An tOmbudsman Pinsean
Pensions Ombudsman

Digest of Cases **2009**

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Mission Statement

Our mission is to investigate and decide, in an independent and impartial manner, complaints and disputes concerning occupational pension schemes, Personal Retirement Savings Accounts (PRSAs) and Trust RACs, involving maladministration and financial loss, and to grant redress where appropriate.

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DIGEST OF CASES 2009

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INTRODUCTION

In accordance with my long-established practice, I am publishing this Digest of Cases to be read with my Annual Report for 2009. I hope that trustees and others involved in the administration of pension schemes will find it useful. The granting of redress, the investigation of complaints and the identification and correction of errors and acts of maladministration, while useful in their own right as far as the individual complainants are concerned, are much more valuable if lessons can be learned from them, so that the errors and omissions of the past can be avoided in the future.

A copy of the Digest is circulated to the heads of all Government Departments, to all Local Authorities and to all major State bodies.

As well as giving a picture of the work undertaken by my Office, I hope that the Digest will help to increase overall knowledge in relation to Occupational Pension Schemes, PRSAs and Trust RACs.

It is possible to include only a small cross-section of the very large number of cases with which I deal with each year. The cases chosen for the Digest are designed to give a flavour of the wide range of issues we have to deal with, ranging from simple failure of communication to much more complex issues. The need for an examination of the background to an Act of 1926 in one case illustrates how complicated an investigator's life can get!

In the normal way, I take pains to ensure that parties to complaints are not identified. The privacy of the individual, in particular, is important but it is also true to say that the identification of business entities could result in information on those businesses getting to people who should not have that information. In the case of Public Authorities, anonymity is not generally possible if the details of the case are to be meaningful. In general, provided that confidentiality and privacy are not breached, my Office will be pleased to discuss in principle the facts of any case that is of interest to trustees or to practitioners in the pensions area.

This year, I am departing from the normal practice in one particular case, and naming the employer concerned, as the case involved not just investigative difficulties for my Office but was then compounded by serious malpractice following the issue of my Final Determination.

I have also commented in some detail on the case of a worker employed by the HSE on a "sessional" basis, and what followed – or failed to follow – my Determination in that case.

Before going on to the individual cases, there are some general comments that I feel I should make.

Firstly, the good news is that people are now a lot more knowledgeable about pension matters. It has been a very harsh lesson and a very high price has been paid by many, but it is a lesson that has been well learnt. Many of the submissions now being made to my Office display a great deal of knowledge and information acquired by complainants in relation to the matters that concern them.

Secondly, however, as far as scheme members are concerned, I wish to emphasise the importance of checking the detail contained in scheme documentation. One complainant's Annual Benefit Statements showed an incorrect date of birth for four successive years, but this was not picked up until his complaint of a miscalculation of benefits was being investigated. The member should have noticed this himself and brought it to the attention of the scheme administrator.

Thirdly, the Pensions Ombudsman is not the "champion" of complainants but an independent adjudicator. Those complained against must have a proper opportunity to answer and deal with the complaint, which is why the use of the Internal Disputes Resolution (IDR) process is so important. It is essential, when a complaint is being presented, that all relevant papers and full facts are available to everyone, and complainants should demonstrate maladministration and loss - not just a jumble of papers or a vague allegation that a pension is being paid incorrectly.

Fourthly, there are limits to my jurisdiction. I have no function in relation to the discretionary powers of the Revenue Commissioners over the approval of pension schemes, and what they will or will not allow under their guidance and practice. If a scheme member is unhappy with some aspect of Revenue practice, which he feels is unfair to him, there is nothing that I can do about it. Trustees or administrators may be able to make submissions to Revenue if they feel the case is strong enough, but this Office has no function in that area. Similarly I have no jurisdiction where a discretionary power has been exercised correctly. However I most certainly do have jurisdiction where a discretionary power is fettered, in advance, by administrative direction or practice. This is not uncommon in public sector schemes where a discretionary power is vested in the relevant Minister but where regional or national HR arrangements purport to pre-empt the Minister's decision by ruling out whole categories of workers in advance, so preventing the consideration by the Minister of details of individual cases.

Fifthly, I do come across cases involving the most appalling maladministration but where there is no actual loss of scheme benefit. In order for me to grant redress, there must

also be a financial loss. However, administrators of pension schemes can now seek to be Registered Administrators by the Pensions Board under the terms of the Pensions Act 1990. Accordingly, where I am aware of instances of serious maladministration, even where no loss of scheme benefit has occurred, I will report such cases to the Pensions Board as an aid to their monitoring of Registered Administrators.

Finally, an area coming increasingly into focus in this Office concerns problems arising out of the interaction of marital breakdown and pensions. Complaints arising from Pension Adjustment Orders (PAOs) are increasing in number. Orders are badly drafted, not served on trustees, or are unclear as to their application. In one Public Sector case, the Decree of Divorce mentioned pensions in a general way, but the PAO referred only to the Spouses' and Children's scheme – which was the intention. However, the trustees had been provided with both Orders and refused to pay the member his proper benefits, until the matter was clarified by me. Public service schemes are a bit of a minefield anyway, and if there is an AVC scheme living alongside the main scheme, up to six PAOs may be needed to deal adequately with all the benefits.

Paul Kenny
Pensions Ombudsman
September, 2010

DIGEST OF CASES 2009

1. Communications Problems

(a) The Whole Truth?

This case typifies, at best, poor communication. The complainant had transferred her SSIA savings into a PRSA and had left clear written instructions as to how the funds were to be invested. She had even ticked the appropriate box! Due to an administrative error, however, the funds where put into the default option. To their credit, the company involved discovered the error some time later and contacted the investor. However, rather than writing to her and saying that the error had been discovered and put right with no loss to the investor, the first paragraph of the company's letter extolled the virtues of the default option, in particular the benefit of the automatic switching of funds to secure funds as retirement approaches. The investor was in her early 30s!

The letter then went on to say that the company had reviewed their records and had noted that, in the discussions about how the transferring SSIA funds would be invested, the investor had discussed other funds. While this statement was technically correct, it failed to point out that the investor had specifically chosen one of these funds. It gets better. The letter then went on to say that this "inconsistency" would be addressed to ensure that the investor was at no loss whatsoever and explained in great detail and in a somewhat technical manner how this inconsistency was to be addressed.

The point here is that the person was now so confused and, more importantly, untrusting, that she complained formally to my Office. In the meantime, the company had run the figures and credited her account with the relatively small loss which had been incurred through the initial error.

The moral here is very simple. If the company had been up front with their customer, come out with their hands up, admitted the mistake, apologized, advised her of the amount of the loss and credited to her account, there would have been no issue whatsoever. Instead, the actual misrepresentation of what had occurred couched in unnecessary technical language only succeeded in destroying this person's confidence in the company and forced her to come to my Office. In the end, the initial approach by the company, on discovery of the error, succeeded not just in alienating their customer but also resulted in the use of the scarce resources of my Office to address the matter.

(b) The administrator, a broker, repeatedly provided inaccurate information to the complainant resulting in a breakdown in communications that led to the dispute coming before OPO

The complainant's employment ended in January 2007. In April 2006 she had made enquiries with the broker of the company's pension scheme regarding concerns she had about the contributions to her pension fund. She claimed that there was a discrepancy between the contributions deducted from her wages and the premiums paid into her pension fund. Following a significant amount of correspondence between the complainant and the broker it was agreed in December 2006 that the complainant's funds had suffered an underpayment of approximately €2,500. It was also agreed that the complainant would be entitled to some form of compensation for the loss of investment earnings on the underpayment. The complainant requested details of the investment returns over the period of the underpayment from the broker. Dissatisfied with the level of information that she was receiving from the broker, the complainant raised the matter with the Pensions Board. Subsequently the broker informed her that another error with regard to her pension contributions had come to light. The employer portion of her contributions had been miscalculated and this had given rise to a further shortfall of the order of €650 of employer contributions. The broker offered to pay a sum representing the investment growth on the original underpayment, the underpayment of the employer contributions and the investment growth on that. The complainant responded to the broker with a request for further information. The broker informed her that its offer was final and suggested that the complainant refer the matter to me.

Having examined a considerable amount of documentation in relation to this case my investigator noted that the complainant's own written communication was not always expressed as clearly as it might have been and I have no doubt that this contributed to the problem. However, the lack of clarity and the level of inaccuracy contained in the communications from the broker to the complainant in this case concerned me.

It has been my experience that poor communication has led to a great many complaints to this Office. Often the poor quality and lack of clarity and precision in communications to beneficiaries is all too obvious. Trustees, administrators and employers need to understand that what is required by the regulations is only the necessary minimum and the mere compliance with these requirements is no guarantee of effective communication. I believe that effective communication could greatly reduce the number of complaints the trustees and administrators have to deal with. It would also serve to promote member and consumer confidence in pension products. People in the pensions industry need to

ask, not whether they themselves understand their communications, but whether the ordinary lay person is likely to do so.

In this case, had the two-way communication been better this matter could have been resolved without my intervention. While the requests from the complainant to the broker were less than completely clear and she sought a significant amount of information, this does not excuse the broker from its obligation to provide the complainant with complete and accurate information. The Disclosure of Information Regulations are intended to ensure that individuals have access to the information necessary for them to make informed decisions about their pension.

I upheld this complaint and directed the broker to calculate accurately the investment returns that had been lost by the complainant and to pay this amount into her pension fund.

2. The Trustees of a Pension Scheme Failed to Apply Properly a Transfer Amount to the Complainant's Benefits - Lack of Knowledge of Statutory Obligations

The complainant was a member of a scheme for clerical employees. Following the settlement of an action taken by her, she became entitled to membership of another scheme of the same employer. The High Court settlement clearly stated that her membership of the new scheme would be prospective from the date upon which she joined the scheme and her "Pensionable Service" within the scheme would date from the date upon which she joined the scheme and would be prospective from that date only. The settlement also stated that if the complainant chose to join the new scheme, her accrued fund in the original scheme would transfer to the new scheme, without specifying its treatment within the new scheme.

When the complainant enquired about making Additional Voluntary Contributions (AVCs) she was shocked to be informed by management that she had no entitlement in respect of her service under the old pension scheme.

Following enquiries by my Office correspondence was received from the legal representatives of the employer. The correspondence stated that the employer had been concerned as to what would happen to the complainant's entitlements under the original scheme and wanted to confirm that she would have no rights against that scheme in

respect of the contributions that had been made to it in respect of her and, consequently it required that the funds be transferred to the new scheme but not to the benefit of the complainant.

My Office wrote to the legal representatives and pointed out that under Part III of the Pensions Act 1990 the benefits that the complainant had accrued under the Clerical Pension Scheme were preserved on her behalf until her retirement (or death). These preserved benefits belonged to the complainant by statutory right. These benefits could not be taken away from her by her employer or the trustees of either of the schemes. The legal representatives of the employer responded by providing copies of correspondence between the employer and the complainant from the time that she was considering joining the new scheme. This correspondence showed that the complainant had been informed by the trustees of the new scheme that if she chose to join it she would not have any entitlement in respect of her past service.

My Office drew attention to the obligations and responsibilities of the trustees of pension schemes generally. The trustees of the old scheme had an obligation under law to preserve the benefits accrued by the complainant in the scheme until her retirement and there is no provision for her to be deprived of that benefit. However, the Pensions Act provides for the transfer of accrued benefit from one scheme to another. The High Court settlement availed of this provision by directing that the complainant's accrued benefit be transferred to the new scheme if she elected to join it.

After obtaining further professional advice on the matter the trustees of the new scheme, through their legal representatives, informed my Office that the complainant would be issued with a revised benefit statement providing details of her accrued benefit under that scheme *and* the benefit in respect of her transferred fund from the old one.

I hope that the recent introduction of a mandatory training requirement for trustees will result in the disappearance of this sort of needless error.

3. Public Service – Failure to Pass on Increase

The complainant joined a government department in 1983. The salary of his post at that time was linked to 80% of the departmental Grade III engineer scale. In August 2000 the complainant retired on medical grounds and received a pension appropriate to his retirement salary and service. In May 2002 the then Secretary General of the

complainant's former department approved the decision to pay post-holders in the complainant's former grade at the Engineer Grade II scale back-dated to January 2001. Subsequently the Department of Finance informed the complainant's former Department that this decision was a breach of the Administration Budget Agreement. However, in 2004 the Department of Finance eventually sanctioned an increase to the salary of the complainant's former grade from 80% of the Engineer Grade III to the full Grade III salary scale and agreed that those who had been upgraded to the equivalent of Engineer Grade II could retain the salary on a "personal to holders" basis. On 27 October 2003 the complainant had applied to his former Department to have his pension increased in line with the increase that had been granted to all existing post-holders. On 11 August 2005 his former department refused the complainant's request on the basis that the increase in salary was actually an upgrade in the post because of a change in job requirements and, based on pensions policy, an upgrade which occurs due to changes in the job requirements is not applicable to staff who retired prior to the effective date of the upgrading. This is normal Public Service policy – matters such as productivity increases are not in general passed on to retired staff.

I informed the complainant that, because it was not sanctioned by the Department of Finance and was no longer applicable and was held only on a "personal to holder" basis for those who received the benefit of it, it would not be possible to apply the re-grade to the maximum of the Engineer Grade II to his pension. However, I undertook to investigate whether the increase from 80% of the Engineer Grade III scale to the full Engineer Grade III scale should be applied to the complainant's pension.

It transpired that the complainant's former department had sought the approval of the Department of Finance to increase the salary scale of the grade to the equivalent of the Engineer Grade II on the basis of a change in the requirements of the job. The Department of Finance did not agree to this request. However, the Department of Finance did approve an increase to the full Engineer Grade III scale. The letter of sanction for this approval was quite specific. It stated that the increase was *"because of safety concerns and the need to attract suitably qualified candidates for the job"*. My understanding is that the Department of Finance is very particular to ensure that letters of approval are precise in their detail. As the letter of sanction stated that approval for the increase was given on the basis of the necessity to attract suitably qualified candidates and concerns on safety grounds and, as no reference whatsoever was made in relation to changes in the job specification, I concluded that since sanction for the grade increase was not based on a change in job specification the increase should apply to the relevant pensions. I upheld this complaint and directed that the complainant's former department apply the increase in the salary scale of the complainant's former grade to his pension retrospectively.

4. Member Refused Permission to Join AVC Scheme

This is another case of a scheme administrator, in this instance the employer, not being aware of its legal obligations – viz., the obligation to make an AVC facility available.

The complainant claimed that he had suffered financial loss due to the fact that he was incorrectly told that he could not join an AVC Scheme in early 2004. The complainant eventually joined the AVC Scheme in December 2004 but at that stage was too late to avail of the tax relief applicable to contributions made in respect of the 2003 tax year (which would have required the contributions to be paid and a claim for relief submitted before 31 October 2004). The complainant believed that this resulted in financial loss as he could not avail of the tax relief for 2003.

If a complaint is to be upheld it must be shown that financial loss has occurred due to maladministration. There was certainly maladministration in this case, however it was not possible to determine if there was yet financial loss. Therefore I did not uphold the complaint but I gave the Trustees of the AVC Scheme, the employer and the complainant certain directions. I directed the Trustees to carry out a review prior to the complainant's retirement which must show whether or not the Complainant could have paid the maximum tax allowable contribution payable in 2003 in addition to the regular contributions, AVCs and PRSA AVC contributions actually paid, from 2004 to the date of retirement. If the review finds that the complainant (a) was permitted to and (b) actually did pay the full maximum tax-allowed contribution for the whole of the period from 2004 to date of retirement, and there was still "headroom" for a further contribution to be allowed under Revenue rules, the employer must increase the complainant's AVC fund by an amount equal to 22% of the maximum AVC which would have been allowable for 2003, adjusted (upwards or downwards) by the actual percentage return achieved in the interim on the 2004 contributions. If the review shows that the complainant could have paid the maximum in certain years but did not do so, any amount payable as aforesaid by the Employer should be reduced to reflect this fact. Having carried out the review, the Trustees must advise the complainant and the employer of the outcome of same and advise both parties if further contributions are due. If further contributions are due the total amount must be invested in the AVC Scheme prior to the date of the complainant's actual retirement date.

I directed the complainant to co-operate and provide all information to the Trustees as requested by them in relation to details of PRSA AVCs and earnings.

5. *Deduction of Units for Risk Benefits*

The complainant claimed that he had suffered financial loss due to the deduction of units from his pension fund to maintain risk benefits *after* he left the service of his employer.

This complaint highlighted a fundamental issue in relation to pension schemes which incorporate Permanent Health Insurance (PHI) and Waiver of Premium benefit and this was brought to the attention of the Insurer at the outset of the investigation.

PHI and Waiver of Premium are benefits which are not approvable by the Revenue in the same way that pension scheme benefits are granted tax relief benefits. They are insurance contracts whose beneficial owners are the employers. Historically, PHI and Waiver of Premium were bundled together with the pension scheme, and sold as a package. It is, however, entirely inappropriate that units in the pension fund were cancelled to fund these risk benefits, irrespective of whether or not the policy terms and conditions permitted it. While the Insurer in question indicated that they do not currently have any pension product on the market where disability insurance is financed from the pension fund, it is clear from this case that there are historic cases which still operate on this basis. I strongly suggested to the Insurer to review its existing polices which include such terms and conditions.

The complaint arose primarily from a failure by all parties to communicate properly in relation to how the complainant's benefits should have been dealt with on leaving the service of the company. This complaint was upheld and I directed the insurer to reinstate the number of units deducted in respect of risk benefits for the period October 2002 to March 2004.

6. *Sessional Worker excluded from Pension Scheme*

The essence of the complaint submitted was that when the complainant commenced working in October 2004 as a sessional pharmacist for the Health Service Executive ('HSE') he was refused access to the relevant Superannuation Scheme. The complainant believed that he should have been included in the scheme at that time as he was working on a part-time "contract of service" basis for the HSE. This was rejected by the HSE who maintained that he was employed under a "contract for service" (e.g. independent contractor, individual working on a sessional basis) as per Circular 14/2003 issued by the Department of Health and Children and as such was not eligible to join the pension scheme.

There were two issues which needed to be addressed in this case - firstly, the issue of eligibility to join the scheme and secondly the treatment of the complainant in relation to contributions and benefits in the scheme if he was entitled to join.

I was surprised at the contradictory information that had been provided in the course of this investigation by the HSE, the HSEEA and the Department of Health and Children. Both the letter to the complainant and the Circular referred to the document "Guidelines on the Implementation of the Flexible Working Scheme and Revised Superannuation Arrangements for part-time and wholetime temporary staff". This document was produced by the HSEEA and the answer provided to Question 4 at Chapter 2 draws a distinction between those on a contract for services - referred to as independent contractors - and those who are paid directly by the employer at "sessional" rates which are subject to deduction of PAYE and PRSI, and who work under the direction of the employer. The document states that these individuals may be regarded as employed under a contract of service. This statement is followed by the recommendation that the individual's contractual arrangements be regularised and that admission to the pension scheme is conditional on the individual signing up to the standard salary and conditions of employment for the category/grade. The point here is that if the individuals are regarded as being employed on a contract of service basis, which was suggested in the document, there should not have been a need for them to have their contracts altered before they are included in the pension scheme.

The HSE in a letter to my Office stated that the complainant could not be considered as a routine part-time worker since he was not remunerated at the standard salary rate - pro rata for hours worked. He was paid at the agreed sessional rate for pharmacists. This suggested that the reason the complainant was not allowed to join the pension scheme was because of the rate of pay he was receiving. It was not suggested that the nature of his contract rendered him ineligible to join the scheme - which was the initial reason quoted by them in refusing his request.

A letter from the Department of Health and Children stated that sessional employment is on a contract for services basis, that it does not have an employer/employee relationship and that sessional employment is remunerated at a different rate to part-time employment in lieu of pensionability. This conveniently ignores the issue of why the complainant is subjected to PRSI at Class A, rather than Class S, which would be appropriate in such a case.

Due to the conflicting arguments and information received, the matter of the contract of employment was referred to the SCOPE section of the then Department of Social and

Family Affairs. SCOPE's role in this matter is to consider the appropriate class of PRSI payable in respect of the complainant, the decision being extremely important from the point of view of the nature of the complainant's contract of employment. Following investigation and detailed examination of the employment contract, SCOPE concluded that the complainant was subject to control and direction when carrying out duties, was subject to dismissal, and all parties had to comply with the regulations set out in the Minimum Notice and Terms of Employment Act 1973. He was entitled to holiday and sick pay and worked an average of twenty hours per week for a fixed hourly rate and that the hourly rate was determined by the Department. SCOPE concluded that the complainant was employed under a contract of service. This decision by an independent body was not appealed by any of the parties concerned.

The SCOPE decision and my initial findings were forwarded to the HSE and the Department. The HSE expressed reservations and commented that sessional workers received enhanced pay rates for their work and stated that the higher sessional rate could be seen to take into account a compensatory factor for non-inclusion in the pension scheme and non-reckonability of sessional service. Two options for the complainant were put forward, the first of which involved abandoning sessional status for pro rata part-time status, repaying the sessional status pay premium and paying contributions on the service to be reckoned. The second option involved having pension based on actual pensionable remuneration and on treating each year of part-time service as a year of service for pension purposes - full, as opposed to pro rata, integration would also apply. This second option appears to contradict previous assertions that the sessional employee could not be included in the scheme unless the employment contract was altered!

The HSE pointed out that if a sessional worker joined the pension scheme, it would create a definite inequality between them and a lower paid colleague on the standard pay scale. While this may be the case the amount of remuneration paid to employees is not one where I have a function. My primary concern relates to whether or not individuals are being treated in accordance with the rules and regulations of a particular pension scheme and relevant legislation. [As part of an attempt to find some rationale for the sessional pay rates, we did examine the pay scales applicable to fulltime employees and found the sessional rate to be somewhere near the middle of the incremental scale, so a long-serving sessional employee would be much lower paid than a full-time counterpart.]

The Department pointed out that historically the sessional rate provided for sick pay, holidays and pension but that provision for sick pay and holidays had been removed from the rate. However, despite providing various pieces of historical data in relation to sessional rates, neither the Department nor the HSE were able to provide a definitive

breakdown of the pharmacist's sessional rate. This is somewhat surprising when one considers that one of the most recent arguments for declining eligibility was that a higher rate was paid to take into account the fact that the post was not pensionable. While I was inclined to accept the argument that there was, or had been, a loading in the sessional rate for pension, no clear evidence to this effect was produced and as I mentioned earlier, the rate of pay for any post is not something with which I have a concern.

It was clear to me that the HSE had a need for the employment of specialists on a sessional rate as part of their service delivery. This does create an issue when it comes to pension provision. However, the Department and the HSE cannot ignore the legal obligations under the Protection of Employees (Part-Time Work) Act, 2001, the Protection of Employees (Fixed-Term Work) Act 2003 and the provisions of the pension scheme. While the legislation appears to have been applied to those on standard contracts and in receipt of pay in accordance with standard pay scales, the effects of the legislation on the pensions of employees working on a sessional basis have not been dealt with adequately.

I concluded, and formally Determined, that the complainant was a part-time employee working on a "contract of service" basis and therefore should have been allowed access to the pension scheme and his benefits and contributions pro-rated and integrated. While I acknowledged that the issue was a challenge for the HSE and the Department, I also went to some trouble to suggest an equitable solution to the problem of sessional employees having differing hourly rates of pay depending on the number of hours worked.

***COMMENT**: I have gone into some detail in this case to highlight an example of the intransigence within some public sector organisations in dealing with the need for urgent changes in practices and procedures. As I mentioned in my Final Determination, I found the attitude of the Department and the HSE frustrating in this case. The HSE firstly advised the complainant that he could not join the pension scheme because he was a sessional worker. The argument was then broadened to point out that as a sessional worker he was on a contract for services and so was not eligible. Subsequently he was advised that he could join, but he would have to agree to a change in his terms and conditions and his rate of pay and the difference between the sessional rate of pay paid to him and the standard salary would have to be repaid. Later still, it was pointed out he could join on his current contract but his benefits and contributions would not be pro-rated which would result in a small or possibly no pension benefit from the pension scheme. It is abundantly clear that a "corporate" decision was taken that sessional workers would not be given access to the pension scheme and once one ground for refusal was refuted, another was substituted and so on.*

While I expressed frustration when I issued my Final Determination in March 2009, this was nothing compared with the deep irritation I now feel for the way in which the HSE and the Department of Health and Children are treating both my statutory Office and their sessional employees. I have two additional cases, identical in all material respects, to that detailed above.

Despite

- *the protection of employees legislation being in force for over nine years;*
- *my Investigator being told in 2005 that the HSEA believed that the complainant should be included in the scheme;*
- *extensive investigation by my office and by the SCOPE section of the then Department of Social and Family Affairs in an identical case;*
- *my issuing a legally binding Final Determination which was not appealed to the High Court by any of the parties involved;*
- *the Department of Health and Children advising me personally in April, 2009 that the Department would be instructing the HSE to treat similar cases in accordance with my Final Determination;*
- *one of the complainants offering to change from sessional to part-time permanent employment in 2007 but some two years later still had no response from the HSE;*
- *the same individual making 4 separate requests for IDR since 2005 without result (which under legislation should be completed within three months); and*
- *becoming aware as a result of a Freedom of Information request by the complainant that the HSE had stated in May of 2010 that employees who were in receipt of a sessional rate of pay had been admitted to the HSE superannuation scheme (contrary to the previously clearly stated HSE position) and that the basis on which these individuals were admitted to the pension scheme included circular 64/2002 and the Determination of the Pensions Ombudsman.*

I am still frustrated in my efforts in having the two identical complaints before me resolved by agreement. I have been palmed off for over a year now with the excuse that a Working Group is examining the issue relating to all sessional employees and that a decision may be forthcoming by the end of this year. In such circumstances, I have no option but to initiate full investigation of these cases and again employ the services of SCOPE, all to what end? Simply to issue an identical Final Determination.

I have asked myself how a body could treat it employees so appallingly, simply because they were seeking to obtain their legal rights. The answer is simple, of course. The HSE is concerned at precedent, at "opening the floodgates", at the cost implications

and probably a myriad of other concerns of which I am not aware but none of which could supersede the legal rights of an individual. The fact that the HSE or its predecessor and the Department of Health and Children devised this employment arrangement and continued to employ people under this process when the problem was known, does not permit it to ride roughshod over an individual's legal rights, let alone abandon its moral obligation to its own employees. Too often I have come across cases in the public sector where the legal rights of an individual are set aside on the grounds of undesirable precedent and/or cost implications. Somehow the question "what is the right and proper thing to do?" fails to be asked or is deliberately ignored.

I have also advised the HSE that at the end of my investigations into the two current cases, I intend issuing a very detailed and chronological report to the Houses of the Oireachtas on the use of the scarce resources of the State in the investigation of these complaints.

7. Investment Instructions Not Implemented

The essence of this complaint was that the complainant's funds were not moved to the BIAM Cash Fund in October 2007 after he issued an instruction to the scheme consultants and to the trustees to that effect.

When the complainant issued his instruction, he did so in the middle of a bulk scheme investment switch. Neither the complainant nor the trustees indicated that the instruction to move to the cash fund was outside the bulk scheme investment switch. While the trustees consented to the switch to the cash fund, the pension scheme consultants presumed that this was to be executed as part of the bulk switch. It was only in January 2008, when it was discovered that the funds were not switched in November 2007 as part of the overall switch, that the timing of the switch became an issue.

I concluded that there was maladministration in the scheme consultant's failure to switch the complainant's funds to cash at the end of November 2007 as part of the overall investment switch but the complaint of failure to make the transfer prior to the date of the bulk switch was not upheld.

I directed the consultant to make a payment to the complainant's retirement fund to purchase 1,182.1590 units in the BIAM Cash Fund. The amount represented the difference between the number of units which would have been purchased in the BIAM Cash Fund at 26th November 2007 if the complainant's funds had been transferred as

part of the overall investment switch, and the number of units purchased on 14th January 2008 when the funds were actually switched.

8. Refusal of Ill-Health Pension – Decision Remitted to the Trustees

The complainant claimed that he was entitled to an ill-health pension under the scheme and that the medical evidence supported his case that he was unable to continue in his current job. The trustees had refused to grant an ill-health pension.

It is not within my remit to question or interpret medical evidence, though the medical evidence in this case appeared to support the view that the complainant would be unable to continue in his normal occupation. The Notice of Determination issued by the trustees at the end of the Internal Disputes Resolution (IDR) process indicated that they had regard to all the medical evidence and concluded with the words, *"you do not qualify for an ill health pension"*.

It appeared that the trustees had formed the opinion that the complainant did not fulfill the requirement set out in the definition of *Incapacity* under the scheme rules, in that his ill-health was not sufficiently serious as to prevent him from following his normal occupation. It is clear from the number of medicals which were requested by the Trustees that they had taken the complainant's application for ill-health retirement seriously and it was also clear from the extracts of the various Trustee meetings that they had considered the findings of each medical report and on this basis decided not to grant an ill-health pension. While the decision rests upon what appeared to be a discretionary power of the Trustees, I was not entirely happy that the Trustees fully appreciated the import of the Rules as they stood "*at the time of the Complainant's application"*.

I noted that the definition of Incapacity had been amended in new Rules which had been approved by the Trustees. The new Rules required that, in order to qualify a member for an ill-health pension, the Trustees would need to be of the opinion that the ill-health suffered prevented the member from continuing in his own occupation **and** seriously impaired his earning ability. I also noted that the explanatory leaflet dated December 2001 suggested that a member might retire due to ill-health if absent for a continuous period of 12 months and if the Trustees have independent medical evidence to the effect that the illness or disability is permanent and that the member is unable to undertake remunerative employment. This did not accurately reflect the old rules which it purported to explain and, while not identical, was closer to the provisions of the new Trust Deed and Rules. This concerned me, not only from the point of view of communication to

members, but it caused me to question the basis for the Trustees' decision in terms of which set of Rules they had relied upon in coming to their decision.

I directed the Trustees to confirm to the Complainant that the decision taken in not granting him an ill-health pension was taken based on the medical evidence available to them and on the Rules of the Scheme *which were in force at the time of his application.* If the Trustees were unable to provide this confirmation, I directed them to reconsider the Complainant's application for an ill-health pension under the Rules of the Scheme as they had been at the time of his initial application.

9. Application of MVA; Alleged Negligence; Annuity Value Questioned

This complaint was threefold. The complainant claimed that

(i) the Market Value Adjustments (MVA)/penalties applied by the Insurance Company to his fund were unfair and unjustifiable and were applied to his fund and in particular to the fund deriving from the demutualisation payment despite assurances he received and relied on as set out in a letter from the Insurance Company. The complainant had also questioned the underlying basis for the assurances provided versus the actual financial situation of the Insurance Company once demutualised;

(ii) the Insurance Company was negligent when dealing with the demutualisation payment which resulted in a loss of almost 6% because of the movement in exchange rates;

(iii) the actual annuity in payment he was receiving was less than that quoted based on the fund values and annuity rates provided.

In this particular case I issued a Preliminary View on the likely outcome of the investigation.

It was clear from the information provided that there was certainly maladministration in relation to the handling of the complainant's benefit, particularly regarding the late payment of the demutualisation bonus into the pension fund and the loss arising in relation to the difference between the currency rate at the date the payment was made and the date the payment was applied to the scheme. However, this issue was addressed by the Insurance Company after the complainant and the broker/trustee had raised the problem on a number of occasions.

There also appeared to be maladministration in relation to the annuity rates quoted and applied to the pension fund. While the Insurance Company admitted during the course of this investigation that an error occurred in the actual calculation of two of the annuity rates, I could find no evidence of it advising the broker/trustee or the complainant of the annuity rate error and the knock-on effect on the total annuity. I found this unacceptable, given the error which had already occurred in relation to the application of the demutualisation bonus in relation to the exchange rate.

Given the frequency and abundance of correspondence between the Insurance Company and the broker/trustee and the complainant at the time of his retirement, the error in the annuity rates should have been advised to the parties prior to the setting up of the annuity. In view of the fact that this did not happen, I was of the opinion that the annuity rates quoted at outset should be maintained and the shortfall between the total annuity paid since February 2005 to date and the amount due based on the original annuity rates quoted should be paid to the complainant.

The issues raised by the complainant regarding the value of his policy when he retired, the application of MVAs and penalties to his fund and the issue of the demutualisation itself, were considered by the Actuary retained by my Office to consider the case. I believed that the complainant was not treated any differently to any other member of a pension scheme in relation to the demutualisation. The Actuary's overall conclusions were that the Insurance Company did not act unfairly or unjustifiably in determining the amount of benefit payable at the time and I accepted these conclusions.

I directed the Insurance Company to apply the annuity rates originally quoted in August 2004 to the Complainant's benefits effective from August 2004.

As indicated in my preliminary view the general issue of the demutualisation and how it was managed and the treatment of policyholders after the demutualisation was one which not only affected the complainant but also all other policyholders. Insofar as this investigation has considered the factors relevant to the complainant's case, I determined that there was no maladministration. However, the issue of the demutualisation *in general* was not one which could be considered further by my Office. It was simply not within my jurisdiction. To the extent that a number of questions had been raised during the investigation in relation to the demutualisation, I decided to pass on the information obtained and the opinions expressed in the course of the investigation to the Financial Regulator.

10. Delayed Transfers – Financial Loss

This complainant claimed that, despite his having completed the documentation necessary to effect a transfer from the Scheme of a previous employer ('Scheme 1') to the scheme of his current employer ('Scheme 2'), he discovered two years later, on leaving his then current employer that the transfer had not been executed. When the funds were eventually transferred, the complainant alleged that there was a shortfall in excess of €20,000 in the transferred funds.

In addition he claimed that, when he later left the second employer, the delay in resolving the issue with the original transfer from Scheme 1 had a knock-on effect on the purchasing power of the subsequent transfer from Scheme 2 to the scheme of his new employer ('Scheme 3').

This investigation was quite complex in that it involved transactions between three different pension schemes though the same consultants provided advice to both Scheme 1 and Scheme 2. Due to the nature of the complaint, the parties involved and the information received I issued a Preliminary View on the case. In the Preliminary View I stated that I believed maladministration had occurred and that it was the consultants which had to bear the sole responsibility for that maladministration (the same firm of consultants had advised both schemes).

All parties to this complaint had acknowledged that an error occurred resulting in the delay in transferring the complainant's funds to Scheme 2.

The Trustees of Scheme 2 and the consultants claimed that the overall responsibility for the transfer of the funds from Scheme 1 lay with the Trustees of that scheme. While this was technically and legally the case, I found it unacceptable that both the Trustees of Scheme 2 and the consultants were denying their responsibility for the proper administration of the complainant's benefits.

The consultants argued that their adviser responsible for Scheme 2 was not involved with Scheme 1. While this may be correct, that adviser undertook (based on correspondence received) to ensure that arrangements were made for the transfer to Scheme 2. The complainant accepted this undertaking at face value – after all, the same organisation advised both schemes. He was not made aware at any stage that he should have referred the issue of the transfer to a different adviser. It was unacceptable for the consultants to try and attach the blame for their maladministration to the Trustees of Scheme 1. Neither was it acceptable that, having given his instructions and signed the necessary

papers, the complainant should be expected to oversee the conduct of the transfer. The fact is that both ends of the transfer transaction were to be undertaken by the same firm of consultants, albeit by different personnel.

I reviewed the submissions made in response to the Preliminary View and the views put forward at a meeting with the consultants and I did not change my opinion.

I welcomed the clarification and the clarity of the explanations provided by the consultants to my Office. The consultants also apologised for the confusion in relation to the incorrect documents provided to my Office and the lack of proper explanation behind the various calculations provided to the complainant.

There was not only maladministration in relation to the consultant's handling of the complainant's benefits and the errors that arose in the administration of same, but more particularly in their efforts - or lack of effort - to resolve those issues. I am fully aware that errors and mistakes happen in the administration and management of pension schemes despite enormous efforts to put in place systems and expertise to avoid such occurrences. While such errors and mistakes are unacceptable, they do happen and it is extremely important that, when a mistake occurs and is detected, corrective action is taken to alleviate the situation. Responsibility for the error must be taken, a clear explanation why the error occurred must be given and a genuine and realistic effort must be made to resolve the issue. Communication is paramount in this situation.

If a clear explanation had been provided to the complainant and a genuine attempt made by the consultant to resolve the issues in this case, the complainant would have been satisfied and would have been in a position to make an informed decision in relation to his transfer to Scheme 3.

Instead, there were inaccuracies in the information provided in relation to the transfer from Scheme 1, there was a mistake in one of the transfer values provided in January 2003, he had difficulty in contacting the consultants in relation to why the transfer value calculation was taking longer than anticipated and the subsequent letter he received setting out the transfer value only added to his sense of mistrust of the consultants.

It was clear based on the most recent clarification, that the transfer value in a letter of 30th May 2003 contained an accurate value at the time. However, no allowance was made for the fact that this member's benefits had previously been handled badly and there had been previous errors. In addition, there were a number of parts to the complainant's benefits, added years from the transfer-in, actual Company service and an extra award

of service as part of his contract with the employer. There was no attempt to provide a full explanation of the difference between the transfer value now quoted and those previously quoted and how the different tranches of benefit were treated.

Due to the number of errors made in relation to his benefits during his membership of the Scheme 2 and the lack of explanation provided in relation to the transfer value in May 2003, the complainant was not prepared to action the transfer until he was satisfied with the accuracy of the figures provided by the consultants. His actions were not surprising, given what had already transpired.

I believe that the complainant suffered financial loss due to the consultant's inaction and failure to provide clarification and to communicate with the complainant. When his benefits were finally transferred on the wind-up of Scheme 2 his transfer value was subsequently enhanced and a solvency reduction was not applied on the instruction of the Employer. However, despite a substantial increase in value, the transfer value purchased a much reduced service credit under Scheme 3 than that which would have been purchased if the complainant had been in a position to transfer the lower transfer value prior to July 2003.

I directed the consultants to pay to Scheme 3 an amount to purchase the difference in the service credit which would have been purchased by the original transfer value quoted in May 2003 and the service credit actually purchased when the higher value was transferred on the winding-up of Scheme 2.

11. Garda Claim for "Special Pension" and Other Benefits

This complainant maintained that when he retired in 2004 he should have been granted a special pension under the The Garda Síochána Pensions Order 1925. The complainant claimed that his ill-health was work-related and should therefore be classified as *"an injury received in the execution of his duty"* which he believed would entitle him to a special pension in accordance with the terms of the Order.

This case was reconsidered by the Department of Justice Equality and Law Reform when it was referred to them as part of the investigation commenced under Section 131 of the Pensions Act 1990 (as amended). The Department advised the Office that a special pension would be granted to the complainant. The complainant's pension and gratuity were recalculated and all arrears due from 2004 have been paid. The complainant was satisfied with the outcome. Therefore I considered this part of the complaint to be resolved.

The complainant also claimed that unsocial hours and weekend allowances should have been paid for in respect of his absence due to stress related sickness in the period 20th January 2002 to 21st February 2003. It was pointed out to the complainant that this issue did not fall within the remit of the Pensions Ombudsman. However the matter was passed on to the Department for further consideration. On 5th February 2009 the Department confirmed that the particular allowance would not be included in the calculation of the complainant's superannuation entitlement. As this issue was an employment issue between An Garda Síochána and the complainant it could not be considered further by me as part of the investigation.

12. Professional Added Years

The complainant claimed that he should have been considered for the grant of professional added years under Article 66 of the Local Government (Superannuation)(Consolidation) Scheme 1998. The Department of Education and Science had denied the complainant's claim and also denied his claim for the grant of added years under Circular S6/87 issued by the Department of Environment.

The complainant had retired from a lecturing position at an Institute of Technology in 2002 having qualified for 32.8383 years pensionable service out of a possible 40 for full pension. He claimed that he was a "registered officer" as required under Article 66 and that he was not a "teacher" as set out under the Local Authorities (Officers and Employees) Act, 1926. [Teachers were specifically excluded from the application of Professional Added Years under this Act].

The Department rejected the complainant's contention that the word "teacher" applied to first and second level teachers only. It claimed that the word "teacher" was regularly applied to staff employed as lecturers in Institutions of Technology and, in fact, until recent years the basic recruitment grade in the Institutes was the grade of College Teacher.

I considered the complaint under both Circular S6/87 issued by the Department of the Environment and Article 66 of the LGSS.

In relation to the complainant's claim under Circular S6/87 it appeared that the complainant occupied a post for which any university degree or an equivalent professional qualification was required and as the service requirement was only "not less than three years", it was clear that these qualifications could have been obtained by age 24 for anyone leaving

school at 18, as was then the norm. On that basis, I found that the complainant was not entitled to a grant of added years under Circular S6/87.

In relation to Article 66 of the LGSS, I considered all the correspondence and documents submitted as part of this investigation. I also consulted the records of Dáil Éireann for the period in which the 1926 Act was debated in that House. These failed to enlighten me as to why "teachers" were excluded from the application of the Act.

The context of the Act must nevertheless be considered. The complainant rightly pointed out that, at the time the Act was passed, the only persons in the employment of Local Authorities who could be described as teachers were Technical School Teachers, who taught at second level. The Act did not envisage the later institution of higher-level Colleges under the auspices of Vocational Education Committees.

Circular S6/87 defines the terms, *Professional, Technical* and *Specialist posts* for the purpose of the grant of added years under that Circular. It is clear that the complainant holds a "professional" post under the provisions of the Circular. It cannot then be otherwise for the purposes of the Local Government Acts.

I believe it was clear that the complainant was a lecturer and not a teacher and so the terms of Article 66 applied to him. However in terms of Article 66, the granting of professional added years is the subject of a discretionary power given to the employer as the Trustee of the scheme, so I do not have any power to substitute my decision for that of the employer.

It was my determination that the complainant was entitled to make application for added years under Article 66 and his application should be considered by the Department of Education and Science and a decision regarding same should be notified to the complainant.

13. Investment Decision Not Implemented

The essence of this complaint was that the complainant's request to move his pension to a cash fund in September 2008 within the Pension Scheme was not acted on promptly and as a result of a delay there was a substantial loss to his pension fund. The complainant had been made redundant and a liquidator had been appointed to the employer company.

The complainant claimed that he contacted the Insurance Company in early September 2008 and asked them to move funds to cash and was advised by the Insurance Company that they could not act on his authority. He then entered into communication with the Liquidator and the Financial Controller of the employer. The relevant funds were eventually moved to cash by the Insurance Company. The investigation found, having reviewed the original employer application form, that authority was granted to members to request switches without requiring the authority of the Trustees.

This case highlighted the need for all parties in the administration and management of a pension scheme to check the documents governing the pension scheme in relation to the rights of the member under the pension scheme.

Generally Insurance Companies provide standard documentation and services in relation to pension schemes and in such cases there is little variation from scheme to scheme in terms of the options available to members. However, it is clear - and this case underlines the point - that differences and variations do exist, and Insurance Companies must not make assumptions about options available to particular members until the governing documents of the particular scheme are checked – which includes the original application forms.

The Liquidator was to some extent operating in a vacuum as he did not have access to the governing documents. The Liquidator does not automatically take responsibility for the scheme once the Company/Trustee goes into liquidation; however attention should have been paid to the type of investment fund in which the member's benefits were invested, particularly when the complainant had raised concerns regarding the investment of his benefits and it was a period of extreme volatility in the markets.

I directed the Insurance Company to treat the complainant's benefits as if the funds had been switched to cash when first requested by the complainant.

14. Euro/Punt Exchange Rate and Non-payment of Benefits

This complainant stated that when he first started working with his former employer he was "*operating in punts*". On retiring, his pension was paid to him in euro and he complained that the exchange rate was incorrect. He stated that he was also informed that the pension should increase with indexation which it had not done since he retired. He alleged that when he got in touch with the scheme about the exchange rate they said

they set the rate themselves. He stated that he had tried to resolve the issue but "*they will not return my calls*".

When I contacted the scheme Secretary he advised me that the superannuation scheme used the prescribed standard method of converting punts into euro – that is, the punt amount is divided by 0.787564. This is the only method that is permitted for converting Irish pounds into euro. I did not know what method the complainant himself employs for making the conversion but there is only one lawful method of doing it and I was happy that this is the method used by the scheme.

With regard to the failure to pay the complainant's benefits, the scheme was unaware that he had changed address, and had not notified the Trustees of any change of address. The complainant's employment had been terminated in 1984 and he reached age 65 in 2008. At that stage, the Trustees sent his lump sum cheque by registered post to his last known address. In addition, they included a pension declaration form and a bank payment form to be completed so that they could progress the payment of his pension. The forms were never completed, nor was the letter returned to sender. In June 2009, the Trustees wrote again to that address, requesting that he return the pension declaration form.

Following my conversation with the scheme administrator the trustees again wrote (twice) to the complainant's present address, enclosing the relevant pension declaration and bank payment forms. The Trustees requested that the forms be returned immediately and upon receipt of the relevant forms, his pension and arrears would be paid to him immediately. At the date of my determination, they had not had any communication from the complainant.

I found that the method used by the scheme for converting Irish pounds to euro is the correct method, the only method allowed by law. In relation to the question of cost of living adjustments, I did not believe that there had been any increases in the pay of serving staff since the commencement date of the complainant's pension so the question of index-linking was at best premature. I instructed the complainant to return immediately to the Trustees the pension declaration and bank payment forms.

I believe that the element of this complaint concerning the rate of exchange was vexatious. The failure to update the scheme with at least two changes of address was the complainant's own responsibility and the bringing of the complaint to my Office resulted in the use of scarce resources where the complainant himself was the cause of much of the confusion.

15. Local Government – Overtime Not Included in Pensions Calculation

The complainant in this case alleged that a call-out charge, which he had been in receipt of while carrying out his role in the housing department of a local authority, had not been included as reckonable in the calculation of his superannuation pension. The complainant, prior to submitting a complaint to my Office, requested the respondent to carry out IDR. This was completed but the complainant was still unhappy and subsequently requested an investigation by my Office.

The initial ground for rejection was that the Local Government Scheme provided that: "*Neither salary nor emoluments shall include any of the following:*

(e) payment for special work of a casual or temporary nature……..

The Call-Out which you worked was not rostered as it could not be predicted. The Call-Out was worked as and when it was required and therefore it was of a casual nature."

It became clear from this investigation and many others like it, that ad hoc practices at local level have led to a situation where staff feel they are being treated unfairly by management compared to other work colleagues. In this case there must have been a need for the call-outs to occur - otherwise the practice would not have been in place over such a sustained period of time. While the respondent made the case that the call-outs at issue were not part of this individual's job, it was unclear as to who would have responded to the call-out if he had not done so. The respondent would have been aware-given that payments were being made in respect of such call - outs - that the complainant or his colleagues would have responded and, more importantly, that the complainant was not an outdoor staff member.

The argument put forward by the respondent was that Article 26 (1) (e) of the Act excludes the payment for special work of a casual or temporary nature from superannuation calculations. The respondent further stated that the call-out work was not rostered as it could not be predicted and that the call-out was worked as and when it was required and therefore it was of a casual nature. Surely this is what a stand-by/call-out allowance is designed for? The essence of a standby emergency service is the unknown. It cannot be predicted in advance, or presumably it would be avoided.

It was clear in this case that the respondent should have put in place outdoor staff to be available to deal with the calls that the complainant and his colleagues had to deal with but, for whatever reason, it chose not to do so. The concept of legislation, rules and circulars within the workplace is to protect the individual and the organisation.

The interpretation of these should not be used to shore up failure within management to correctly identify potential problems and provide for their resolution. The purpose of Article 26 (1) (e) is to ensure that certain payments that may be made from time to time are not pensionable. It is not there to invalidate a claim for the inclusion of what amounts to a stand-by allowance called by another name. If the respondent wanted only outdoor staff to be available for emergencies, then it should have ensured that this was the case.

I upheld the complaint and ordered the payment of arrears of pension.

16. Distribution of Death-in-Service Benefit

In this case, two sisters of a deceased member complained that they were not included in the distribution of her death-in-service benefit.

One sister initially contacted the Office of the Pensions Ombudsman (OPO) to outline the complaint and to express her surprise that the benefit payable under a pension plan, following the death of her sister, was not paid into her late sister's estate. It was explained to her that it was not automatic for the death benefit to be paid into the Estate of the deceased person but that it would have to be paid in accordance with the Rules that governed the pension plan. Later the same day, the solicitor representing the sisters contacted the OPO by phone to discuss the case. She advised that she had received a copy of the relevant extract from the Trust Deed and Rules, which showed that the definition of Beneficiaries included siblings. She advised that the member had not left a will or a "wishes" letter relating to distribution of her plan benefit. She queried the decision of the employer in this case to pay the whole of the benefits to the partner of the late member.

Following investigation I concluded that the employer had gone to considerable lengths to establish the facts of the case and had taken into account a number of relevant facts regarding the late member and her relationship with her partner. The employer had demonstrated to the satisfaction of the OPO that proper examination and due consideration went into the process of determining the distribution of the death - in - service benefit, under a discretionary power. It is not within the authority of the Pensions Ombudsman to interfere with, or substitute his decision for such a properly executed use of a discretionary power under the pension plan rules.

In implementing the direction given to them by the employer in this case, the Trustees were complying with, and working within the plan rules. These rules did not grant them the power to decide how the death - in - service benefit might be distributed, or to challenge the employer's direction on the matter. The rule in this case obliges the trustees to pay the benefit to any one or more of the Beneficiaries or the Personal Representatives in such shares as the Employer directs. The Employer directed them to pay all of the benefit to the deceased member's partner. Having satisfied themselves that he satisfied the definition of a Beneficiary, the Trustees complied with this direction and paid the entire benefit to him. They could not be faulted for this action, as in implementing the employer's direction, they were complying with the plan rules.

17. Alleged Maladministration in Wind-up Process

The transfer value payable on the winding-up of a scheme was less than that initially quoted. Investigation found maladministration, in that the initial transfer value figures were incorrectly calculated and had not been presented to the complainant as the estimates they actually were. The initial figures quoted did not represent the member's entitlement under the rules, but rather the Actuary's estimate at the inception of the wind-up process of what this might be. His entitlement was to the transfer value at the conclusion of that process, accurately calculated. The Pensions Ombudsman accepted that, as he had received this amount, there was no financial loss.

COMMENT: A number of complaints are received by this Office every year, in which members complain of misinformation concerning their entitlements. Unfortunately, this Office is constrained in what can be awarded by way of redress – it is limited to the "loss of scheme benefit". Therefore, I cannot award redress for failure to live up to estimates. However, these cases underline the need for trustees to exercise great care in the provision of information. Estimates should be clearly identified as such, so that unrealistic expectations are not created.

18. Failure to pay 3% Post-Retirement Increase

The complainant in this case alleged maladministration, in that the scheme administrator had failed to pay a post-retirement increase of 3%, having paid this in the past.

On investigation it emerged that neither the Plan Rules nor the leaving service benefits statement promised the complainant guaranteed post retirement increases of 3% p.a.

- the entitlement was to increases in line with Consumer Price Index increases. This complaint was not upheld. However, it was found that the Administrator had erred in paying 3% p.a. in the past, leading to an overpayment that the Trustees were obliged to recoup. The Administrator accepted liability for the error and undertook to repay to the plan the excess amount they had paid out - thus absolving the complainant from having to repay anything.

19. Misinformation regarding Entitlement to Revaluation

This complaint came from a scheme member with deferred benefits who alleged that the scheme administrators had caused him great concern and distress with their conflicting statements and paltry lump sum commutation factor and that the trustees had not treated all early leavers of the plan equally.

In 2005 he received a statement from the administrators quoting revaluation of benefits at the rate of 4% or CPI, whichever was the lower. This is the revaluation prescribed under the Pensions Act for early leavers with preserved benefit after January 1 1993. In June 2008 a further statement, correcting the 2005 statement, was issued quoting revaluation at the rate of 2% or CPI. In August 2008 he received a further statement confirming that he was not entitled to any revaluation.

The lengthy investigation concluded that he was not entitled to any revaluation based on the rules and the legislation that was relevant to his date of leaving service (1990). Clearly the member was dissatisfied that his deferred benefit had suffered as a result of inflation, particularly as he had been led to believe otherwise. The scheme administrator was guilty of maladministration for providing incorrect information in 2005 to the complainant concerning his benefit under the scheme and further for providing incorrect information again in 2008. Failure to provide the complainant with information that he requested within the two month deadline specified in the Disclosure of Information Regulations under the Pensions Act was also maladministration.

Although I may uphold a complaint in part by making a finding of maladministration, I can award redress **only** if, following an investigation by my Office, it is found that a pension plan member has suffered financial loss due to that maladministration. The yardstick used to evaluate financial loss is the member's entitlement as set out in the rules of the plan. I do not have the authority to change the rules of a pension plan, nor to make an award exceeding the complainant's "loss of scheme benefit". If it is found that a

member has received his proper entitlement then I cannot make any award in his favour or uphold a complaint of financial loss, even if there has been gross maladministration. If it transpires that a member has received less than his plan entitlement then I can direct that the position be rectified and his benefit brought up to the level of his entitlement.

In this case I had to find that the Employer, Trustees and Administrators had dealt with the complainant's entitlement under the pension plan in accordance with its rules and consequently there was no financial loss to the complainant. The fact that he was disappointed with the value of his retirement fund was understandable given that, on two entirely separate occasions, he was misled about the benefit to which he was entitled. However this does not entitle him to more than is provided for him under the plan rules.

20. Commission Refunded, but Complainant Still Unhappy

This was a case which was dealt with by mediation. The complainant stated that, a number of years ago, he had effected a pension contract and in so doing made an agreement with his broker that the transaction would be handled on a "Nil" commission basis. Subsequently, he learned that, while the initial transaction had been correctly effected, in subsequent years the broker had received commissions on both renewal and incremental premiums.

I contacted the insurance company concerned, and learned that they had not at the time been offering a "Nil Commission" contract, and that the waiver of commission by the broker had had to be processed manually. The system had clearly failed somewhere along the line.

They undertook to investigate and in due course made an adjustment to the number of investment units held under the policy, the net effect of which was to place the scheme member in a slightly better position than would have been the case, had not commission been paid. They did state, however, that manual adjustments of this nature could not be undertaken in the future. I passed this information to the complainant, who became highly indignant. I had to point out that the commission agreement was a private arrangement between him and his broker, which the insurer had done its best to honour. Ongoing renewal commission payments would amount to €2.84 per month and it would impose a disproportionate burden on the insurer to have to rewrite its software or make regular manual corrections.

21. Construction Workers' Pension Scheme (CWPS) Cases

(a) CWPS ISSUES

2009 saw an increase in the steady flow of complaints from employees in the construction sector concerning failure by employers to comply with the pension element of the Registered Employment Agreement covering construction workers. The majority relate to the failure to include employees in the Construction Workers Pension Scheme or, worse, the deduction of pension contributions and non-remittance to the pension scheme, which is at best misappropriation or, at worst, plain theft.

To date, my Office has received a total of 609 complaints involving the construction industry of which 254 were dealt with by the end of 2008. Of the remaining 355 complaints, 158 were dealt with during 2009, leaving a total of 197 complaints carrying into 2010.

The construction industry has been hard hit over the past three years and employment in the sector has collapsed. This might have suggested that complaints from that sector would drop considerably but this is not the case. I have no doubt that one of the reasons for this is that people simply did not wish - or were afraid - to complain while they still had a job. Once unemployed, with poor prospects for re-employment, they had nothing to lose by making a complaint.

I have spoken before about the difficulties I have had with employers in this sector, primarily small companies, who failed their employees by not registering them with the pension scheme; or worse, who deducted pension contributions from their employees, kept the money for themselves or used it as "working capital". It is easy to be tempted to do this if your business is encountering problems. The difficulty I have is that a very large number of the complaints to this Office refer to contributions that were due to the scheme over a long number of years, when many of the employers concerned were making real money. We still get complaints going back beyond my earliest "look-back" date, which is April 1996!

However, another side of the coin which employers bring to my notice is the irresponsible attitude of employees who wish to have nothing to do with the pension scheme, who refuse to pay their contributions with blatant disregard for any dependents they might have or for the impossible position in which they leave employers. This is because under the Registered Employment Agreement for the sector, employers have no option but to register and pay contributions to the pension scheme and remain liable for, say,

mortality benefit in the event of an employee's death, even if the employee refused to have anything to do with the scheme.

In addition, I often get complaints from small companies stating that they cannot pay contributions because the larger companies to which they were sub-contractors have failed or refused to pay them. This is the sort of thing that gives the industry a bad name and is most unfair to the good employers who do honour their obligations.

(b) Death-in-Service Benefit Unpaid – Complaint Disallowed

The employee in this case had worked for 23 weeks with the employer. He died in the 23rd week. The Rules of the CWPS require a person to have been a member of the scheme with contributions properly paid up, for 26 weeks prior to the date of death. The employer remitted an additional five weeks, for time due, to the pension scheme in order to secure a death benefit for his next of kin. The member had had no previous membership of the scheme in other employments. The payment of additional contributions after his death did not qualify him for the scheme mortality benefit, as he had not actually worked for 26 weeks. This complaint was disallowed.

(c) RODALKO LIMITED

It is not usually the custom of my Office to disclose the identities of complainants or of respondents. However, I have chosen to do so in this case.

This complaint was brought by the parents of a deceased construction worker. They alleged that the employer had failed to register their son in the Construction Workers' Pension Scheme as required under the Registered Employment Agreement for the construction industry and that the death-in-service benefit of €63,500, which should have been payable under the rules of the scheme, would not now be paid.

There was considerable dispute over which of three separate but variously interconnected companies was the employer of the deceased member. One employer was alleged to be the employer for a number of weeks, but it was stated that another of the companies was acting as its paying agent in dealing with payment of wages. The whole inter-company issue became so tangled, and there was so much confusion of evidence, that I eventually decided that I had no choice but to hold an oral hearing to get to the bottom of the matter.

I invited all the relevant parties to attend the oral hearing. I further decided that, for this complaint, I would make two Determinations, the first being a Determination of Fact in relation to who was the employer of the deceased member, and a further Determination on the substantive matter of maladministration.

It became clear that Rodalko Limited was the subsidiary of another company, with common directors, Eamon O'Riordan and Tim O'Riordan. The directors of the third company were also shareholders in Rodalko Limited from a particular date (and were listed as employees of that company on a return made to CWPS by Rodalko). Following the oral hearing, I determined that Rodalko Limited had been the deceased member's employer. It also became clear that that company had attempted to register the deceased member in the scheme some sixteen weeks after his death. Following a full investigation, I made a Determination that Rodalko Limited was liable for payment of an amount of €63,500.

The company's response to this was to appeal it to the High Court, but it soon became evident that this may have been a device to induce the complainants to enter into a settlement. In the course of negotiations, solicitors acting for Rodalko threatened that, if the terms of the settlement being offered were not accepted, the company would be placed in liquidation. Eventually, terms were agreed between the complainants and the respondent, under which an amount less than what was owing would be paid by instalments and the High Court appeal was ended.

However, when the first instalment cheque was presented for payment, it could not be cleared by the bank. The complainants again contacted my Office, and I arranged for the Garda Síochána to be advised. Not surprisingly, there followed considerable activity on the part of the respondent and, after some delay, I received notification that a bank draft for the full amount of €63,500 had been received by the complainants.