case law concerning a test for determining whether an event occurred "in the execution of duty". A common element in which the injury was held to have been sustained "in the execution of duty" was that –

> *"An event or events, conditions or circumstances impacted directly on the physical or mental condition of the claimant while he was carrying out his duties which caused or substantially contributed to physical or mental disablement"* [1]

Applying that test, something external had to impact on the complainant while he was carrying out his duties. It would not be enough that he experienced a feeling or emotion (such as disappointment, or a perception of being undervalued) contemporaneously with the carrying out of his duties, even though that feeling or perception might be connected with his duties. It would, however, be sufficient for there to be a causal connection with service as a police officer. It would not be necessary to establish that work circumstances are the sole cause of the injury. Mental stress and psychiatric illnesses may arise out of a combination of work circumstances and external factors (most obviously, domestic circumstances). What matters is that the work circumstances have a causative role.

When I considered the totality of the evidence in this case, I asked myself whether, had the complainant not been interviewed about serious allegations, including alleged assault, would he have suffered the ill health he now suffers from? That was a question that was most difficult to answer fully and perhaps was unanswerable. However, it could be said that, prior to January 1998, the complainant had an unblemished record which included positive supervisory assessments from his immediate supervisors. He was described as a conscientious worker, a good timekeeper,

1 R. (Stunt) v Mallett [2001] I.C.R. 989

a good mixer, as having a good approach to the public, as anxious to learn about all aspects of police work and as not afraid to ask for advice and guidance. His sergeant concluded that he expected that, with more experience, the complainant would be an excellent member of An Garda Síochána and would be a valuable asset wherever he was serving. This all changed in a sick report in 1999 which stated that the complainant had not settled in well and "displayed a rather gruff demeanour". There was also mention of an alleged confrontation with his sergeant leading to a caution and that he was not getting on with other members of his unit. He was described as not displaying himself as a good team player and the report referred to the "serious conflict" between the complainant and his in-laws and that this had continued "unabated". It was noteworthy that this negative assessment had come after the allegations in February 1998 were put to him and the subsequent interactions between the complainant and his superintendent. It was also clear that domestic issues concerning the complainant were still being taken into account, although described as "private matters".

It was difficult in the light of all this to escape the conclusion that, considered as causative factors in the complainant's psychological condition, his domestic and family circumstances were inextricably linked with his working environment, and that explicit connections between the two were being made by his superior officers.

The Chief Medical Officer stated that he based his decision to certify the complainant as permanently unfit for work as a Garda on the various medical reports available to him. He further stated that he concluded that the complainant had not suffered malicious injury in the execution of his duty which resulted in his current state of health and therefore advised that he should be in receipt of an ordinary pension after his retirement.

It was my view that similar principles to those set out in the English cases could be applied to the Garda Síochána Pensions Order, 1925 in that what was required was that a qualifying injury was sustained in the course of the person's employment and which is attributable to his employment. I also considered that *duty* should not be given a narrow meaning.

The complainant was not claiming a special pension as a result of any injury he received by way of assault on his person. He was, however, maintaining that the investigation into the allegations against him and the manner in which the whole process was handled was, if not wholly, at least substantially, the cause of his permanent ill-health. In my view, the causal connection did not simply relate to operational police duties but could relate to all aspects of the officer's work including the officer's 'work circumstances'. It was enough to show a causal connection between the injury and police service including, not just operational duties, but other events at work such as conversations with colleagues. Whether there was sufficient causal connection was a matter for the judgment of the Chief Medical Officer.

My Final Determination on this matter was that the Minister for Justice, Equality and Law Reform was to write to the Commissioner of An Garda Síochána regarding the complainant's application for special pension. The Minister was to deliver guidance for consideration of special pension awards which took into account the principles I had outlined above, and was to request a registered medical practitioner (as provided for by the Garda Síochána (Retirement) (Amendment) Regulations, 2000), to give an opinion on the complainant's entitlement to a special pension in accordance with the said guidance. On receipt of the registered medical practitioner's opinion, the complainant's entitlement was to be considered forthwith, in the light of that opinion. The registered medical practitioner was also to be presented with a copy of the Determination for his information.

Recognising, however, that the issues raised in this case carried implications which had a much wider application than the individual case herein considered; and that the statutory provisions governing the award of special pensions were open to interpretation by different individuals, I also determined that, on or before 30 June, 2007, new guidelines should be drawn up and issued, for the benefit of personnel involved in the consideration of applications for special pension awards. Such guidelines were to incorporate the principles which I had outlined herein so that, although each individual case must turn on its own facts, there would be a consistent framework in place within which the facts of

each case could be considered. The guidelines were to be applied to any application made for a special pension from their date of issue.

This Determination has been appealed to the High Court.

FAILURE TO PUT PENSION SCHEME IN PLACE

The complainant alleged that his employer, the respondent, had failed to put in place a pension scheme that would provide him with the benefits promised under his contract of employment.

The complainant was employed by the respondent company from 1991 to 1996. Prior to this, he had been employed with another firm from 1969 to 1990. He states he was approached by a recruitment agency on behalf of the respondent and offered a more senior position and corresponding higher salary than he enjoyed with his previous employer. He claimed that he informed the recruitment agency that any move to the respondent company would be conditional on the respondent company offering a pension plan that mirrored the benefits he enjoyed under the scheme provided by his previous employer. Prior to his taking up employment with the respondent company in January 1991, the complainant received a letter from the managing director which set out the terms and conditions under which the respondent company was prepared to employ him. This letter stated that the respondent company would assume payments under his existing pension plan and the intention was that this level of contribution would be adjusted in line with inflation. The complainant accepted all the terms specified and signed the agreement.

Following my investigation of the complaint I was satisfied that the respondent company had undertaken to provide the complainant with pension benefits equal to that he enjoyed in his previous employment. The terms and conditions of his employment contract made this quite clear. It was also clear that the respondent company had, for many years, failed to put in place any pension scheme for the complainant to comply with this commitment. Furthermore, the complainant experienced grave distress in having to fight for what he considered his rights under his employment contract.

I accepted that the establishment of a defined benefit scheme for a single member would place an unfair burden on the employer and that a target benefit defined contribution scheme as had originally been envisaged in September 1994 was a fair compromise in this regard. However, I noted that the employer failed to honour even this commitment. On this basis I was satisfied that the complaint of maladministration against the respondent company should be upheld. My Final Determination, therefore, was to instruct the employer to pay to the trustees within two months of the date of the Determination such additional amount as was necessary to fulfil the original commitment given in the contract of employment. I instructed the trustees of the scheme to ensure that this additional investment was invested in the complainant's pension scheme for his benefit and that they then inform the complainant as to his options in relation to benefits due under the scheme.

PRE-JANUARY 1991 SERVICE – DISCRETIONARY POWER OF TRUSTEES

The three complainants made a joint complaint that on leaving the company's service in March 2001, they did not get credit in the calculation of their entitlements under the pension fund for the full period of service they had completed with the company. They joined the company's service and the pension fund in 1972 but only service completed after 1 January 1991 was credited in the calculation of their pension fund leaving-service benefits.

The complainants contended that other employees who left service around the same time as they did and in broadly similar circumstances were given credit for their pre- and post-1991 service in the calculation of their pension fund benefits. They alleged discrimination by the company in their treatment of them under the pension fund.

The pension fund was a defined benefit plan and each member's entitlement in various circumstances, e.g. retirement, death, leaving service, was dictated by the rules that govern the fund. These rules did not grant members an automatic right to the sum of the contributions paid into the fund on their behalf over the term of their membership – these were held in trust and were invested towards

providing whatever benefit the member became entitled to under the rules of the fund. The trustees have a duty to administer the fund in accordance with its rules and to ensure that each member is notified of, and ultimately receives, his entitlement as set out under those rules. Benefits payable to members on leaving service were set out under the trust deed and rules of the fund and, following my investigation, I was satisfied that these rules had been properly applied in this case.

The Pensions Act, provides that pension fund members who left service after 1 June 2002, having completed at least two years of pension plan membership must receive a benefit based on their full pre- and post-1991 plan membership. However, it is important to note that the complainants in this case left service in March 2001. The pension fund rules were amended to comply with the legislation, even though the latter would have overridden them in any event. However, neither the over-riding legislation nor the amendment to the fund rules had any retrospective application and could not be relied on to provide the complainants with a pension fund entitlement greater than that already advised to them.

The thorny issue in this case was the matter of a discretionary power of augmentation and the fact that it was used to augment benefit for certain fund members, but not for the complainants. When they left the company's service in March 2001 the pension fund rules entitled the complainants only to a benefit based on post-1991 service. To provide them with a pension fund benefit based on their full service would have entailed the grant of an augmentation under the fund. Benefits could only be augmented by the trustees, with the consent of the company, or on their instruction. The company was asked to augment the complainants' leaving service fund benefit but declined to do so. In the absence of such consent from the company the trustees were powerless to grant any augmentation to the complainants.

Augmentation is not an entitlement under the fund, but a discretionary benefit that could be granted only by the exercise of that power by the trustees, with the consent of the employer. I did not consider that it constituted discrimination or any breach of trustee responsibility under the pension fund for this discretion to be exercised in favour of one member over another, as long as the augmentation of any member's benefit did not impact negatively on the entitlements for the other members.

In effect, therefore, the case being made by the complainants' was that they were treated differently from other members who left in or about the same time. It was, however, clear that they received their entitlements in terms of the scheme rules and that they did not have their entitlements diminished by augmentation granted to other leavers. Any special treatment given to others was given by the exercise of discretionary power, and I am explicitly prohibited from overturning a discretionary decision properly exercised, under the terms of the Pensions Act.

It was my Final Determination that this complaint should be disallowed.

MALADMINISTRATION – UNSUITABILITY OF A PENSION SCHEME

The complainant had complained of maladministration relating to the setting up of the scheme in that

(a) it was totally unsuitable as a company pension scheme;

(b) the fact that his pension contributions were allocated as new premiums each year had led to financial losses to him by way of high new premium charges as opposed to renewal rates; and

(c) he was forced by the insurance company to move his pension fund to a new scheme.

The employer established an occupational pension scheme with effect from July 1997 with an insurance company, using the services of a broker. The plan aimed to provide guaranteed minimum pensions at various retirement ages and conversion to cash to be calculated based on the prevailing annuity rates at retirement. These guaranteed minimum pensions were to be augmented by annual, maturity and terminal bonus additions where applicable. The insurance company confirmed that there would be an initial commission of 8% and a renewal commission rate of 4% in respect of new members including the complainant. The plan was established on a *with-profits* assurance basis.

In early 2003, the employer/trustee appointed a new financial intermediary to act as consultant to the pension scheme. The new intermediary reviewed the adequacy of the arrangements and advised the employer/trustee that the contract was for a series of individual policies with a policy number allocated to each member and a new policy number issued for each increment in contribution. The new intermediary concluded that this form of contract was more suitable for individual business rather than group pension business. He noted that the lack of transparency in the charging structure made it difficult to determine accurately the effect that charges would have over the full term of the contract, and compared this charging structure to the transparent charges applicable to Personal Retirement Savings Account (PRSA) products. The intermediary recommended to the employer/trustee that consideration be given to switching to a contract with a charging structure similar to the PRSA model. He also advised careful consideration before switching members within 10-15 years of retirement in order to determine whether such a switch would be in their best interests, as the existing contract included some valuable guarantees for those close to retirement.

The complainant alleged maladministration by the insurance company and the original broker relating to the setting up of the scheme, stating that it was totally unsuitable as a company pension scheme. Following my investigation of the complaint I was satisfied that at the time the employer was considering introducing a pension scheme for his employees, he sought and received independent financial advice from a properly registered insurance broker. The broker was qualified to provide the financial advice. I am satisfied that the plan selected was a proper investment plan for an employer to take out as a company pension plan. The question as to whether it was the most appropriate plan revolves around the quality of the independent financial advice offered to the employer by an insurance broker. A finding on this aspect of the complaint was outside the remit of my Office as I was simply concerned with the administration of the pension scheme and whether or not the complainant had suffered any financial loss as a result of any maladministration of the scheme itself. Many pension funds are invested in with-profits policies and it is not within my remit to question the investment strategy of the trustee unless there is a breach of trustee duty involved. There was no evidence of any such breach in this complaint.

The regulation of investment and insurance intermediaries falls under the statutory remit of the Irish Financial Services Regulatory Authority (IFSRA) under the Investment Intermediaries Act, 1995, as amended and I forwarded a copy of the complaint to the IFSRA for consideration. On a general note, I was concerned that, while a with-profits plan is generally a suitable vehicle for pension schemes, differentiation between those best suited for executives of companies and those best suited for ordinary staff members was not properly explained in this case. The fault for this lay with the insurance company, the broker, and the employer himself. In the case in question it was my opinion that the plan was better suited for more highly paid personnel such as middle management and executive grades, in that flat rate fees are applied to the policy regardless of the size of the premium. That said, I could not find that the plan taken out was not suitable as a pension arrangement. A finding of maladministration on this aspect of the complaint could not be upheld.

The second aspect of the complaint related directly to the charging structure of an insurance policy, which was again outside the remit of my Office. While I was concerned about the lack of transparency in the charging structure, in particular as it related to monthly member charges, it was a complaint that fell properly within the remit of my colleague, the Financial Services Ombudsman. I passed the complaint to my colleague for his consideration, observing only that I was astounded that no-one thought to advise the employer/trustee of the implications of having different renewal dates for the various incremental policies that were issued. If this went on in relation to all members of the pension scheme, the potential cost was considerable. If it was more widespread as a practice, involving many employers, the consequences would be enormous.

With regard to the last element of the complaint, I could find no evidence that the complainant was "forced" to surrender his policies by the insurance company.

PENSIONABILITY OF OVERTIME

The complainant was employed as a plant operator in the Tarring Section with a local authority and retired in 2003. As part of his job, he came in an hour earlier than the other workers in order to prepare the tar for use and transport it to where it was required. He was paid overtime for this work. The local authority refused to include overtime in the calculation of his final pensionable remuneration. The complainant, on the other hand, considered that this overtime was rostered, regular and a requirement of his job and was, therefore, reckonable and that the failure of the local authority to include this overtime in the calculation of his final pensionable remuneration in line with the rules of the scheme, amounted to maladministration.

Article 105 of the Local Government (Superannuation) (Consolidation) Scheme, 1998 (S.I. 455 of 1998) provides that overtime is not normally included as part of wages or emolument, except in certain circumstances which are set out in Circular S.12/91 issued by the Department of the Environment and Local Government on 11 December 1991. Overtime payments may only be included for superannuation purposes where the work in respect of which the overtime payments were made –

(a) was scheduled work attached to the office or employment (i.e. the particulars of office or conditions of employment specified that the holder of the office or employment has to perform the particular work on an overtime basis); where a schedule of work is not available the local authority should confirm

    i. that the overtime was not optional (i.e. that the person in question had to work the overtime and could not refuse to work it), and

    ii. that the overtime was part and parcel of the employment of the person in question.

(b) was work of a regular and recurring nature i.e. that the particular officer or employee was required to perform the duties during specified hours on specified days; and

(c) was work of a kind which could only be performed outside of, and in addition to, the normal hours of work of the grade to which the officer or employee belonged.

Paragraph 5 of the circular states that the Minister will not be prepared to give a direction that payment for overtime shall be part of salary or wages for superannuation purposes where –

(i) the overtime was occasioned by work volume or staff shortages;

(ii) the amount of overtime worked fluctuated (i.e. where there was no regular and recurring pattern to the overtime worked); or

(iii) where the overtime worked could have been performed within normal hours.

In the current case the local authority contended that if the overtime worked by the complainant did not comply with all of the conditions outlined it could not be included in the calculation of the superannuation award. I accepted that this was the case. However, during the investigation of this particular complaint the local authority agreed that the complainant's overtime complied with paragraph 4(b) of Circular S 12/91 in that it was of a regular and recurring nature and that at least part of it complied with the conditions set out in paragraph 4(c) of the circular in that it was work of a kind that could only be performed outside of, and in addition to, the normal hours of work of the grade to which the officer or employee belonged. Therefore the only outstanding issue was whether or not the overtime met the conditions set out in paragraph 4(a) of the circular i.e. scheduled work attached to the office or employment. The local authority maintained that the overtime payments that were made to the complainant did not relate to scheduled work attached to the employment. The overtime was optional, in that an employee had a right at any time to work, or not to work, the overtime – without in any way prejudicing or interfering with the contract of employment.

During the investigation of this complaint, it came to light that the Department of the Environment, Heritage & Local Government had previously allowed overtime to be considered as part of pensionable pay in a number of appeal hearings. The overtime in question generally resulted from specific operational requirements e.g. opening/closing depots and cleaning and refuelling machinery. The Department also had precedent cases

where they concluded that, where overtime was deemed to be necessary and had, in effect, become an accepted work practice and part and parcel of a person's conditions of employment, the benefit of the doubt, as to whether the overtime was optional, was given to the appellant. Applying this very reasonable principle in this case led me to believe that the complainant equally be given the benefit of the doubt. On that basis I found that that the complainant could be deemed to have complied with the condition as set out in paragraph 4(a)(i) of Circular S. 12/91 and my Final Determination was that, to the extent that, where the overtime could be deemed to have complied with the conditions set out in paragraph 4(c), this overtime could now be deemed to have complied with all the conditions set out in that circular and should, as a result, be included in the calculation of the complainant's pension benefits.

ADMISSION TO PENSION SCHEME

The complainant alleged maladministration of a Retirement Benefits Scheme in that the trustees had failed to admit him to membership of the scheme with effect from its commencement date in January 2000.

The complainant had a history of employment with the same employer over many years. He was employed by them during the period 1975/76 to 1978 and again between 1980/81 to 1988 when he was made redundant. He was re-employed between 1990 and 1993 and from late 1993 to 2002. The company had a number of pension schemes in operation during this period, one of which (Scheme A) was introduced with effect from 1 July 1981. As per the scheme rules, all full-time employees of the company who were over age 25 and under age 55, with two years continuous service with the company, were eligible for membership. The complainant joined this scheme in 1983 on fulfilling the conditions for membership in accordance with the rules. This was a defined benefit scheme based on 1/60th of final pensionable pay for each year of pensionable service. The scheme was non-contributory. Leaving rules provided that, where a member's service was terminated through no fault of his own, e.g. on account of redundancy, the member would be entitled to a reduced pension based on contributions paid by the company up to the date of termination. This would normally be payable from age 65. There was no preservation otherwise.

A separate Retirement Benefits Scheme (Scheme B) was established with effect from 1 January 2000 which was a defined benefit scheme.

Following my investigation I was satisfied that the complainant was employed at various times by his employer between the periods 1975 to August 2002. I was equally satisfied that he had entitlements to join both Scheme A and Scheme B at various times during his employment with the company. I was satisfied that Scheme A applied to his employment prior to January 2000. I was satisfied that all full time employees of the company who were over age 25 and under age 55 with two years' continuous service with the company on 1 July 1981 were eligible to join with effect from that commencement date. I was further satisfied that all employees who were not eligible to join from the commencement date were to be admitted to membership on 1 July following the date they first satisfied the age and service conditions mentioned. I was satisfied that the complainant became entitled to membership of the original scheme with effect from 1 July 1983 and remained a member until 1988.

I was also satisfied that the complainant again became entitled to membership of the scheme on his resumption of employment with the company in 1990 and again in 1993, provided he satisfied the two year waiting period. The employer had failed to show which, if any, parts of this service were part-time and therefore ineligible under the scheme; and, in the absence of such proof, I stated that I was inclined to accept that all of this service was full-time and therefore reckonable under the scheme. As the scheme was non-contributory, the employer would therefore be liable for all costs associated with accrued benefits under the scheme.

For the purposes of Scheme B a member who had previous pension arrangements under the company's previous scheme was defined as *"... any Employee who has been a member of the Company's previous pension arrangements"*. The complainant had received a Supplementary Letter of Announcement dated 15 March 2002 which was directed to pre-2000 members. This also included an informal notification of the complainant's pension scheme entitlements and was presented by the scheme consultant

who also acted as pensioneer trustee to the scheme. The complainant then completed an attached application for membership and dated it 10 May 2002.

I indicated that I did not find any merit in the trustees' contention that, as the trustees had no earlier evidence of application for membership, they could not accept him as a member from an earlier date. I stated that I was satisfied that the complainant, as a member of a previous pension arrangement with the company, had an automatic entitlement to join this scheme and that this declaration was simply to acknowledge membership and consent to the transfer of reserves relating to his participation in the company's previous pension arrangements. I noted that the pensioneer trustee appears to have reached the same conclusion from its deliberations on the subject and felt so strongly that it indicated that, unless this matter was put right, its continuing trustee relationship to the scheme would become untenable.

I was satisfied that the complainant qualified for membership of Scheme B from its commencement date in January 2000 to the date of his redundancy in August 2002. He also qualified for the transfer of his service under Scheme A to this scheme.

I directed that the trustees of the new Scheme B determine the transfer value of the complainant's entitlements under the old Scheme A; and that the employer immediately pay this value to the trustees of the new Scheme B. I further directed that the trustees of the new Scheme B then determine the actuarial value of the complainant's entitlements under this scheme and communicate directly with him as to his entitlements under this scheme.

VALUE OF PENSION FOLLOWING WIND-UP

The complainant was made redundant by his employer in 2002, aged 56. He was then advised that he could receive benefit from the Retirement & Death Benefit Plan (the Plan) in either one of the following ways:-

- a pension of €15,461 per annum, payable from age 65. This pension would be re-valued up to age 65 and when in payment would increase in line with the Consumer Price Index (CPI), subject to a maximum increase of 2.5% p.a. There was an attaching Spouses Pension of 50%, payable in the event of his death, or
- an immediate early retirement pension of €9,255 p.a., with an attaching 50% Spouses Pension and escalating in line with the CPI, subject to a maximum increase of 2.5% p.a., or
- a transfer value of €143,584.

The complainant chose to leave his benefit in the Plan, confident that, as a defined benefit one it would be secure and would increase in value, until he decided to draw it as a pension.

In July 2003 he enquired as to the early retirement pension that would be payable to him from October 2003. He was advised in September 2003 that the Plan was being wound-up and the benefit payable to him was dependent on the transfer value, then valued at €164,812. This amount would secure him an immediate pension of €6,774 p.a. The option of taking a deferred pension was no longer available as the plan was being terminated. The complainant was unhappy with the fall in his early retirement benefit from €9,255 p.a. quoted in June 2002 to €6,774 p.a. quoted in September 2003. He voiced his complaints to the trustees, his former employer and the Pensions Board and, dissatisfied with their responses, brought his complaint to me in November 2004.

Following examination by this Office of the considerable body of papers submitted in the course of this investigation I was satisfied that the pension plan benefits offered to the complainant in September 2003/January 2004 represented the scale of his entitlement under the Plan. These were based on the transfer value he became entitled to on the winding-up of the pension plan. I could sympathise with the position the complainant found himself in with regard to his entitlements. He understood that he had a guaranteed entitlement under a defined benefit pension plan and that subsequent events should not have depleted that guarantee. In reality, however, his deferred benefit entitlement under the defined benefit plan was only fully secure as long as the pension plan was ongoing and the employer was prepared to support the promised scale of benefit.

This was the situation that existed in June 2002 when the complainant was advised that, given the consent of the employer, he could receive an immediate pension benefit of €9,255 p.a. This pension was calculated in accordance with the plan rules and was based on his deferred pension benefit with a discount factor applied to take account of earlier payment. He was advised that, by postponing receipt of this pension, the pension ultimately payable to him at some later date would be greater, as the discount factor would reduce, the closer he got to normal retirement age. This was reasonable advice given the circumstances that prevailed in 2002 and would have been borne out had the pension plan not been wound up in September 2003.

When the employer withdrew from and terminated the pension plan effective from September 2003, there was nobody left to act as guarantor for members' benefits. As the complainant was not in receipt of a pension prior to September 2003 he was classed as a deferred pensioner when the Plan went into winding-up. On wind-up, the active plan members and deferred pensioners effectively lost the promise of a guaranteed future pension benefit and received instead a transfer value benefit, relating to their share of the assets of the Plan. As the Plan was able to meet 100% of its liabilities on an actuarial basis at the date of wind-up, each member's share or transfer value was the discounted cost of securing their accrued deferred pension, calculated on the statutory transfer value basis. This transfer value amount was not sufficient in 2003 to secure, on the open annuity market, the same level of early retirement pension that had previously been quoted to the complainant. That early retirement pension had been calculated using the early retirement factors that applied in 2002. However those factors were only applicable as long as the Plan was on-going and they were certified as applicable by the actuary. Had payment of the early retirement pension begun in 2002, that benefit would have had to be bought out on the winding-up as a priority item. I acknowledged that he had been a victim of these circumstances, but the position he found himself in was not as a result of acts of maladministration by the administrator, the employer, or the trustees. The termination of the pension plan caused that problem. The rules of the Plan permitted the employer to cease contributing to the Plan. The trustees had no authority or power to compel an employer to continue contributing or to maintain a pension plan in force. Since contributions ceased the Plan had to be terminated and the trustees had the duty to administer the wind-up and distribute the benefits to the Plan members in a fair and equitable manner.

The complainant had further alleged that the administrators were guilty of an act of maladministration in that they omitted to advise him in 2002 that the quoted figures were calculated on the assumption that the Plan would not be wound up in the future. I did not accept this nor could I assume that the complainant would definitely have acted differently in 2002 if his plan benefits were qualified by a statement to the effect that the benefits would only hold good as long as the Plan was not wound up. Such a statement *might* have prompted a member to query what the effect of a wind-up would be on his plan entitlement. This is not a question that could have been answered with certainty. I believe that the general routine inclusion of such statements with leaving-service options would only confuse most members.

I disallowed this complaint as the investigation by this Office had not found that the complainant suffered financial loss due to an act of maladministration by either the employer or the trustees or administrators of the Plan.

REFUSAL TO APPLY POST RETIREMENT INCREASES

This complaint referred to the refusal of the Health Service Executive (HSE) to apply a new senior staff nurse rate of pay to a retired psychiatric nurse (the complainant) although he did, at the time of its introduction, have the necessary service requirements to avail of that rate of pay. The complainant retired in July 1998.

The new post of senior staff nurse (SSN) was established in November 1999 following a Labour Court Recommendation- LCR 16330 – as part of the resolution of the nurses' dispute at that time. It was agreed that this new post would be set up to fulfil an identified need in the system. A job specification, training programme and eligibility criteria were agreed for the post. Serving staff with 23 years or more post-qualification service on 1 April 2000 were guaranteed the SSN post.

Such staff received an additional 5% increase in salary over and above the long service increment on their salary scale. The payment was effective from 5 November 1999.

Serving nurses were required to complete an application form and validate their previous nursing experience in order to avail of the payment. The form contained a commitment to participate in a training/orientation programme as was provided for in the original Senior Staff Nurse Agreement. Initially it was agreed that there would be 2,500 posts but subsequently all serving nurses who applied for the post and who fulfilled the required criteria were upgraded.

The Nursing Alliance claimed, on behalf of the complainant, that the post should be considered as being effectively a long service increment rather than a new post based on the following arguments:

- It was well established practice that pay increases, which apply to serving public and civil servants are applied to retired officers from the relevant grades. This practice had applied universally to public and civil servants in the past and, indeed, has also applied to increases awarded under the Public Service Benchmark process. Therefore, the non-application of the SSN rate of pay (and other awards made at the same time) stood out as an exception to normal public service practice.
- The requirement indicated to the Retired Nurses Association that recipients would have to be prepared to undergo training/orientation programmes, while it was part of the original agreement for the introduction of a SSN rate of pay, has not been imposed on the current recipients of the SSN rate. Firstly, the current arrangements for the application of SSN rate of pay were reduced to 20 years of service. The recipients of the SSN rate of pay received this adjustment on application without having to undertake such training or orientation. The vast majority (if not all) of the current recipients had not had to undertake such orientation or training at all. The Nursing Alliance was not aware of any nurse being required to undergo such a course. Therefore, to place such a requirement upon retired nurses amounted to the imposition of an unnecessary regulation or requirement for the sole purpose of diminishing or eliminating their entitlement. As such it was an inessential requirement and amounted to discrimination against the retired nurse.
- While the original agreement for SSN envisaged a quota system for employers, this never actually limited its application. In effect the Nursing Alliance claimed that the rate of pay for SSN was automatically applied when 20 years post-qualification service was recorded and its application was universal in that it applied to all serving nurses.
- While Labour Court Recommendation 16330 set out a clear requirement for those promoted to the new grade of SSN to take on additional duties as set out in the Appendix to the recommendation, the Nursing Alliance argued that the words Senior Staff Nurse were asterisked and the explanation provided in the footnote at the bottom of the page states *"this does not denote a supervisory role."* Further they argue that the agreement actually states in the third paragraph that *"nothing in this initiative is to suggest that the duties focused on are to be the sole preserve of the Senior Staff Nurse. Such duties will continue to form an integral part of every nurse's and midwife's responsibility."*

  On this basis they argued that *"Clearly, therefore, what was agreed was a payment which was to be based on long service to Senior Staff Nurses who would still be working within the basic job description of every nurse and midwife."*

Following my investigation of this complaint I concluded as follows:

- It was clear that the Labour Court Recommendation provided for the establishment of a new post of SSN with a separate job specification, training programme and eligibility criteria agreed for the post.

  I had examined the job specification as set out in the Appendix to the agreement and the arguments put forward by both sides in relation to this. While it was clear that the new SSN post was never considered to be a supervisory post there was nevertheless in my

opinion the clear intention that holders of the new post were expected in certain circumstances to take a more active role than the staff nurse.

- The Nursing Alliance had argued that, following negotiations with the relevant authorities, one of the three key principles of the SSN post was dropped, i.e. *"the SSN is a new post with attendant responsibilities"* and that in practice there was effectively no difference between the duties of a staff nurse and a senior staff nurse. However, I noted that one of the two remaining principles was that *"The SSN is not a long service increment"* and that the unions, including the Nursing Alliance had signed up this principle. Based on the evidence presented it was difficult for me to say with certainty what was happening in practice as regards the assignment of duties between the posts of SN and SSN. However I had noted the letter from the Director of Nursing and Corporate Affairs Manager of one of the largest voluntary hospitals in the country which clearly stated that the grade of SSN was expected to carry out duties over and above those which are carried out by the grade of SN.
- It was clear that the quota system never applied in practice. The original Labour Court recommendation was that 2,500 posts should be created and, based on that, the Department of Health and Children set a minimum requirement of 23 years service, presumably assuming that this would broadly equate to some 2,500 posts. However, in the initial tranche a total of 3,300 posts were created. Following the review carried out in 2001 the requirement regarding post-qualification service was reduced from 23 years to 20. The Nursing Alliance argued that the granting of the SSN posts is based on the length of service rather than seniority or competition. This is clearly now the case and anybody with the required 20 years service, who applies for the post of SSN, and agrees to participate on a training/ orientation programme as provided for in the Senior Staff Nurse Agreement, is automatically promoted to the new position of SSN.
- The last requirement for the post of SSN is that on application s/he agrees to participate on a training/ orientation programme as provided for in the Senior Staff Nurse Agreement. The Nursing Alliance had claimed that the requirement had not been imposed on the current recipients. The Health Service Executive Employers Agency (HSEEA) accepted that there was an initial delay in formulating a dedicated training programme for SSN but stated that in response many of their larger employers include SSNs in leadership programmes for nurse managers. Having reviewed the arguments put forward by both parties in relation to this issue it was my opinion that the HSEEA could not rely on this condition on its own as a basis for denying the granting of the SSN to pensioners as it clearly has not been implemented properly in relation to staff nurses that have been upgraded to the post of SSN.
- The final point made by the HSEEA was that the new grade of SSN was a separate and distinct grade within nursing for the purpose of the public service benchmarking exercise and that this fact has been agreed with the nursing unions. On this basis the HSEEA argued that it would be unprecedented to base a pension on a new grade that comes into existence after the date of retirement.

Notwithstanding a number of reservations that I had, I concluded that the SSN should be considered as a new post rather than a long service increment. Paragraph 8(c) of Circular Letter S.7/87 as issued by the Department of the Environment, which refers to pensions increases, clearly states that *"No account should be taken of an increase in pay which applied to the pensioner's former post solely on the grounds of re-grading, re-structuring or alteration in duties or conditions of service that did not apply to the pensioner before the date of his retirement"*. Department of Finance rules on the granting of pension increases are very specific, and similar. On this basis, given that the complainant retired before the implementation of the new grading structure, it was my Final Determination that his complaint should be disallowed.

This Determination has, subsequently, been appealed to the High Court.

REFUSAL TO APPLY 'RED CIRCLED' ALLOWANCES TO RETIRED MEMBERS

The complaint referred to the failure of the South Eastern Health Board (now HSE) to apply the red circled allowance applicable to the deputy nursing officer (DNO) grade – agreed as part of the 1999 agreement to the nurse's dispute – to the complainant, a pensioner who had retired from service as a DNO in 1994.

The red circled allowance of £750 per annum was provided for in a recommendation from the Labour Court, LCR 16261, dated 31 August 1999. As part of the resolution of the nurse's dispute in 1999 a number of existing posts were re-graded. The re-grading created a new post of clinical nurse manager 1 (CNM1), which encompassed the grades of junior ward sister and DNO. The Psychiatric Nurses Association maintained that this resulted in a downgrading for the post of DNO and outlined this in a submission requesting the Court to recommend that the DNO receive the same percentage increase as the junior ward sister had received.

The Labour Court recommendation set out amended salary scales which encompassed a two-phased salary increase for promotional grades at 1 July 1999 and 1 July 2000. Nursing officers were to become clinical nurse manager 2 (CNM2) after application of the second phase increase in July 2000 and received an increase of 9.51%. In relation to the DNO, application of the second phase increase in July 2000 increased pay by 6.4%. If the DNO scale was increased by the same percentage rate it would have generated a further increase of £747. However, instead of a percentage increase, the Court recommended a red circled allowance in this instance of £750 for DNOs, which effectively removed the anomaly for those who were in the post and preserved the direct relationship with the nursing officer/CNM2. This payment was effective from 1 July 1999, payable on a red circled basis to current staff. It would be discontinued once an individual gained promotion, or if the post was upgraded, either by appeal or restructuring.

In this context the HSE explained that the term *"red circled allowance"* is an industrial relations term used to describe an arrangement which is personal to an individual or group of individuals. On the basis that it is personal to the holder the arrangement ceases to be applied when the recipient of such an arrangement retires, resigns or is promoted from a post. The allowance is reckonable for pension purposes for an individual in receipt of the "red circled" allowance in the period prior to retirement.

The Nursing Alliance, on the other hand, argued that the red circling in this case did not fit this description and had to be seen in the context of the specific circumstances outlined in Labour Court recommendation 16261. They argued that what happened in this case was that the new CNM1 grade encompassed people formerly in the grades of junior ward sister and deputy nursing officer, psychiatry. They stated that the complainant served in the DNO grade and this grade received the red circled allowance which allowed former DNOs a higher rate of pay than the new CNM1 grade on a personal to holder basis. The Nursing Alliance claimed that, clearly, as the complainant was part of the DNO grade at the date of his retirement, he was entitled to the increase which applied to his former grade. The Nursing Alliance also argued that the reference in the Labour Court recommendation to *"current staff"* was simply to distinguish serving staff from future staff and that the Labour Court had no jurisdiction over pensioners and could not be inferred to have dealt with the pensions issue in its wording. The Nursing Alliance also argued that the red circle allowance was applied to all DNOs with effect from 1 July 1999 (while they were still DNOs) whereas the grade of CNM1 did not come into existence until 16 November 1999. They argued that as all DNOs received the red circled allowance with effect from 1 July 1999 it should, under the rules of parity, have also been passed on to retired DNOs.

I examined the arguments put forward by both the complainant and the respondent in relation to this complaint and concluded as follows:

- The allowance of £750 p.a. for the grade of DNO, which arose following the recommendation from the Labour Court LCR 16261, was to be paid on a red circled basis to current staff and to current staff only. The Nursing Alliance had argued that the Labour Court made the reference to current staff simply to distinguish them from future staff in the grade and that as it has no jurisdiction over pensioners,

its recommendation could not be seen as precluding pensioners from receiving the benefit of the increase. I accepted the argument that because the Court had no jurisdiction over pensioners, it could not be deemed to have dealt with the pensions issue.

- This recommendation was later agreed with the nursing unions as being those staff in place on 16 November 1999 and the payment was to be paid with effect from 1 July 1999. This was clearly set out in the Summary of Guidelines on Agreements concluded as part of the settlement terms of the 1999 nurse's dispute and also in the Department of Health and Children circular of 16 November 1999. Furthermore the allowance was to be paid on a 'personal to holder' basis and would cease if the individual retired, gained promotion or if the post occupied was upgraded. On this basis it was clear, in my view, that it was not intended that the increase should be passed on to former officers who had retired before the creation of the post of CNM1.
- The Nursing Alliance had made the point that the only relationship that retired deputy nurses could have had was with the grade of 'red circled Deputy Nursing Officer', (to which the allowance of £750 was applied from 1 July 1999) as the CNM1 grade did not exist until 16 November 1999. I examined this argument and it was my opinion that the crucial point was that a DNO had to be serving in the grade *on 16 November 1999* to become eligible to receive the red circled allowance. If, for example, a DNO who was serving in the grade as at 1 July 1999, retired before 16 November 1999, s/he would not have got the benefit of the red circled allowance. It could not, therefore, be argued that all DNOs who were in situ as at 1 July 1999 automatically received the red circled allowance even though it was paid from that date. The fact remains that only the DNOs who were in situ on 16 November 1999 got the red circled allowance and that was when they had been re-graded as CNM1s. While they were a distinct cadre within this grade, the fact was that not every person in the grade of CNM1 was eligible for the red circled allowance and, under the rules of parity, it could not, therefore, be passed on to retired DNOs.
- The increase did not apply to all holders of the upgraded post of CNM1 nor was it intended to be a permanent feature of the pay scale. Therefore, under the general rules on parity, which apply to all public service increases, the allowance was not one which could be applied to the pensions of those who had retired before its introduction.

In conclusion, I was satisfied that the red circled allowance was seen as a once off allowance payable to the DNOs who were in place on 16 November 1999, and to those only, and that it was not intended that the allowance would be passed on to those who subsequently came into the grade of CNM1 or to those that had retired from the grade of DNO before the operative date. I was further satisfied that under the rules of parity as enunciated by the Department of Finance it could not be considered as being a special increase that could be passed on to pensioners. My Final Determination was that this complaint should be disallowed.

MISMANAGEMENT OF FUNDS BY PENSION PROVIDER

The essence of the complaint submitted by the complainant was that his policies had been mismanaged by the insurance company as proven by the numerous errors made by it in quoting transfer values since 2003. He believed that he could not rely on the accuracy of the figures quoted and contended that he had suffered significant financial loss as a result of the mismanagement of the policies.

The complainant's funds were invested in five traditional with-profits policies and were due to mature on his 65th birthday in 2007. It was therefore extremely important from the complainant's perspective to get an accurate picture of his retirement fund coming up to retirement. The complainant had started this process in 2003 and on several occasions had received inaccurate information, misquotes etc. All his efforts to receive accurate and reliable information had been thwarted. It was practically impossible for the complainant to plan his finances and make decisions regarding the investment of further contributions without this information. The longer the process took, the less time was available to the complainant to make decisions regarding his finances. It was apparent that the pension

provider had failed to grasp this aspect of the situation. While admittedly the intermediary broker had a role to play in this process, the pension provider had failed to make any real effort to consider the issues in depth and provide accurate information relevant to the complainant's circumstances.

While transfer values would provide an indication of the nominal value of the fund at a point in time, the guaranteed benefits, including both guaranteed and final bonuses were extremely relevant in this case, as the complainant was so close to retirement. However, very little attention was paid to this aspect of his pension until this Office became involved. While the pension provider was busy addressing the reasons why incorrect transfer values were quoted, they ignored the relevance of the guaranteed benefits. They failed to consider the complainant's situation as a whole – they merely responded to requests for information. While this level of service might have been adequate if the complainant was receiving accurate information and was satisfied with it, it was less than adequate where it was clear that the complainant was not satisfied with, and had very good reason not be satisfied with, the information received.

Following my investigation I found that there was serious maladministration on the part of the pension provider in relation to the manner in which values were quoted to the complainant, the explanations given for the numerous errors made and the overall handling of the issues associated with the values quoted. However, in response to my findings the pension provider agreed to maintain a minimum maturity value on the total benefits at the maturity date of €196,661, which represented the total transfer value at 6 November 2006. If the actual maturity value in 2007 was higher the pension provider agreed to pay the higher figure. In addition they agreed that the guaranteed annuity rates attaching to each of the five policies could be used at the maturity date. If current annuity rates at that date were more favourable than the guaranteed annuity rates, then they would apply instead.

In my Final Determination I directed that the pension provider honour the commitments it had given above and also that it would provide relevant information regarding the maturity of the complainant's policies in the first week of April 2007. This information was to set out the transfer value, maturity values based on the guaranteed fund (including bonus and final bonus) and the likelihood of any changes in the figures between April 2007 and the maturity date in May. Details of information required by the pension company to enable them to settle the maturity benefits would also have to be communicated directly to the complainant and copied to his solicitor.

MATURITY VALUE OF PENSION POLICY

The complainant contended that the maturity value of his AVC policy with the pension provider should be higher than that quoted. The complainant based this contention on correspondence between himself, his employer, who was his brother, the pension provider and the pension broker. The complainant believed that the pension provider did not address the relevant issues and he was further frustrated by the fact that he continued to receive incorrectly addressed letters from the company.

In August 2002 the complainant's AVC policy with the pension provider matured. The complainant was initially advised that the maturity value of the policy was €66,546. A further letter was issued in which a maturity value of €61,866.89 was quoted. The complainant queried the difference in the two values and estimated that the correct value of his policy was €69,266.56. This figure was submitted to the provider together with supporting calculations set out in a letter by his employer. The provider responded to the complainant's requests a number of times, attempting to address the issue by enclosing details of growth rates on the funds in which his policy was invested and setting out the bid/offer prices of the units purchased and the surrender value of these units. They also apologised for issuing the incorrect second maturity value.

On a number of occasions the complainant asked for clarification of the maturity value quoted by the pension provider and requested them to consider the calculations submitted by his employer and to indicate the errors, if any, in these calculations. Following further correspondence the broker advised the complainant that the provider had confirmed the final retirement value of €69,266. However the provider confirmed to him that the maturity value plus

interest was €68,370. The provider maintained that they had no record of ever quoting a value of €69,266.

Following my investigation of this complaint I determined that it should be upheld as one of maladministration on the part of the provider and the broker/administrator, both of whom were respondents. The maladministration arose when the respondents attempted to deal with the issues and concerns raised by the complainant in relation to the maturity value of the policy. The complainant believed that the maturity value quoted by the provider was incorrect. The investigation found that this was not the case, the maturity value quoted was correct. However, the respondents did not adequately address the complainant's questions and the problem was allowed to continue for over two and a half years without resolution.

As part of my Determination I directed the provider to value the complainant's policy using the maturity value at August 2002 increased by the growth in the Exempt Cash Fund from August 2002 to the date of payment. I directed the provider and the complainant to co-operate with each other to settle the benefits due from the policy within two months of the date of the Final Determination. I considered this to be a fair and reasonable method of adjusting for the erosion of the fund and in finally resolving the matter. I also directed the provider to amend their records so that future correspondence to the complainant was addressed correctly. I noted that the broker offered to rebate the commission earned on the policy, and the complainant advised that he wished to accept this rebate. I therefore directed the broker to pay this rebate within 30 days of the date of the Final Determination.

NON-REMITTANCE OF PENSION CONTRIBUTIONS

This complainant stated that from August 2001 to early January 2004 pension contributions deducted from his salary, together with pension contributions owed by his employer, were not paid to the pension provider for investment in the pension plan.

The complainant alleged maladministration resulting in financial loss against the former directors and the former financial controller of the company, which had been dissolved with effect from December 2004. The complainant discovered towards the end of 2003 that contributions which had been deducted from his salary had not been remitted to the pensions company for investment in the pension plan. He brought this to the attention of the managing director of the company who promised to repay the outstanding contributions due. The pension provider confirmed to the complainant in December 2003 that they had not received employer and employee contributions in respect of his fund after July 2001. Deductions from the complainant's salary in respect of pension contributions had continued after this date.

The pension provider had contacted the Pensions Board in relation to the pension plan and the Board had undertaken an investigation. A number of meetings between the Board and the managing director of the company were held and he agreed to repay the total amount of contributions due in respect of the complainant and three other members of the pension plan. The pension provider confirmed that the managing director had paid €12,000 in total in respect of the contribution arrears in the pension plan and this amount was split evenly between the four members. As all contributions in respect of the complainant's membership of the pension plan had not been paid despite the Board's intervention, the complainant referred his complaint to this Office.

Following an investigation of the complaint it was established that there was, in total, around €12,000 outstanding in respect of unpaid contributions in respect of the complainant, €6,000 of which comprised deductions that had been made from his salary but had not been remitted to the pension plan by his employer. A sum of €3,000 was subsequently paid into the plan on behalf of the complainant by the managing director of the company, leaving an outstanding balance of some €9,000.

In this case the company acted as trustee to the pension plan. Two of the respondents to the complaint were directors of the company while the third was its financial controller. It was clear that the two directors were intimately involved in the operation of the pension plan. The provider also had direct contact with the financial controller in relation to contribution payments, and it was reasonable

to assume that he had a direct involvement in the pension plan, particularly in the area of the deduction of employee contributions from salaries and the payment of contributions to the provider.

Under Section 58A(1) and (2) of the Pensions Act 1990 (as amended) the employer is obliged to remit all contributions to the trustees or to another person on their behalf within 21 days of the end of the month in which the contributions are due. The trustees have a corresponding obligation in accordance with Section 59(1)(a) to ensure that these contributions are then invested within 10 days of the latest date on which the contributions should have been remitted or paid. There was thus a clear breach of the Pensions Act by the company, its directors and its financial controller. While the company was both employer and trustee in this instance, in reality the obligations on the company as employer and trustee fell to the directors of the company. The directors, together with the financial controller, were in effect responsible for the management of the pension plan and should have ensured that all pension contributions due in respect of the pension plan were paid to the provider. The directors not only failed to pay the employer element of the contributions due to the pensions company but they knowingly retained contributions which had been deducted from the complainant's wages.

My Final Determination was that this complaint should be upheld as one of maladministration on the part of the respondents who I deemed to be liable for the financial loss, jointly and severally. I concluded that the respondents should also be responsible for the purchase of the number of units needed to place the complainant in the position he should have been in if the contributions were paid when due. I therefore directed the respondents to pay to the provider an amount required to purchase these units for the complainant's pension fund.

DELAY IN CALCULATING THE COST OF RECKONING PREVIOUS SERVICE

The complainant had alleged maladministration of the Local Government Superannuation Scheme (LGSS) by way of the delay in calculating the cost of reckoning previous temporary service. She was appointed to a permanent position by a health board in 2002. The Health Service Executive Western Area (HSE) was established on 1 January 2005 and took over the functions formerly undertaken by the board.

Persons appointed to a permanent wholetime post in a health board are eligible to join the LGSS. Membership of the scheme is compulsory. The particulars of office relating to the complainant required her to pay class A rate of PRSI contribution (fully insured), to make superannuation payments to the board at a rate of 1.5% of her pensionable remuneration plus 3.5% of net pensionable remuneration. The rules governing the payment of superannuation contributions by fully insured permanent officers of health boards in respect of previous non-pensionable temporary whole-time and part-time service are contained in the Local Government (Superannuation) (Consolidation) Scheme, 1998 (S.I. 455 of 1998). Under the scheme it is compulsory for contributory members of the scheme to have previous temporary wholetime and part-time health board service reckoned for superannuation purposes and to pay superannuation contributions in respect of such service. Under Articles 64(5) and 80(2)(b) of the scheme, a fully insured officer, entitled to reckon a period of previous part-time or temporary wholetime service as service for pension purposes is required to make contributions in respect of such service at a rate levied on the person's pensionable pay *at the time the contributions are being paid*.

On appointment to her permanent position in 2002, the complainant had no option but to reckon any previous temporary service with the HSE. In March 2003 the HSE wrote to her informing of a compulsory service bill in respect of previous temporary service as a staff nurse during the periods February 1990 to August 2002. Some of this service was broken service, i.e. it stopped and started and the total reckonable service involved was 1.441 years. The complainant was advised that the approximate cost to reckon this service by way of payment of lump sum was €1,580.99. She was advised that this was based on current salary only and that any additional emoluments she was currently receiving would have to be taken into account before discharge of the bill. She was also advised that she could, as an alternative, offset the amount due by paying

additional percentage contributions (i.e. by doubling her existing contributions) on a monthly basis over a period corresponding to the length of time of her reckonable temporary service.

The complainant was also advised that arrears of contributions which were due in respect of the Spouses and Children's Scheme were not being deducted at that stage but would, instead, be taken from retirement lump sum/death gratuity at the rate of 1% per year of service in question. The complainant contacted the superannuation section by telephone and informed them that the estimate had taken no account of service as a student nurse. She requested that this service should be included and asked to be notified of the revised lump sum due to reckon the total temporary service.

The complainant finally received a revised notification in March 2004 which included student nurse service for the period 7 September 1985 to 4 November 1989, giving her a total of 5.603 years service to reckon. She was advised that the approximate bill to reckon this service would be €7,128.81. She was again advised that this was based on current salary, and given the additional information as previously furnished.

The complainant queried the compulsory bill in writing in April 2004. She pointed out that she had made numerous attempts to get a revised bill issued and that all delays involved were the responsibility of the HSE and that it was unfair for her to suffer as a result of the HSE's inability to issue the revised notification in a timely manner. [The new estimate was proportionately about 16% higher than the first one]. She requested that her bill should be revised to reflect her salary details at March 2003 rates. In accordance with Articles 63, 64 and 80 of the Local Government (Consolidation) Scheme and Circular Letter S1/97, the HSE was obliged, in respect of all fully insured officers appointed by the HSE, to collect superannuation contributions due on all reckonable temporary part-time and whole-time health board posts. Verification of qualifying service can be reasonably straightforward with a short turnaround time, but can also be the subject of lengthy and complex enquiries particularly in relation to verification of part-time service. The policy of the superannuation sections across the health services is to notify relevant personnel of the cost of purchasing this service as soon as possible following appointment. However, many such sections experience major delays in doing this, primarily due to staff shortages and lack of suitably qualified staff. There have also been a number of recommendations made by my colleague Ms. Emily O'Reilly, Ombudsman, on similar cases [2]. In each of these cases, we both came – independently – to the same conclusions.

The common features in all cases examined by the Ombudsman and myself are:

- it had taken the HSE a prolonged period of time (in some cases three years) to calculate how much the complainants would have to pay in additional superannuation contributions;
- as a consequence, because of salary changes in the interim, the arrears had increased significantly and were very much in excess of what would have been payable by them if their cases had been dealt with by the HSE within a more reasonable timeframe;
- it was clear from discussions held by the Department of the Environment, Heritage and Local Government (DOE) with the Health Boards and from Circular Letters S.1/97 and S.7/97 that:
    - the HSE was aware of the need to notify those concerned of their contribution liability in respect of previous temporary whole-time service and part-time service as soon as possible after they became pensionable and to clarify that each officer's contribution liability would increase in line with increases in his/her salary;
    - it was also aware that, because of the number of new appointments involved, the perceived need to verify previous experience and the inexperience and limited number of staff available in superannuation sections, the administrative arrangements it had in place to facilitate the making of the relevant calculations in respect of contribution liability were totally inadequate; and

2 http://ombudsman.gov.ie/en/Publications/InvestigationReports/

- it was further aware that any delay in calculating arrears would result in increased costs to the officers involved.

- although those affected by the contribution liability may have been aware that delays in calculating the level of liability would have implications for the amount they would ultimately have to pay, effectively there was nothing they could do about it;
- the fallout from the failure of the HSE to make the relevant calculations in respect of contribution liability in reasonable time had adversely affected the complainant financially;
- the HSE could have assessed the amount payable in respect of temporary whole-time and part-time service on the basis of the amount of service actually claimed by each individual. In this context payment could have commenced at a much earlier date, with verification of the service to follow;
- the DOE had previously advised that every effort should be made by the HSE to notify fully insured officers of their contribution liability as soon as possible after they become pensionable and added that, as an interim measure, pending verification of previous temporary service, the HSE should give such officers an estimate of their contributions liability and give them the option of paying for this by lump sum method or by paying extra periodic contributions. The Department had indicated to the HSE that the only information required to determine the lump sum contribution was pensionable pay on appointment, rate of old-age contributory pension on appointment and length of previous service (or an estimate of same if necessary). Any necessary adjustment could be made on verification of the previous service. As an alternative, the person should be given the option of paying a multiple of their standard superannuation contribution. For example, a decision to double the standard contribution would mean that the liability would be paid off in a period of time equal to the length of the previous service. Once again, any necessary adjustments could be made when the actual length of previous service was verified.

In conclusion I considered it reasonable to expect that an organisation such as the HSE should be in a position to issue a detailed costing, calculated as per above if necessary, within three months of the person's appointment to a permanent position. Any delay after this three month period which results in a financial loss to the individual member of the scheme was therefore unacceptable. In this regard I am pleased to learn that a meeting between the Departments of Finance, Environment Heritage & Local Government (DOE) and Health & Children recently took place to discuss the issue of contributions liability for past service under the LGSS. I note that all three Departments are sympathetic to contributions liability being calculated, at the latest, on the basis of a person's current salary at the end of the third month after appointment to a post which obliges such contributions to be made, provided delays were not the fault of the scheme member. I am pleased to note that the DOE has agreed to amend the LGSS to implement such a change and that the Department of Finance has no objection to this.

In relation to the present complaint I directed the HSE to calculate the complainant's superannuation liability due under Articles 64(5) and 80(2)(b) on the basis of the complainant's salary at the end of the third month following her appointment to a permanent position.

I was also concerned at the apparent practice of assuming that members of the scheme with previous reckonable service liabilities would pay associated liabilities to the Spouses' and Children's Scheme at retirement, or out of any death gratuity on the basis of 1% of up-rated pensionable remuneration. Members should be informed of their liability at the time the main scheme liability is calculated and of the options available under the scheme rules that are available to them. It is up to the member, *not the employer*, to decide which option best suits him or her. Failure properly to inform the member could lead to complaints in the future which would be difficult for the HSE to defend. This all appeared to me to suggest internal procedural weaknesses within the superannuation section itself as the procedures for checking and communicating service details were not robust enough. I therefore recommended that an internal review be carried out in relation to these comments and procedures put in place to address these weaknesses.

PAYMENT OF INJURY GRANT – FOR LIFE OR NOT?

The complainant alleged that a decision by the Health Service Executive (HSE) to cease paying an injury allowance awarded to him as a result of an injury that he sustained at work was wrong and that he should have been entitled to it for life. He based his claim on the following:

- if he was able to work he would have been entitled to work 19 hours per week after the age of 65 years with the health board without affecting his pension rights;
- financial reasons for stopping an injury grant amounted to age discrimination; and
- it was common for most retired staff after the age of 65 years to work if they wished to do so. Because of his injury he was being denied that right.

The complainant worked as a psychiatric nurse from April 1960 to June 1994. He retired from his position in June 1994 when he was 55 years of age and entitled to a full pension and lump sum. In December 1994 the complainant brought a case against the HSE in the Circuit Court for compensation in respect of an injury he received at work before he retired. He was successful in his claim but the HSE then appealed the decision to the High Court, which upheld the original decision. In April 1995 the complainant then applied to the HSE and to the Department of the Environment for an injury grant equivalent to 5/6th of his salary as pension, as provided for under the rules of the Local Government Superannuation Scheme (LGSS), on the basis that he had retired due an injury that he received in work in October 1991, and that his injury claim had been upheld by the High Court.

The complainant's original application for the injury grant was turned down on the basis that, under the rules of the LGSS, the resignation had to be for health reasons and had to be effective from date the injury was sustained. He subsequently appealed this decision in 2000 and was successful and the grant was backdated to his date of retirement in June 1994. He was informed that the amount of the allowance payable would be reduced by (a) the pension payable under the superannuation scheme, (b) the annual value of the lump sum and (c) any benefit payable under the Social Welfare Code. The allowance was also subject to review.

In June 2004 the HSE wrote to the complainant, stating that a decision had been made that payment of the injury grant allowance in addition to retirement pension should cease when the recipient reached the statutory retirement age of 65. As the recipient had reached age 65 in April 2004, payment of the allowance would cease from May 2004. The complainant appealed this decision but was turned down by the HSE on the basis that Article 109 of the LGSS provides that this allowance may be paid *"for life or for a limited period as the local authority may consider reasonable"*. It was considered reasonable to cease this allowance at age 65, which is the normal retirement age for staff employed in a health board (prior to 1 April 2004), as it was not envisaged that a staff member who retired early on health grounds should be treated more favourably than a staff member who retired at age 65 with full service.

The complainant cited to me a different interpretation which had been put on this Article by the Department of the Environment, Heritage & Local Government who took the view that where a local authority decide to pay an injury grant, such a grant should be payable for the lifetime of the individual concerned.

I determined that both interpretations of the rules of the scheme were defensible. It was clear that under the scheme rules the HSE had the legal authority to cease payment when he reached 65, as they clearly considered it reasonable to do so at this age. On the basis that in making a determination under Section 139 of the Pensions Act I am not entitled to make a direction which would require an amendment to the rules of a scheme, or to substitute my decision for one arrived at by the exercise of a discretionary power, I had no alternative but to disallow this complaint.

I also noted that the complainant sustained his injury at work in October 1991 but did not resign until 26 June 1994, when he was entitled to his full pension entitlements. When he was awarded the injury allowance in December 2000 he was informed that the allowance was subject to review. However, the notification did not specify when this review would take place or what form it would take. A later letter dated 18 January 2001 set out the complainant's entitlements but again made no reference to any limited period of award. I am aware that at the time these letters issued the HSE had not

promulgated its policy with regard to the cessation of injury grants at age 65, but nevertheless it should have been made clear to the complainant that the grant would not be paid for life.

In this case the complainant had retired on a full pension, having accrued the required years' service. However, I feel it is important to note that in general the period of time for which a person receives the allowance is not recognised for pension purposes. If, for example, a person retired for health reasons and was granted an injury allowance when he/she had only 10 years' service, applying the HSE interpretation of the rules would mean that at age 65, that person would revert from being on an allowance of 5/6ths of salary to a pension based on only 10 years service. In these circumstances I feel that a more reasonable solution might be that the years for which the injury allowance is paid should also count for pension purposes. In this way the application of the HSE policy would not have such a catastrophic effect when the recipient reached the age of 65. I recommended that the HSE should set out clear procedures both for the granting, review and cessation of injury allowances which should be made available in advance to all persons applying for such allowances. I recommended that consideration should be given to the amendment of the rules of the Local Government (Superannuation) (Consolidation) Scheme 1998 to provide that the years for which the injury allowance is paid should also count for pension purposes. I also stated that, notwithstanding the general procedures as laid down by the HSE for the cessation of injury allowances, each case should be considered on its merits, as in certain circumstances there might be reasonable grounds for the payment of the allowance beyond the age of 65.

INCLUSION OF BONUS IN FINAL PENSIONABLE SALARY

In September 2004, the complainant was made redundant by the company he worked for after 26 years of service. On attaining age 65 in June 2005 he opted to receive his entitlement from the pension plan in the form of a tax-free lump sum and a reduced annual pension. At that time, the complainant raised a query with the plan administrators as to the calculation of his final pensionable salary. He understood that this would include an averaging of bonuses paid to him and pointed out that, in particular, a special bonus of €9,868.96 paid to him in April 2003 had not been included in their calculations. The complainant advised that this 'special' bonus of €9,868.96 was paid to him in April 2003, on completion of 25 years' service with the company. He stated that he had queried its inclusion in the pensionable salary calculation being discussed under the September 2004 redundancy programme with the company's human resources manager but that the latter had *"refused to discuss the subject other than to say that it was not included"*. In giving a Notice of Determination the trustees of the plan determined that *"As trustees we do not deem that a payment of this nature falls within the definition of salary for pension purposes"*.

The plan definition of final pensionable salary had been confirmed as *'the average of pensionable salary in the best 3 consecutive years in the last 10 before retirement or leaving service.'* Pensionable salary was defined as *'basic annual salary at each 1 January, plus an annual average of bonus/commission earned in the preceding 3 years, less a deduction equal to 1.5 times the single persons rate of State Retirement Pension.'* This formula had been correctly applied by the pension administrators in the calculation of the complainant's benefits under the pension plan, based on the salary details supplied to them by the company. The key question was whether or not the jubilee payment of €9,868.96 made to the complainant in April 2003 should form a part of his final pensionable salary calculation.

The plan rules did not specify or list the payments to employees that qualify as 'bonus' or 'fluctuating emoluments'. However, normal understanding of the term 'bonus' would be that it was a regular performance- or target-related payment made in addition to basic salary. The term 'fluctuating emoluments' implies multiple payments of differing amounts. The optimum intention under a pension plan is to provide an income in retirement that relates to an employee's regular pre-retirement earnings. Where customary bonuses, commissions or other fluctuating emoluments make up a reasonable part of an employee's actual annual earnings this situation can be recognised under a pension plan by including an averaged value of

such payments in calculating the salary on which their pension should be based (and the Revenue Commissioners generally require such payments to be averaged). The plan rules neither specifically include nor exclude payments such as the jubilee payment in the definition of pensionable salary. The complainant was not promised that the jubilee payment would form a part of his pensionable salary calculations, nor was he clearly told that it would not.

The jubilee payment of €9,868.96 made to the complainant was not a performance or target-related bonus, nor the type of payment made on a regular basis. It was described by the company as a once-off loyalty payment – made to an employee on completion of 25 years service with the company. It was not taxed in the hands of the complainant nor did he pay any pension plan contributions relating to it. The jubilee payment equated to the pre-tax equivalent of one month's salary.

As the plan rules did not provide the absolute clarity needed to determine this dispute I considered the actual working practice and the basis for calculating benefits and costs under the plan. The company confirmed that jubilee payments figures were not included in the annual salary returns made to the plan administrators nor in the triennial returns to the plan actuary, to determine benefits and costs under the plan. The jubilee payment was thereby not considered by the employer to form a part of the pensionable salary calculation.

Under the circumstances I took account of the sponsoring employer's intention under the plan, as evidenced by the calculation of its liabilities, and to the established practice in the administration of the plan, whereby no employee had ever had the jubilee payment included for pension purposes. I therefore determined that the complainant was not entitled to have the jubilee payment included in the calculation of his final pensionable salary.

BENEFIT EXPECTATIONS

The complainant had been a member of his employer's ("Company A") Retirement Plus Plan since its inception in 1991. This was a *defined contribution* pension plan to which the employer contributed 7% of salary and the employees did not contribute. In 1999 Company A was taken over by Company B and the staff were given the opportunity to join the latter's *defined benefit* pension plan on a future service basis. The complainant, along with others, declined to join the Company B pension plan and were retained on the existing basis, as members of the Company A pension plan.

The benefit package offered under the Company A plan included death and disability benefits – the costs of which risk benefits were a first charge against the contribution. The complainant had declared that he only became aware of the fact that the risk charges came out of the 7% employer contribution on receipt of a member handbook in February 2005. He had assumed that the costs of death and disability benefits were paid by the employer in addition to the 7% of salary contribution. He stated that the fact that they were not had led to a smaller than expected amount being invested in his pension fund and had therefore resulted in a financial loss to him. He alleged that maladministration on the part of the trustees, the pension administration company and the pension provider had led to this financial loss. The complainant also claimed that he had not received benefit statements in 1993, 1994, 1995, 1998, 1999 & 2003.

Following my investigation of the complaint I found that the basis of this plan had not changed over time. It was still a defined contribution plan to which the employer paid 7% of salary and the members did not contribute. The plan provides death in service and disability benefits as well as making pension provision for staff. The cost of the death and disability benefit cover was a first charge against the plan contribution, with the remainder paid into a retirement fund for each member. The complainant had alleged that he only became aware that the 7% overall contribution was the basis of the plan in 2005 and had not received benefit statements for several years since 1993. I could not accept the first allegation because Company B had stated that, in March 1999, they provided all the members of the Company A pension plan with a comparison between the Company A and Company B plans and this clearly showed that the basis of the former plan was an overall contribution of 7% of salary, to include the cost of risk benefits. In addition, the complainant had in his possession benefit statements for the years of 2000, 2001 and 2002 which clearly showed that the cost of risk benefits

was deducted from the contribution paid into the plan for him. The pension provider confirmed that benefit statements were produced for the alleged 'missing' years and sent to the brokers acting for the employer. Whether or not they found their way to the complainant I did not consider to be pivotal to this complaint, as their receipt or otherwise did not affect his entitlement to benefit – this was determined by the rules of the plan of which he was a member and not based on some unfounded expectation he may have had.

That said, I did acknowledge that the trustees had an obligation to issue annual benefit statements and advise plan members of the availability of annual reports. If they did not fulfil this obligation then they were guilty of maladministration as well as a breach of the Disclosure Requirements of the Pensions Act 1990. In this case, while I can accept that the complainant may not have received each and every one of the benefit statements he should have, he did not have a legitimate expectation of, nor could he claim entitlement to, a benefit greater than that promised to him in accordance with the rules of the Company A plan. That plan is a defined contribution one, where the overall contribution of 7% was to provide for death in service, disability and retirement benefits.

There was likely maladministration in the non-production to the complainant of various annual benefit statements. That aside, I do not believe that, even if they had been given to him, the type of statements produced in the earlier years, or the annual reports, would have given the complainant a clear indication of the nature of the plan as they were somewhat vague in content. Neither would having possession of benefit statements have altered his entitlement under the rules of the Company A plan.

I could not uphold that any such possible maladministration had led to financial loss in terms of what was the complainant's entitlement under the Company A Retirement Plus Plan. The fact that he may not have fully understood the basis of the plan of which he was a member or had an unfounded expectation of a different level of benefit did not entitle him to a benefit in excess of what the plan promised. I disallowed his complaint.

USE OF SURPLUS FOLLOWING WINDING-UP

The complainant made a complaint in relation to the wind up of a contributory pension plan (Plan A) to the effect that the trustees ought not to have agreed to the amalgamation of this plan with a separate Plan B within the same company without ensuring that the members of Plan A received the entirety of the surplus at that time. He alleged that members were paying into Plan A for years the equivalent of a rate of 10 – 15% before changing to 7% under this new calculation in 2005. The complainant stated that this resulted in there being a large surplus of €2.3m approximately, €1.2m of which was used to backdate members' escalation benefits. His dispute was over the remaining €1.1m which he claimed was not, but should have been, put aside for the benefit of the Plan A members.

The complainant was a member of Plan A which was established in the 1980s following the acquisition of the company by the parent group. It was a contributory defined benefits scheme which was separate from the other pension schemes within the group and benefits were integrated with the state pension. The benefit structure under the plan had been improved for future service from 1 July 2003 based on the Plan B scale of benefits. However, benefits in respect of service prior to that date were still based on the less valuable scale that had previously applied under Plan A. The wind up of Plan A was triggered by a proposal by the Group PLC, as principal employer, to amalgamate Plan A and Plan B, which was to be achieved by winding up Plan A and transferring all its assets and liabilities to Plan B. This was part of a general objective of the Group PLC to reduce the number of pension plans across all sectors of the group, which operated in several countries. According to the complainant the first notification of the proposed amalgamation was at a meeting of the trustees held in November 2004 and the amalgamation was completed on 31 December 2004.

The key issue was the methodology used by the trustees to transfer the assets from Plan A to Plan B. The trust deed and rules of Plan A provided for transfers out to another scheme on an individual member transfer basis but did not include a provision to permit a bulk transfer of assets and liabilities to another scheme on an ongoing scheme basis. However, the trustees, in winding up the scheme, invoked

Section 48(3) of the Pensions Act which provides that *"In applying the resources of a relevant scheme which has been wound up, the trustees may discharge, notwithstanding anything contained in the rules of the scheme and without the consent of the member concerned, the liability of the scheme for benefits payable to or in respect of any member by making a payment to another funded scheme which provides or is capable of providing long service benefit and of which he is a member or prospective member."*

Clause 24 of Plan A provided for the dissolution of the fund following the determination of the plan. Clause 24(b) provided that *"... and FIFTH in respect of such part of the balance of the Fund then remaining unexpended in its hands as the Trustees in consultation with the Principal Employer (which consultation shall not be necessary if the Principal Employer is in liquidation) shall decide, in augmenting the pensions under the first, second and fourth applications of this sub-clause or in providing benefits for Beneficiaries or for Dependants subject always to any limitations set out in the Rules."*

Clause 24(c) provided that *"if after having applied the Fund in accordance with the FIRST, SECOND, THIRD, FOURTH and FIFTH applications of sub-clause (b) of this Clause, any balance of the Fund remains unexpended, the Trustees shall refund such balance to the Employers in such proportions as shall be Determined by the Appropriate Authority."*

Notwithstanding the fact that the trustees invoked Section 48(3) of the Pensions Act in winding up the plan they would still have been bound by the provisions of Clause 24. The complainant had received legal advice on the interpretation of this clause to the effect that *"... on a wind-up of Scheme A, it would not only be open to trustees of Scheme A, but there would in fact be an imperative on them, to use any available surplus in or towards augmenting the members' pension benefits ... it is highly likely that on the winding up of the Scheme A the trustees would be obliged to use any available surplus substantially, if not wholly, for the benefit of the members ... That is not to say that the Company would not, and does not have, an interest in the surplus. It may well do so, but on a wind up it would ultimately be for the trustees to decide the issue."*

While it was clear that, under the rules of the plan there was a requirement on the trustees to consult with the principal employer regarding the distribution of the surplus after the pension entitlements of the members had been secured, there was no requirement or duty on the trustees to augment member benefits with this surplus. The trust deed and rules provided that it was at the trustees' *discretion* as to how much of the surplus should be used to augment member benefits, following consultation with the principal employer.

In this instance it was clear that there had been prior consultation between the trustees and the principal employer and that, following this consultation, a decision was taken to augment substantially the members' benefits. In this regard the trustees of the plan stated in their response to this complaint that *"The Trustees can confirm that the Plan members received substantial benefit improvements as part of the agreed arrangement with the Principal Employer and the member interest in the surplus was realised by way of an established and agreed benefit plan. It should also be noted that the Plan members were able to participate in a Plan, i.e. Plan B, which was open to new members and which also has a long term and more secure future."*

According to the official trustee meeting minutes the surplus of Plan A as at 1 January 2003 was €1.9m while the cost of the additional benefits being provided to the members was in the region of €1.2m. This left an amount of approximately €0.7m which was subsumed into Plan B. Again this would have been perfectly in order in accordance with Clause24(c) of the trust deed and rules. Having examined the facts of this complaint it was my opinion that the wind up of Plan A and its amalgamation with Plan B was carried out in accordance with the requirements of the Pensions Act and in accordance with the trust deed and rules of Plan A. The members of Plan A received substantial benefit improvements as a result of this amalgamation. No member suffered any loss, financial or otherwise as a result of this amalgamation. My Final Determination was that this complaint should be disallowed.

ENTITLEMENT TO AND CALCULATION OF DEFERRED PENSION

The complainant was made redundant by the respondents in 1982 and at the time was promised a deferred pension that would become payable at his 65th birthday. In March 2005, when he was 58, he received a benefit statement from the consultants and administrators to the pension scheme. As well as setting out the deferred benefit entitlements and transfer value figures, this offered him the option of receiving an immediate benefit under the pension scheme. He chose to receive the immediate benefit but, on receipt of this request, the administrators retracted the benefit offer, stating that he had no benefit entitlement from the pension scheme, as he had left the service of the company in 1982 of his own accord. The ex-employer claimed not to hold old employment records in respect of the complainant. However, through records held by the Department of Enterprise, Trade and Employment, he was able to prove that he had been made redundant. The ex-employer accepted that this entitled him to benefit under the pension scheme.

In October 2005 the administrators advised him that the benefits available from the pension scheme were lower than the figures quoted in March 2005. This was unacceptable to the complainant who alleged that the delay in providing his pension scheme benefit, and the resultant fall in its value was due to maladministration on the part of the administrators and the pension scheme trustees.

Following my investigation of this complaint I concluded that it should be upheld. My investigation uncovered acts of maladministration on the part of the trustees and the employer that led to inferior pension scheme benefits being offered to the complainant in October 2005. The trustees failed in their duty to maintain proper scheme records and to make arrangements to pay the benefits, as provided for under the scheme rules. The employer failed in its duty of care towards the employee, by not retaining employment records or correctly establishing the reason for the complainant's leaving service in 1982.

These acts of maladministration had the effect of delaying payment of benefit to the complainant until a time when a reduced scale of benefit was offered to him under the scheme, and thus caused a financial loss to him. In my Final Determination I decided that the complainant should be put in the position he should have been in, had the maladministration not occurred, and should be offered his pension scheme entitlement, as set out in the administrator's letter of 23 March 2005. I was pleased to record that the trustees and employer recognised the shortcomings in their handling of the complainant's benefit and undertook to provide him with the original scheme benefit as set out in the administrator's letter.

REFUSAL TO ALLOW MEMBER TO JOIN SCHEME

The complainant alleged maladministration of the Local Government Superannuation Scheme (LGSS) by her employer and the trustees/administrators of the scheme by their refusal to allow her join the scheme. The complainant was employed as a part-time nurse by the Health Service Executive (HSE) (successor to a Health Board) during the period 1965 to 2004. During this period she worked a minimum of 8 hours per week and frequently exceeded these hours. The relevant pension scheme for the grade of nurse as operated by the HSE is the LGSS. However, access to the LGSS was restricted to permanently employed officer grades until recent years. As a result the complainant was not entitled to membership of the scheme.

An *Agreement of Flexible Working in the Health Services* came into effect on 1 February 2001. Paragraph 18 of this agreement provided for part-time and temporary staff currently in employment, who had been employed for over one year under a potentially renewable contract of employment of an average of 8 hours per week or over to be afforded the option of membership of occupational pension schemes. Details of the specific arrangements were the subject of a separate agreement. In January 2002, the Department of Health and Children issued Circular Ref 7/2002 removing the one year's continuous service requirement and giving effect to mandatory registration in the relevant superannuation scheme in respect of all new temporary appointments, with effect from 1 February 2002. In accordance with Circular 7/2002, it became mandatory that all wholetime temporary and part-time staff appointed on or after 1 February 2002 be registered in the relevant

superannuation scheme. The Health Service Executive Employers Association (HSEEA) issued *Guidelines on the Implementation of the Flexible Working Scheme and Revised Superannuation Arrangements For Part-Time and Wholetime Temporary Staff* in April 2002 which clarified that there was to be admission to the relevant superannuation scheme for all wholetime temporary and part-time (non pensionable) staff appointed between 1 February 2001 and 1 February 2002 on a compulsory basis.

Wholetime temporary and part-time (non pensionable) staff who were employed on 1 February 2001 on potentially renewable contracts of employment and who had in excess of one year's continuous service on that date were to be afforded the option of joining the relevant superannuation scheme. The revised superannuation arrangements for part-time staff were consistent with the provisions of the *Protection of Employees (Part-Time Work) Act, 2000,* which came into operation on 20 December 2001. Under this legislation, part-time employees are entitled to the same conditions of employment on a pro rata basis as their comparable wholetime equivalents, including access to occupational pension schemes. As a result, the HSE issued option letters and forms to all staff on 30 August 2002 who were employed in a wholetime temporary or part-time (non-pensionable) capacity on 1 February 2001. As the complainant met these criteria she received this letter and option form, which she returned, opting out of joining and including a handwritten comment:

> *"As I am retiring in six months time I do not wish to join this – thank you."*

The complainant retired in July 2004 and did not receive a pension under the LGSS as she was not a member of the scheme at retirement. She did however receive a non-pensionable gratuity of €26,021.78 under the Local Government (Superannuation) (Gratuities) Regulation, 1984.

Following her retirement, the Irish Nurses Organisation (INO) negotiated on her behalf with the HSE in an attempt to have her service recognised for pension purposes. The HSE refused the request on the basis that the complainant had rejected the option of joining because she was retiring. The HSE also made the point that the option letter issued to her in error as she was over 65 years of age on 1 February 2002 and would therefore not have been entitled to join the scheme.

Article 4 of the Local Government (Superannuation) (Consolidation) Scheme, 1998 (S.I. 455 of 1998) provides for the definition of an eligible officer for the purposes of membership of the scheme but limited membership to those under 65 years of age. Circular 7/2002 from the Department of Health and Children (DOHC), dated 30 January 2002, announced revised superannuation arrangements for part-time and temporary staff in the health service. Circular S. 4/2002 from the Department of Environment, Heritage and Local Government (DOELG), dated 14 May 2002, announced equalisation of pension provisions for all local authority staff and set out the superannuation implications of the Protections of Employees (Part-Time Work) Act, 2001. This provided that *"any part time local authority employee (i.e. any part-time member of staff of a local authority) whose normal hours of work are at least 20% of the normal hours of a comparable full-time local authority employee shall, in anticipation of the necessary statutory cover, become a member of the LGSS. Such membership of the LGSS will apply with effect from 20 December 2001."* The complainant was born on 7 May 1935. On 20 December 2001 she was already 66 years of age and was therefore not entitled to become a member of the LGSS. It is clear, therefore, that the Health Board should not have given her the option of joining the scheme in the first place.

Notwithstanding the above it was my opinion from the evidence submitted that the complainant had been properly informed of the changes in the superannuation scheme and that she duly returned the option form on which she clearly stated that *"As I am retiring in 6 months time I do not wish to join this".* I also noted that the complainant had spoken with one of the superannuation staff of the health board who outlined the impact of the option the complainant had in relation to the scheme.

The complainant had also raised an issue regarding the Protection of Employees (Fixed Term Work) Act 2003 and stated that at no time was this brought to her attention or explained to her. The HSEEA issued guidelines "Protection

of Employees (Fixed Term Working Act) Implementation Guidelines" in relation to this Act. These provided that

- Temporary employees in their fourth or subsequent year of continuous employment will in most cases now be entitled to permanent status.
- "Automatic Permanency": Existing temporary employees who were in employment when the legislation came into force, i.e. 14 July 2003, who complete or have completed three or more years continuous service with their employer, may have their contracts renewed only once more by the employer for no longer than one year. Following the next renewal the temporary contract will be deemed to be a contract of indefinite duration, i.e. a permanent contract of employment.
- Exemptions are provided under the Act on objective grounds.

The Protection of Employees (Fixed-Term Work) Act 2003 came into force on 14 July 2003. At that stage the complainant was still in employment and would appear to have satisfied the HSEEA guidelines for automatic permanency. However, the complainant was aged 68 when the Act came into effect. The purpose of the Act is to ensure that fixed term/temporary workers are not treated less favourably than comparable permanent workers. In this context it is my opinion that no discrimination had occurred as any person, either temporary or permanent at that stage would have had to join the LGSS before the age of 65. (Since the introduction of the Public Service (Miscellaneous Provisions) Act 2004, which applies from April 2004, it would in theory now be possible for a new entrant into the public service to join the LGSS after the age of 65).

On the basis of the above I had no option but to disallow the complaint.

APPOINTMENT OF TRUSTEES – CONDUCT OF BALLOT

The complaint was that the trustees and administrators of a pension scheme were guilty of maladministration in their conduct of the selection of persons to be appointed as trustees of the scheme.

The complainant was a former worker who had retired on disability grounds as a result of an accident. He was chairman of a group of disabled workers from the company, all of whom were beneficiaries of an income continuance plan. In January 2006 the complainant contacted this office by telephone and complained that the disabled workers from the company were being deprived of the right to vote in a ballot for the selection of 'member trustees'. The closing date for receipt of completed ballot papers was to be 6 January 2006. Basically, the problem was that ballot papers for the election of the trustees were posted directly to the retired members of the scheme by the administrators of the scheme, who pay the pensions on behalf of the company, on 20 December 2005, which arrived with them on Friday 23 December. However, the ballot papers for the disabled members, who were also entitled to vote and who are also paid their income continuance benefits by the administrators, were not sent directly to them by the administrators but were sent instead to the company for onward distribution. The complainant did not know about these ballot papers until 3 January 2006 when some of his colleagues told him about them – his own had not arrived at all at that stage.

When the company received the ballot papers in respect of the disabled members they apparently stuck address labels on the envelopes and put them in the post, postmarked 31 December 2005. Because of holiday closures, An Post was not functioning until at least the following Tuesday, 3 January 2006, and the complainant's ballot paper actually arrived on 5 January 2006 giving the deadline for the return of papers as 5 p.m. on 6 January. In the meantime, in response to his representations, the administrators had agreed to extend the close of poll for the trustees to 13 January 2006, and informed people by registered post that this was being done. In the complainant's own case, the registered letter arrived on 7 January 2006 – after the polls were to have closed originally.

The complainant alleged that there had been a deliberate attempt to freeze out the disabled workers, on the basis that, if the total turnout in the election – which was a *preliminary poll* on the *alternative arrangement* for the election of member trustees – was less than 25%, then the

alternative arrangement put forward by the company would apply by default. He also had complaints about the security of the ballot.

In February 2006 the trustees issued a Notice of Determination to the complainant. This stated that they had reviewed the election process and the relevant legislation and were satisfied that the election was conducted in accordance with the Occupational Pension Schemes (Member Participation in the Selection of Persons for Appointment as Trustees) (No3) Regulations, 1996. In particular, they were satisfied that the returning officer had treated all classes of voters fairly and that the returning officer had properly protected the integrity and confidentiality of the election process.

Following my investigation of this case I was not satisfied that the Regulations referred to above were adhered to in the conduct of this ballot. The term of office of the trustees, according to themselves, expired on 20 November 2005. However, this appears to be the anniversary of their appointment, and the 1996 Regulations specify a term of 6 years and 60 days (the employer is allowed a period of 60 days from the conclusion of a selection process, in which to appoint the new trustees.) The Regulations require that the process of selection of new member trustees should begin not later than six months prior to the expiry of the term of office of the existing trustees.

The Regulations also provide for the conclusion of a preliminary poll within 30 days and, if an election has to be held subsequently, the whole process must be concluded within 90 days overall. Therefore, the trustees should have notified the employer of the expiry of their term of office, at the latest by 19 July 2005, and appointed a returning officer without delay. The employer should have notified the trustee about the preliminary poll not later than 90 days before 19 January 2006 (allowing for the extra 60 days of the old trustees' term of office).

I determined that the trustees were responsible for maladministration in relation to the scheme, by failing to adhere to the timetable laid down in the Regulations and by failing to comply fully with the Guidance Notes as issued by the Pensions Board. I found that the employer, in its capacity as agent of the returning officer, guilty of maladministration in the matter of the distribution of the ballot papers. I found that the handling of the deadline issue, including failure to react quickly enough to the delay in sending out the ballot papers, the reliance on the employer to distribute papers which could have been dealt with more efficiently otherwise, and even the use of registered post to advise members of the change of deadline, also constituted maladministration. I was prepared to accept that there was no deliberate intention to deprive members of their right to vote. However, the timing of the election itself, over the Christmas period, and relying as it did on the postal service to a considerable extent, was completely misguided and was possibly influenced by the knowledge that the timetable laid down by law was not going to be met.

In conclusion I found that, although the conduct of the election was deeply flawed, I could not declare it invalid, as the powers granted to me under the Pensions Act do not, in my view, permit annulment of an election process. There was no question of financial redress arising here. It is my understanding that the Pensions Board had also considered the matter of the validity of the election and did not see that any further action was required. I instructed the trustees to ensure that the letter of the Regulations and the Guidance Notes was adhered to in the conduct of any future process of selection of member trustees and to ensure that workers in receipt of income continuance benefits and all long-term absentees who were entitled to vote, received their ballot papers through the post, directly from the returning officer and not through the agency of the employer.

CONDITIONS OF EARLY RETIREMENT SCHEME – 'FUTURE EMPLOYMENT'

The complainant, who had worked as a teacher, availed of an early retirement offer in March 1998 from the Department of Education & Science (DES). In May 2004 she received a letter from the DES referring to her acceptance of the early retirement offer in March 1998 and stating that she had breached the conditions of acceptance of that offer, by reason of her employment in a state-sponsored agency and consequently was not, and had at no time been, eligible for receipt of a pension under the early retirement scheme for teachers. She contended that the Department's decision

regarding the reduction in her pension and the demand for repayment was wrong, on the following grounds:

a. the Declaration of Acceptance of Offer signed by her stated *"I understand and agree that I am not eligible for future employment in any capacity as a teacher/ lecturer in any school or college, directly or indirectly funded by the Department of Education".* She claims that it is accepted that her employment was not of a lecturing or teaching nature;

b. the letter she received from the DES in May 2004 was a number of years after she had begun employment with the agency and she was very surprised at this as she believed that at *all* times the DES was aware of her employment status. This was because during that period and to the present day, she had acted for the DES as a qualifications specialist for the Registration Council for Secondary Teachers, and the CEO of the agency had also been made aware by herself of her status as a retired teacher;

c. the Declaration which she signed in 1998 referred to *'future employment'* whereas, at that time, she was already in employment;

d. the DES was aware, at the time she signed the Declaration, that she was already in employment since 1995, and never enquired as to the nature of that employment when she completed the Declaration. She would consider that the standard procedure;

e the DES never informed her, despite numerous requests, of the status of her request for an appeal, nor of its disputes resolution procedure, and she was presented with the results of an 'appeal' of which she had no notification, and to which she had no opportunity of making representations.

The early retirement scheme for teachers was introduced in 1997 following agreement under the Programme for Competitiveness and Work (PCW). A circular letter setting out the details of the scheme, and inviting applications for early retirement, was issued to secondary schools in May 1997 (Circular 25/97). The scheme provided for applications to be made under three strands. Strand 1 was available to teachers who were *"consistently experiencing professional difficulties in their teaching duties".* Added years were awarded to a successful applicant for early retirement. Under Strand 1, added years were awarded at the rate of 25% of actual service, subject to a maximum award of five years and provided total reckonable service did not exceed 35 years. The scheme provided for specific restrictions on 'future employment'.

Paragraph 10.1 of Circular 25/97 stated:

> *"Acceptance by a teacher of early retirement under Strands 1 and 2 of this scheme will be subject to his/ her agreement that s/he will not be eligible for future employment in any capacity as a teacher/lecturer in any school or college recognised and funded directly or indirectly by the Department of Education."*

Paragraph 10.3 of Circular 25/97 stated:

> *"If a teacher accepts early retirement under Strands 1, 2 or 3 of this scheme and is subsequently employed in any capacity in any area of the public sector, payment of pension to that person under the scheme will immediately cease. Pension payments will, however, be resumed on the cesser of such employment or on the teacher's 60th birthday, whichever is the later, but on resumption, the pension will be based on the person's actual reckonable service as a teacher (i.e. the added years previously granted will not be taken into account in the calculation of the pension payment)."*

The complainant applied for retirement under Strand 1 of the early retirement scheme for teachers in July 1997 whilst assigned to a community school in Dublin. Her application referred to the fact that, prior to the commencement of the career break, she had been given leave of absence to work in a university for a period of years. The complainant was notified in September 1997 that her application had been approved, subject to verification that her service met the requirements of the scheme. She completed the Statement of Service form and declared in it that she was currently on a career break from teaching. She also declared under the heading *"Details of Service with a Public Service Employer"*, that she had been employed by a particular State body from 1961 to 1968. No other public service employment was mentioned.

The complainant was offered five added years under the terms of the early retirement scheme, bringing her total service up to 26 years and 266 days. Her gross lump sum came to £27,713.39 and initial annual pension came to £9,237.84.

In 2004, in the course of the enquiries made by another section of the DES, the Secondary Pensions Section learned that the complainant was currently employed by another State agency and had been so employed on a part-time basis since 1995. Taking into account the specific restriction on future employment of which she had been made aware in paragraph 10.3 of Circular 25/97 and Condition 6 of the Letter of Offer, it was considered that the complainant had never complied with the terms of the early retirement scheme and was, therefore, not entitled to payment of pension under that scheme. The complainant was, however, eligible for payment of a preserved pension from her 60th birthday in 2001. As the work was part-time and the preserved pension was less than 22 years' service (compared to a maximum of 40 years), abatement of the pension would not arise. The complainant was formally notified in May 2004 that she was in breach of the conditions under which she had been offered and accepted early retirement and that she had at no time been eligible to receive a pension under the early retirement scheme. She was also advised that payment of preserved pension had commenced with effect from 1 May 2004 and that the full amount of pension paid to her from 1997 to her 60th birthday, together with the excess pension paid to her since then (amounting in total to €53,293.04) was repayable to the Department.

She appealed against the unilateral decision to withdraw that pension and to seek repayment of pension monies. She requested that her appeal be considered by the Minister under the internal disputes resolution procedure, as provided for under the Pensions Act 1990 (as amended), on the following grounds, inter alia:

1. She did not breach the terms of Circular 25/97 in relation to being *'subsequently employed in any capacity in any area of the public sector'*. She stated that she was *"in fact, at the time of the signing of the letter of agreement in such employment; therefore the question of subsequent employment does not arise."*
2. Further, she contended that the agreement she had signed highlighted the fact that acceptance of employment was specifically intended to apply to teaching/lecturing; and her work did not fall into this category.
3. She also contended that the terms of the agreement could not be claimed by the Department as binding; because the latter, its servants and agents, were always aware of her employment situation, in that (a) the chief executive of the agency was always aware of her status as a retired secondary teacher, who had retired under the provisions of the early retirement scheme; and (b) the Department itself, in breach of the agreement which it was now seeking to enforce, had sought and paid for her services on numerous occasions, from that date up to 2004.

In July 2005 the DES issued a Notice of Determination to the complainant. It specifically addressed the issues raised in the complainant's letter and then declared:

> *Because of your failure to comply with an express condition governing the award of an early retirement pension to you, and because you were at no time in compliance with the condition, the decision to rescind the award of the pension with effect from 1 August 1997 is upheld. As a consequence, pension payments made to you in respect of the period from 1 August 1997 to 30 April 2004, amounting in total to €53,293.04 are repayable to the Department ... It is confirmed, following consultation with the Department of Finance and consideration of legal advice, that the Department will require repayment.*

Subsequent correspondence also revealed that the complainant had, for a number of years, concurrent with the various other employments, been working at a university which is also in receipt of State funding.

During my investigation of this complaint I looked in detail at each of the points that the complainant had made and came to the following conclusions:

- It is the responsibility of the person who has accepted early retirement under the scheme to be familiar with the conditions governing it and to comply with those

conditions, which were clearly set out in Circular Letter 25/97.

- Both the agency and the university constituted an 'area of the public sector' for the purposes of paragraph 10.3 of Circular Letter 25/97 and point 6 of the Letter of Offer.
- The complainant had been employed by the agency on a temporary part-time basis for a number of years prior to her early retirement as a teacher and only ceased employment with them in 2006. The complainant, on the basis that it was a public sector body, was obliged to cease her employment with the agency to be eligible for acceptance into the scheme.
- The complainant was employed by the university for a period of three years in the past, and since then up to 2004 as an occasional supervisor of students. The complainant, on the basis that the university was a public sector body, was obliged to cease her employment with it to be eligible for acceptance into the scheme.
- It was reasonable to expect that the complainant would have referred to her employment with the agency either through the Statement of Service form which she was asked to complete, or through her Declaration of Acceptance of Offer. While it could be argued that the section in the Department responsible for the agency was aware of the complainant's employment with it, it is not reasonable to assume that the Secondary Pensions Section, which was responsible for the administration of the early retirement scheme, could have been expected to know this. As I have already stated, the onus was on the complainant to inform them of this fact. This equally applies to her employment with the university.
- Although the employment with the agency was at the relevant time part-time and non-pensionable, the conditions of the early retirement scheme refer to 'employment' simpliciter, without regard to the nature, duration or pensionability of that employment. This applies equally to her employment with the university.
- While the emphasis in the Acceptance of Offer was certainly on future employment as a teacher/lecturer it is evident that the complainant agreed to abide by the terms of Circular 25/98 – in particular condition 10.3 – and the Department's Letter of Offer – in particular point 6 – both of which prohibit subsequent employment in any area in the public service. I have already outlined above what I consider to be the implications of these requirements.
- The complainant had stated that the DES was in breach of the Declaration of Acceptance of Offer when it sought and paid for her services occasionally subsequent to her retirement. In my opinion there was an onus on the complainant in accepting that work, to inform the relevant section of the DES that she had retired under the early retirement scheme for teachers, and, as such, might not be eligible, under the rules of that scheme, to undertake that employment. It appeared that the Department itself unwittingly acted in breach of the rules of the early retirement scheme by offering her that work. However, the fact that it did so does not, in my opinion, in any way validate the complainant's participation in the early retirement scheme. It was my opinion that the onus was on the complainant in this situation to comply with the rules of the scheme.
- I was satisfied that the complainant was being paid her correct pension, with effect from 2004, which was a preserved pension payable from her 60th birthday in 2001 – based on 21 years and 266 days of pensionable service, without the five added years.
- The information which had subsequently come to light in relation to the complainant's employment with the university merely reinforced the decision to rescind the complainant's early retirement pension. The fact that it was not teaching/lecturing, nor was it pensionable, does not change the situation.

I disallowed this complaint.

WAIVER OF ABATEMENT – FETTERING A DISCRETIONARY POWER

The complainant brought a complaint of maladministration of the Local Government Superannuation Scheme (LGSS) by the Health Service Executive (HSE); the Department of

the Environment, Heritage and Local Government (DOE); and the Department of Health and Children (DOHC). The complainant claimed that the decision by the HSE not to approve waiver of abatement during a period when she was re-employed by the HSE constituted maladministration of the pension scheme.

The complainant retired as a public health nurse in April 2001 and was granted a pension under the LGSS with effect from that date. She was re-employed with the relevant Health Board from September 2001 to May 2002 on a school immunisation programme and subsequently from May 2002 to February 2006 on an infectious diseases (TB) programme. She applied to the Board for waiver of abatement in January 2003 in relation to her re-employment for the period 12 September 2001 to 9 May 2002. She had been contacted in September 2001 by the Director of Public Health Nursing who had asked her to work on the School Immunisation Programme because of staff shortages and her own years of experience and expertise in the area. She worked in this area from September 2001 to May 2002 when the programme was completed. She was then requested by the Senior Area Medical Officer to work in the area of Infectious Disease which was also suffering from experienced staff shortages. Tuberculosis (TB) control in particular required heavy resources and the complainant had many years experience in the infectious diseases area and also possessed a post-graduate qualification in the treatment of TB.

Under the LGSS, in common with other public sector schemes, there is provision for pension in payment to be abated, wholly or partly, if a pensioner becomes re-employed after retirement. The rules do, however, permit abatement to be waived in certain circumstances.

The complaint before me was that the HSE, the DOE and the DOHC erred in not granting the complainant a waiver of pension abatement during her periods of re-employment with the HSE. Her application for waiver was supported by the Health Board, whose Director of Human Resources wrote to the DOHC in February 2003 applying for a waiver of pension abatement in respect of the complainant. He confirmed that it was necessary to re-employ her due to her expertise and experience in the School Immunisation Programme and the infectious disease area and confirmed that there was a shortage of suitably qualified nurses in these areas.

The DOHC responded in February 2003 saying that, in general, applications for waiver of abatement of pension should be made before the period requested but that under the circumstances as outlined by the Board no objection would be raised to the waiving of abatement for the complainant. They then wrote a letter of certification to the DOE in February 2003 stating that the Minister for Health and Children was satisfied that the conditions for waiving abatement of pensions, as set out in DOE Circular EL 19/65, were satisfied. A further application for waiver of abatement for the period 31 May 2002 to 20 September 2003 was then submitted to the DOE on 14 October 2003. No decision had yet been made on the earlier application. This second application was accompanied by a further certificate from the DOHC which again stated that the Minister for Health and Children was satisfied that the conditions for waiving abatement of pension as set out in DOE Circular 19/65 were met. The applications for abatement were refused by the DOE in November 2003 on the basis that the waiver of pension abatement was in practice granted only to medical consultants and certain paramedical grades and that nursing grades were not regarded as satisfying the DOE criteria. This general policy position had also been accepted by the DOHC based on a meeting between both Departments in March 2002.

The regulations relating to abatement and the waiver of abatement in the complainant's case are contained in Article 54 of the Local Government (Superannuation) (Consolidation) Scheme, 1998 (S.I. 455 of 1998). Article 54(b) provides that the Minister for the Environment may, at his discretion but subject to certain conditions, waive the application of pension abatement in any particular case [emphasis added]. The conditions set out in Article 54(c) are that the Minister, after consultation with the authority making the payment, is satisfied that (i) persons with particular training and experience are required for particular work of that authority, (ii) the person who is being re-employed has that training and experience, is being re-employed for that work and is otherwise suitable for re-employment in all respects, and (iii) it is not practicable

to meet that requirement otherwise than by the re-employment of pensioners. Circular letter EL 19/65 is also relevant in that it indicates that the inclusion of provisions for waiving abatement is a special measure for meeting exceptional circumstances and that it is not envisaged that abatement will be waived in more than a very limited number of cases.

It was clear then that Article 54(b) provided the Minister for the Environment with the discretion to waive abatement, subject to the conditions already mentioned. However, discretionary powers are not absolute. A discretionary power may not be exercised in an unreasonable or arbitrary fashion. The Minister therefore must give *bona fide* consideration to the interests of the individual member when exercising his discretionary powers under Article 54(b). While Section 139(2)(b) of the Pensions Act, 1990, as amended, prohibits me from substituting my decision for that of the Minister in relation to the exercise by him of a discretionary power under the scheme rules, I am entitled to investigate the process by which the Minister comes to a decision in the exercise of his discretionary powers.

It was clear from the evidence that the complainant's re-employment met the three criteria specified in Article 54(c) in that:

- she had the particular training and experience needed for a particular piece of work i.e. the School Immunisation Programme and Infectious Disease work;
- she was being re-employed for that work and was otherwise suitable for re-employment in all respects (there was no indication to the contrary); and
- her employing authority clearly stated that it was not practicable to meet that requirement otherwise than by her re-employment and her line managers supplied supporting documentation to this effect. There was no evidence of any effort by either the DOHC or the DOE to question this or seek other proof.

The DOHC, although identifying an error in the process in that the application for waiver should have been made earlier, also clearly supported the original application and stated in February 2003 that the Minister [for Health and Children] was satisfied all conditions for waiver were met. They also supported the second application in October 2003. The DOHC also confirmed (during my investigation) that exceptional cases do not arise frequently in the health sector.

During its reply to the original complaint the DOHC had argued that the system of assessing waiver applications was not "robust enough" back in 2003. However, this could not change the fact that the Minister was clearly of the opinion at that time that conditions were satisfied. This opinion was based on the process and procedures in place at the time for verification of applications. This was the appropriate test – not a revised and more robust test established later. The difficulties arose when the DOE came to consider the application. They were clearly concerned that waiver of abatement should be considered only in exceptional circumstances and reminded the DOHC of their meeting of March 2002, where it appears that an agreement was reached between both Departments that applications for waiver would be considered only in relation to two grades – hospital consultants and radiographers. This was where I believe both Departments erred. There was no provision in the Pensions (Abatement) Act, 1965, Circular EL 19/65 or the Local Government (Superannuation) (Consolidation) Scheme, 1998 (S.I. 455/98) for limiting waiver of abatement to certain grades. I was satisfied that each case had to be considered on its own merit, without regard to the grade of the person in respect of whom application is made.

This brought me to my consideration of a letter which issued to all personnel officers in the HSE from the DOHC in January 2004, purporting to limit the consideration of abatement to two specific grades, and to a lesser extent, to Circular 19/65, which attempts to limit waiver of abatement to not *"more than a very limited number of cases"*. The DOHC letter appeared to have issued with the tacit support of the DOE. Where some form of discretion has been conferred on a public body, and the public body chooses to indicate the conditions on which it is going to exercise its discretion, it does so by the issuing of a circular or policy letter. This circular in effect publishes how the body's discretionary power is to be implemented. While this process has the beneficial effect of clarifying matters and setting standards, a difficulty may arise

in relation to the law, which is concerned with process rather than substance, and will operate to ensure that the discretion is exercised as authorised by the legislature, rather than that discretion is limited.

I accepted that it was quite reasonable for a public authority to use a circular to proclaim conditions or rules and thereby avoid the danger of being seen to be arbitrary in its decisions, but this had to be done most carefully, or it could cause its own problems. For example, it could lead to the application of the published rule in a rigid sense; or it could emphasise a single policy and shut out consideration of all others, thus neutralising the discretion which the legislature intended to create in the first place. On the other hand, common sense suggested that, to avoid arbitrariness and the other defects mentioned, the law should lean over to accommodate such practices. The result of this was a tension between the use and non-use of circulars where discretionary powers were involved. However, one simple fact remained, regardless of this tension – circulars cannot change the law. As Lardner J. stated in *Devitt v. Minister for Education* [1989] I.L.R.M. 639

> *"No doubt in relation to the exercise of this statutory discretion the Minister may adopt general rules or procedures to guide herself or to notify other concerned persons as to the manner in which she will exercise her discretion, provided they are relevant to the exercise of her powers and are reasonable. But she is not in my view entitled by such rules or procedures to limit the scope of the discretion entrusted to her or disable herself from the full exercise of it."*

In this context I was satisfied that the complainant's application for waiver of abatement of pension was not considered properly. Her application was rejected on the grounds of her grade alone, as opposed to any consideration of the evidence which supported her claim. This was a failure to exercise the Minister's discretionary powers properly under Article 54(b) and (c) of the Local Government (Superannuation) (Consolidation) Scheme, 1998 (S.I. 455 of 1998). I was satisfied that applications for waiver of pension under the LGSS code must apply equally to all officers and employees of all organisations to which the LGSS applies. As such, the Minister's discretion must be exercised on an individual case-by-case basis. I directed that the Minister for the Environment re-consider the complainant's application, taking into account the individual circumstances that applied at the time of her application.

In my opinion the letter from the DOHC to all personnel officers dated 30 January 2004 was not compatible with Article 54(b) of the Local Government (Superannuation) (Consolidation) Scheme, 1998 (S.I. 455 of 1998) or DOE Circular El 19/65, in that it sought to limit the scope of the discretion entrusted to the Minister for the Environment to two particular grades in the health services. On this basis I directed that it should be withdrawn. This was my Final Determination in the matter of this complaint.