Annual Report of the Pensions Ombudsman 2000 - 2001

P E N S I O N S

O M B U D S M A N

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"There are many pleasant fictions of the law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefit of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets."

Nicholas Nickleby, 1838-39, Charles Dickens

Recommendation No 1:

"That a free-to-use service to determine complaints and disputes is retained."

Pensions Ombudsman Quinquennial Review, July 2000, Department of Social Security

FOREWORD

To: The Right Hon Alistair Darling, Secretary of State for Work and Pensions

Dr Julian Farrand, Pensions Ombudsman

With ambivalence I submit to you this Annual Report on the discharge of my functions as Pensions Ombudsman during the financial year 2000-2001. On the one hand, this will be my seventh and last such Report since my term of office finally expires at the end of August 2001, which is a matter of great regret – at least on my part. On the other hand, this Report (the tenth following the foundation of the office in 1990) once again records our ever-improving performance, which is a matter of pleasure – not least on my part.

The first noteworthy aspect of this year's performance is exceeding the targets for Determinations issued not only as to numbers (605 as against 585) but also as to time taken (average under 6 months as against 12 months). A second noteworthy aspect is that the percentage of complaints upheld, wholly or partly, has again dropped significantly to, now, 39% (as against 49% last year, 78% in my first year, 1994-95, and 89% in 1993-94). Of course, in those two earlier years the numbers of issued Determinations were lower (83 in 1994-95 and 49 in 1993-94) but, I am quite confident, no inferences can justifiably be drawn as to quantity countering quality.

During the year I have become aware that our products, Pensions Ombudsman Determinations, are known in the 'trade' as PODs. This tempts me to indulge in horticultural metaphors involving seeds and fertile ground producing weed-free crops (or free-er – upheld complaints down). Happily, however, some temptations can be resisted, albeit in moderation. So I will limit myself to observing that all the real gardening is done by others: the credit for this year's produce should be heaped upon all the expert and industrious staff of my Office without whose labours there would be nothing worthwhile to market.

Nor, despite lawyers' best endeavours, has our harvest of PODs been wholly blighted by appeals to the High Court. Nevertheless, stormy weather has been encountered in cases concerning exoneration clauses cosily sheltering trustees from the costs of their defaults at the expense of scheme members. Further, heavy weather is still being made over differentiating (or failing so to do) between breaches of legal duties, culled by courts, and "injustice in consequence of maladministration", cropped by ombudsmen.

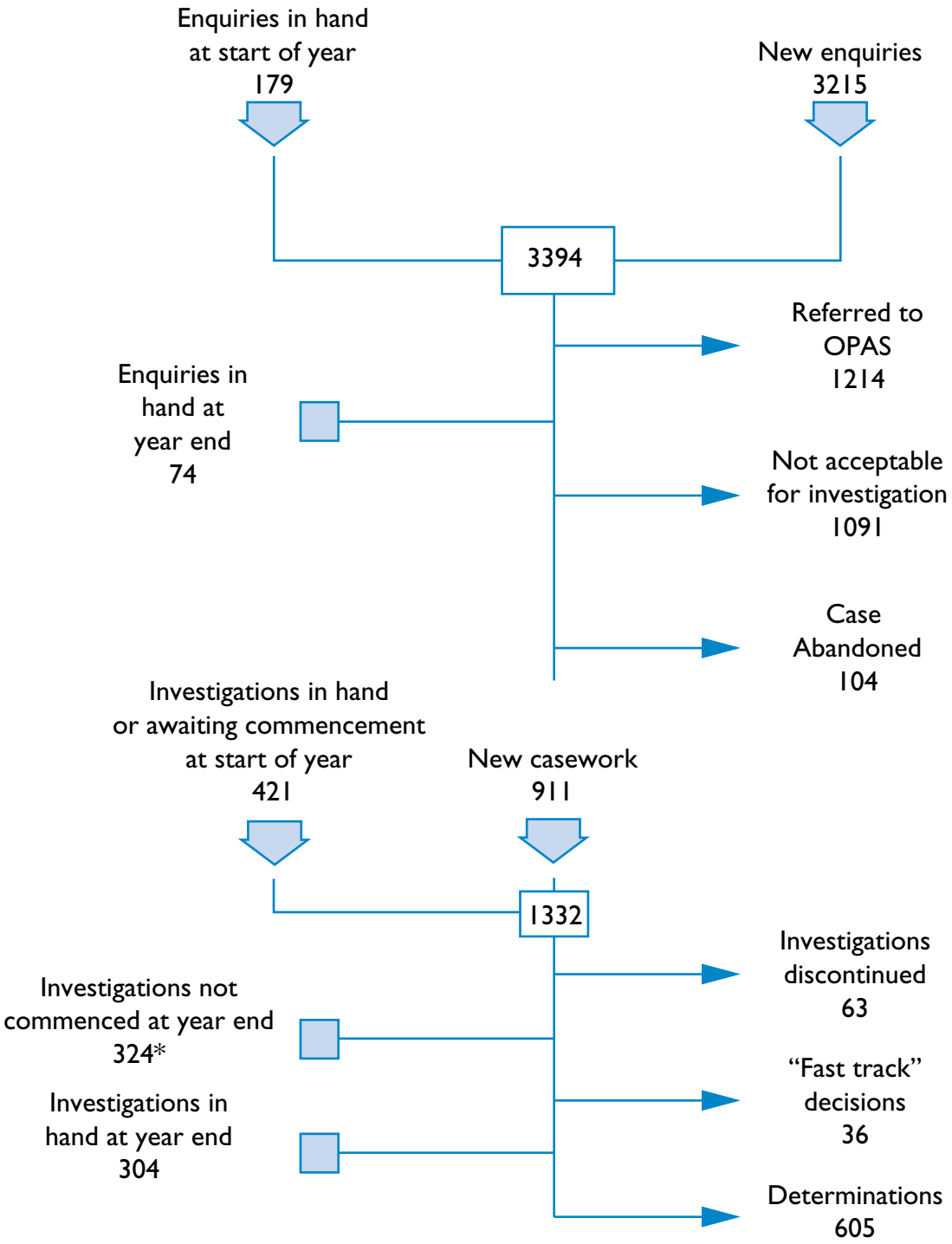
Beyond this, the judicial insistence upon non-interventionist attitudes towards manifestly unfair decisions might justify demands for the abandonment of trustee discretions in favour of member entitlements as a more reliable crop. In mind are death benefits and ill-health pensions as much as surpluses. After all, whatever the perceived minuses, strict entitlement is seen as a plus of money-purchase schemes and it would be a pity for defined benefit schemes to be compared unfavourably in this respect. But this leads on to fundamental questions of scheme governance – is your trustee really necessary? – better left for milking elsewhere!

In my first Annual Report (1994-95), I expressed enthusiasm about undertaking this statutory appointment as Pensions Ombudsman with funding through your Department "whose officials could be expected to provide informed and professional advice and support not merely free from conflicting interests but also with understanding of the proprieties of independence." Instead of simple wishful-thinking, this has proved thoroughly well-founded. Accordingly, appreciation can once again be conveyed via the redoubtable Marilynne Morgan CB, Solicitor to the Department and designated Steward of all your Independent Statutory Bodies, including us.

Lastly all that remains to be said is a message to my successor, whoever he or she may be: *Non Illegitimi Carborundum!*

JULIAN FARRAND
Pensions Ombudsman - July 2001

Figure 1 - Caseflow



* Includes 225 awaiting completion of related cases under investigation

CHAPTER 1: Performance

This year's most conspicuous success has undoubtedly been the further and significant reduction in time taken to process cases whilst maintaining a high throughput in simple numerical terms (605 Determinations issued). The office's target is to determine a case within an average of 12 months from when a decision is made to investigate and within an average of 7 months from the actual beginning of the investigation. Figure 2 shows just how well we have performed against this target and improved over the previous year, with the average for a completed investigation now below 6 months.

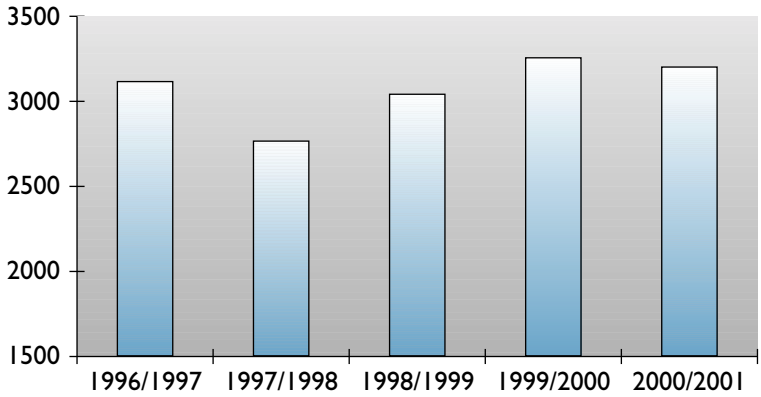
Figure 2 - Investigation times against target

	Target average	Average 2000-2001	(Average 1999-2000)
From start of investigation to determination	7 months	4.7months	(6.8 months)
Waiting time before start of investigation	5 months	1 month	(2 months)

Initial Enquiries

However, one should perhaps begin at the beginning - that is with the initial enquiries and complaints received. In the year under report there were 3,269, very much in line with previous years as Figure 3 shows.

Figure 3 - Enquiries Received (last 5 years)



At the start of the year there were 179 enquiries still in hand from the previous year, bringing the total to be dealt with to 3,394. Of these, 36% (1,214) were referred directly to OPAS, the pensions advisory service, whose role is to offer advice or mediation as necessary. It is expected that most complainants should use OPAS' services before coming to me and in many cases they successfully deal with the issue. OPAS' own case review sets out their activities in more detail[1]. An additional 32% (1,091) could not or did not need to be investigated for other reasons. Many of these (294) were passed on to either the Financial Services Authority or the Financial Ombudsman Service as being more properly dealt with by them. In fact, 2,835 out of the 3,394 (84%) were either accepted for investigation by me, or referred to another body. Of the 559 remaining, 162 either did not

[1] *Helping People through the Pensions Maze - A Review of OPAS cases 2000-2001*

require any response or decided not to pursue the matter for their own reasons. So only 397 (just over 12%) were left wanting to go further but not referred onwards by my office. This reflects the fact that my enquiries team try wherever possible to explain what an enquirer can or should do where we are unable to deal with the matter. Inevitably not all can be helped, however.

Of the complaints which **did** fall on stony ground, the most significant reason for rejection was that the complaint was not brought within the statutory time limit, which is essentially three years from when the matter complained of happened, or the time when the complainant knew, or ought to have known, about it. Amongst other reasons for rejection was the fact that the complaint did not relate to a pension scheme at all (some people write to me as the pension**ers'** ombudsman and though perhaps there should be such a creature, I am not he).

A full breakdown of how enquiries and complaints were dealt with if not accepted for investigation is given in Figure 4.

Figure 4 - Referrals and rejections (showing %age of total referred/rejected)

	2000/2001		(1999/2000)
Reason	**Number**	%	%
State scheme benefits	79	3	(4)
Not relating to pension scheme	110	5	(1)
Seeking financial advice	2	0	(0)
Respondent not in remit	28	1	(1)
Not person permitted to complain	8	0	(1)
Enquiry not yet put to scheme/IDR not used	283	12	(12)
Referred to OPAS	1214	50	(48)
Financial Services Act complaint	294	12	(18)
Appropriate for Pension Schemes Registry	51	2	(2)
Appropriate for Insurance Ombudsman	2	0	(0)
Appropriate for Opra	6	0	(0)
Subject to prior court proceedings	14	1	(1)
Out of time	148	6	(8)
Discretion not to investigate exercised	8	0	(0)
Enquiry abandoned/no action needed	162	7	(5)
Total	**2409**		

Investigations and Determinations

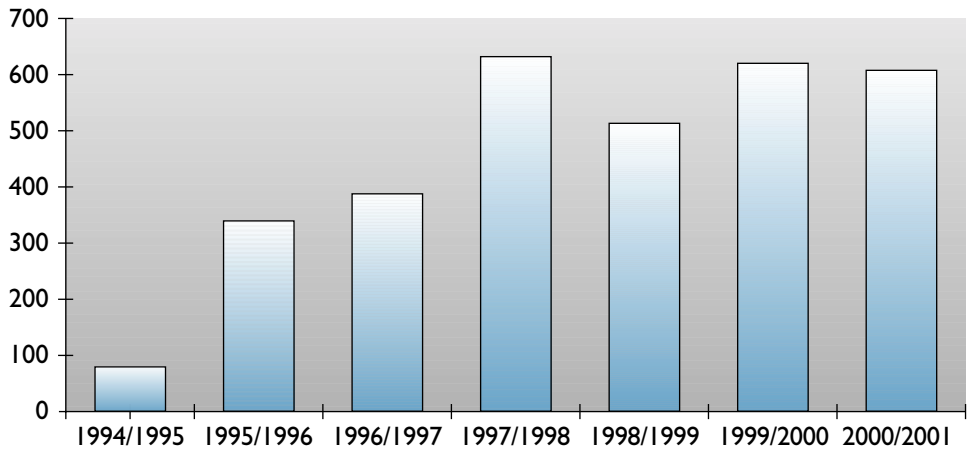
911 cases were accepted by my staff as within jurisdiction during the year. To these must be added 421 that had been accepted for investigation before the start of the year but where the investigation was still incomplete. Thus the total of cases open at some point during the year was 1,332. By the end of the year there were 628 incomplete investigations still in the office, which is to say that we had closed 704.

36 of the closed cases were dealt with under the 'fast-track' procedure which my office uses when it appears clear, without any investigation being necessary, that a complaint cannot be upheld. Essentially one of my staff will write explaining that this is his or her view, giving reasons and offering the opportunity of a review by me. If asked to review the papers I will either agree with the earlier opinion and determine formally not to uphold the complaint or dispute, or else I will order a full investigation. The 36 complainants accounted for here accepted the opinion of the staff member who wrote to them and did not ask for a formal Determination by me.

A further 63 cases were discontinued for one or other of a range of possible reasons. Sometimes the parties will have reached a settlement; in other cases the investigation will have been discovered to be outside my jurisdiction. Complainants may also withdraw at their option (though in some circumstances my consent is required).

The remainder of the closed cases were formally determined by me. There were 605 such Determinations, compared with 619 the previous year and 510 the year before.

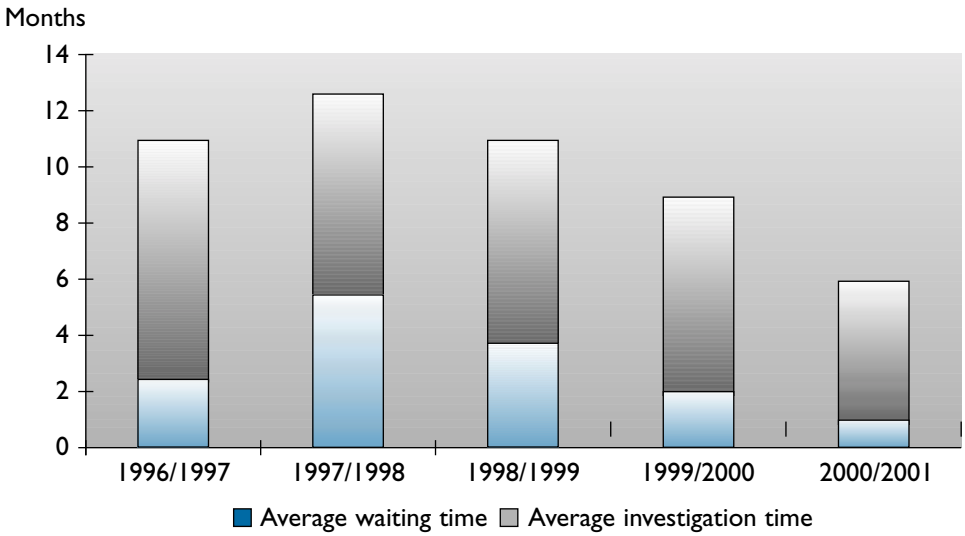
Figure 5 - Determinations issued



We thus exceeded our target of 585 and maintained the high output level at which we have been running for the last four years.

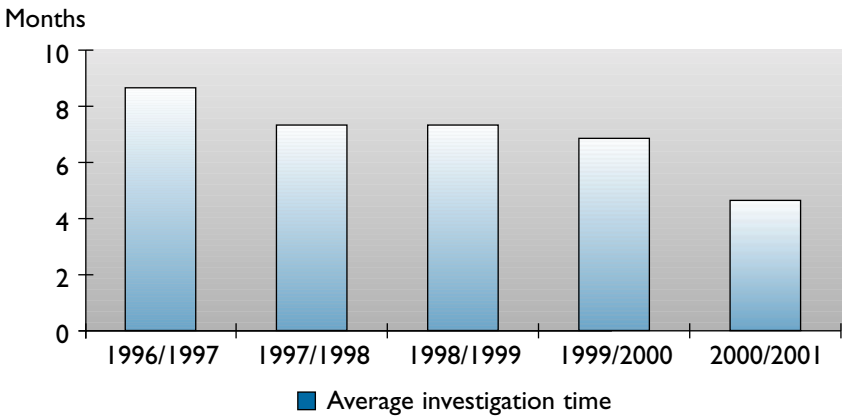
As mentioned at the start of this chapter, we have also kept well within our targets for the time within which investigations should be completed.

Figure 6 - Average investigation times (last five years)



As Figure 6 shows, the total time taken has shown a steady improvement over the last three years. The increase in 1997-1998 was essentially due to an increased number of cases accepted as suitable for investigation in that and the previous year which caused a stockpile to develop, with a resulting increase in the waiting time before an investigation could begin. The actual time taken to investigate has been steadily decreasing over the years as Figure 7 illustrates.

Figure 7 - Average time from beginning of investigation to determination



Although the target refers to averages, it is instructive to see the spread of times:

Figure 8 - Investigation time scales

Overall time (inc queuing time)	**2000/2001**		**(1999/2000)**
	Determinations	%	%
6 months or less	450	74	(45)
Over 6 months and up to 12 months	128	21	(32)
Over 12 months and up to 18 months	13	2	(12)
Over 18 months and up to 24 months	6	1	(7)
Over 24 months	8	1	(3)
Total	**605**		

Investigation time (excl queuing time)	**2000/2001**		**(1999/2000)**
	Determinations	%	%
6 months or less	500	83	(58)
Over 6 months and up to 12 months	89	15	(31)
Over 12 months and up to 18 months	7	1	(7)
Over 18 months and up to 24 months	5	1	(1)
Over 24 months	4	1	(2)
Total	**605**		

As can be seen from Figure 8, 74% of those receiving a Determination during the year did so within 6 months of their case being accepted for investigation - and all but 4% were dealt with inside a year. In my last Annual Report I said (on page 9) that I doubted that there was scope for much further reduction in the time taken for investigations. I am pleased to say that my prediction has turned out to be quite wrong, though I think we may now be running fairly close to our top speed!

CHAPTER 2: Observations

Reviewing the equivalent chapters to this in previous Annual Reports, I note that the point is always made that the number and type of cases which we see does not give a picture of the UK pensions industry as a whole. I then often go on to remind readers that, considering the tiny proportion of those able to come to me who actually do (let alone the even smaller number whose complaints have any substance) there is apparently not much administratively amiss within pension schemes generally. This year is no exception.

On the matter of whether complaints have any substance or not: in the year under report I upheld (in whole or part) 235 of the 605 cases which I determined, ie 39%. In many of the cases which are recorded as upheld in part my directions may not have been to the complainant's satisfaction, or even sometimes to the satisfaction of anyone at all, in that I will not have directed the payment of higher benefits or similar, but will have identified a minor injustice in the form of disappointment or distress and made a direction for an appropriately modest sum of compensation to be paid, not more than a few hundred pounds.

The percentage of cases upheld in each of the years since I took up office is as follows:

	1994-1995	1995-1996	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001
Total	83	308	384	623	510	619	605
Upheld	65	241	227	310	302	301	235
%	**78%**	**78%**	**59%**	**50%**	**59%**	**49%**	**39%**

The drop in the percentage upheld gives some support to the view that over the years my jurisdiction and powers have been restricted as a result of Court decisions on appeal from my Determinations (for example, an article by Simon Tyler of Pinsent Curtis Biddle in *Professional Pensions* 31 May 2001, entitled *Angel* [meaning me!] *has his wings clipped*). An alternative or additional reason might be that the statutory internal dispute resolution procedures are working, with satisfactory settlement being reached in advance of a potentially justified complaint coming to me, and the higher number of complaints not upheld being a consequence of more people being aware of the pathway for a complaint, but the unjustifiably dissatisfied being the majority of those who reach my office. An even more optimistic speculation would be that standards have genuinely improved, possibly as a result of the relatively high profile of my office, so actual cause for complaint has reduced.

Such guesswork may be premature though, since considerable care is needed in interpreting the bare statistics. In the early years the casework coming through was different in kind, as a result of my predecessor's different approach to deciding which cases to investigate. If the first two years are ignored, then the only figure inconsistent with previous years is that for the year under report (previous years having fluctuated between 49% and 59%). Perhaps by the next Annual Report it will be possible to identify whether there is a trend – although by then my jurisdiction will have changed again and there will be a different Ombudsman, both of which facts are likely to confuse the picture.

Subjects

The subject matter of the complaints and disputes determined during the year is set out in the table below.

Figure 9 - Determinations, subject matter

	2000/2001		(1999/2000)
	No	%	%
Contributions refunds and queries	22	4	(4)
Transfers	34	6	(4)
Preservation requirements	9	1	(1)
Membership conditions	39	6	(6)
Enhancement of pensions	16	3	(2)
Early retirement	39	6	(6)
Ill-health benefits	80	13	(10)
Spouse's and dependant's benefits	17	3	(3)
Additional Voluntary Contributions	15	2	(3)
Incorrect/late or no payment	49	8	(10)
No response from scheme	2	0	(0)
Winding up	38	6	(16)
Use of surplus	17	3	(3)
Disclosure of information	5	1	(0)
Calculation of benefits	72	12	(11)
Mis-selling	5	1	0
Other	146	24	(20)
Total	**605**		

The only sizeable variation from previous years is the drop in cases categorised as related to winding-up of schemes, a subject which I have mentioned in every one of my reports so far as giving rise to too many complaints. The drop may be sizeable, but it is perhaps too early to say whether it is significant. In part it is almost certainly caused by a falling off in the number of complaints related to the schemes managed by Century Life - who took them over from Crown Life, the latter company having sold unsuitable pension schemes to small businesses just before the recession in the early 1990s. Future years will show whether there is a real and permanent fall in the number of complaints related to winding up. As things stand there appears to be almost universal agreement that, for a range of reasons, scheme wind-ups take too long, and often leave members with unsatisfactory reductions in benefits. In this respect at least the Minimum Funding Requirement has not been able to fulfil the aspirations of the Goode Committee (who of course recommended a different **solvency** requirement[1]), and its demise has been announced by the Government. It remains to be seen whether arrangements substituted for it will give any greater practical security to members of discontinued schemes.

[1] The Report of the Pension Law Review Committee (CM 2342-1), recommendations 20 to 33

Repeat Cases

Although elsewhere in this report I have noted the improvements made in time taken to decide cases, there are some which have a longevity of their own. The most extreme example is a matter which began before I was in office. Mr Haywood, the complainant, wrote to my predecessor in April 1993. The drama opened then has now almost certainly had its final act written, though not always with Mr Haywood as the protagonist. Two scenes have been set in the High Court and one in the Court of Appeal. This long runner has probably failed to be the first to span the tenure of three ombudsmen – but only just!

This and three other cases determined in the year which were continuations of performances begun earlier are summarised in Chapter 3.

Jurisdiction

On 1 December 2000 Section 52 of the *Child Support, Pensions and Social Security Act 2000* came into force allowing me to investigate disputes between trustees of the same scheme (if referred by a majority), "questions" referred by a sole trustee and complaints or disputes between statutory independent trustees and other trustees. In addition I can investigate complaints and disputes referred by members of personal pension schemes against employers. As a result of this last change, and for consistency following the introduction of stakeholder pensions (which can be either "personal" or "occupational" depending on how arranged), with effect from 6 April 2001 I will investigate complaints relating to personal pensions as long as they do not fall within the mandatory jurisdiction of the Personal Investment Authority Ombudsman Bureau (**PIAOB**).

A schedule setting out my jurisdiction and its current statutory derivation is included as Appendix 1.

The Financial Ombudsman Service

With effect from a date yet to be announced, six of the financial services complaints handling bodies will formally be combined in the new Financial Ombudsman Service (**FOS**). In practice in the year under report they began to operate as if FOS enjoyed actual rather than just virtual reality. My office is the only significant exclusion from the FOS, and I am frequently asked why this should be. Of course, the roles and relationships of the various bodies are properly a matter for Government, so I can best quote from the (then) Economic Secretary to the Treasury, Melanie Johnson debating and rejecting a proposed amendment to the *Financial Services and Markets Bill*, to the effect that the Pensions Ombudsman should be merged with the FOS:

> "It has been [the Government's] intention where possible and sensible to remove the scope for overlaps and gaps in the arrangements connected with all kinds of financial services, so I cannot deny that there is a certain logic in the proposal.
>
> However, the pensions ombudsman's current role is different from that envisaged under the Bill. The pensions ombudsman can entertain complaints against any trustees or sponsoring employers. That would not be the case under the Bill, because all potential respondents - such as employers - would not need to be authorised by the FSA, and so could not be brought within the compulsory jurisdiction. There is a fundamental difference in terms of the basis of the jurisdiction of the ombudsmen.

> Moreover, the financial services ombudsman will generally consider relatively minor complaints - primarily from retail and small business customers about financial services they have bought, their home insurance, a problem with the mortgage and so on - where the nature of the complaint is between customer and service provider.
>
> The pensions ombudsman - as all hon. Members will know - can look at the operation of the pension scheme as a whole, and can even consider complaints by potential respondents such as employers and trustees against each other. The ombudsman needs to be able to deal with the firm, the employees of the firm and the trustees of the firm's pension scheme, and deal with relationships between those people. Accordingly, whereas under the FSA's current proposals [for the future FOS] the ombudsman will be able to make awards of up to £100,000 per complaint, this would not be a sensible approach for the pensions ombudsman, given the collective nature of occupational pension schemes." (*House of Commons Hansard*, 9 February 2000)

So we remain separate, but there is no reason for our customers (whether complainants or respondents) to suffer as a result. The possibility of a common gateway for complaints has been discussed but, for now at least, is not to be put into effect. The reason is that all the relevant bodies believe that applicants can best be served by a flexible system of cross referral rather than forcing complainants to apply to a central, less expert, entity. If expert advice is needed, it is available from OPAS. To quote from *Hansard* again, this time Jeff Rooker the (then) Minister of State with responsibility for Pensions:

> "It is important that consumers are clear about whom they should go to for advice and to complain. The common theme is the office of the pensions advisory service. OPAS handles information and guidance concerning personal pensions and occupational schemes, and will cover stakeholder schemes. It is ideally placed to steer consumers toward the most appropriate place for their concerns to be dealt with. Indeed, the Financial Services and Markets Act enables the financial ombudsman service, with the consent of the complainant, to refer a case to another body, such as the pensions ombudsman, for resolution by that body. Those provisions were included with the pensions ombudsman in mind, to ensure that the consumer can benefit from a seamless service in respect of pensions issues.
>
> Furthermore, we shall work with both the financial ombudsman service and the pensions ombudsman to ensure that the lines between the two are clear and that consumers have access to the right organisation to deal with the concern raised. We want to ensure that consumers are clear about where their complaint will be dealt with." (*House of Commons Hansard*, 3 April 2000)

No doubt all the relevant bodies, as well as Government, will monitor the effectiveness of present arrangements to make sure that both lines and consumers are clear.

"Quinquennial Review"

On this subject, the DSS' "Quinquennial Review" of my office (July 2000) included discussion of the relationship between us and FOS. The relevant (and unobjectionable) recommendation was that "Consideration is given to the practicalities of a merger in the longer term".

This was one of nine recommendations, all similarly acceptable. The object of the review is best explained by quoting from the report:

> "It is Government policy that all non-departmental public bodies should be regularly reviewed to determine whether they are necessary and whether they are organised and managed in such a way to allow the most efficient and cost-effective delivery of objectives."

It was the first review since the office was established in 1991, so it may have been quinquennial by name, but by nature was not. There was a reason – that the office had been subject to the scrutiny and recommendations of the Pensions Law Review Committee in 1993 plus a later administration review and an audit. Quinquennial or not, the first three recommendations deserve to be repeated here:

> "1. That a free-to-use service to determine complaints and disputes is retained.
>
> 2. The existing structure of a statutorily appointed Ombudsman is retained.
>
> 3. The Pensions Ombudsman's jurisdiction should be retained in its current form and regularly assessed to ensure that it continues to provide an appropriate route of complaint for members and those running schemes."

So in this case late is undoubtedly better than never.

The Human Rights Act 1998

When the suggestion of creating what has now become the Financial Ombudsman Service was first put forward, one of the principal objections expressed was the possibility that the (at that time) future direct application of the European Convention on Human Rights would cause insurmountable difficulties. The Article 6 right to a public hearing was seen as a particular obstacle – and the perceived problems would have applied to my office as well. I dealt with that subject at some length in my Annual Report for 1997-1998 (at pages 51 to 53), concluding that "…the advent of Article 6 ought not to mean the end of the world for ombudsmen".

The *Human Rights Act 1998* has now been in force (as relevant) since 2 October 2000 in England and Wales. Notwithstanding my previously expressed view, I considered it prudent to take the Opinion of specialist Counsel, Ms Monica Carss-Frisk. There were no dramatic recommendations, just some minor changes in wording of documents, in particular to make it plain that parties could ask for an oral hearing. Ms Carss-Frisk's Opinion is available on our website.

Thus far, the Act has made almost no difference to the office's day to day activities. Certainly a small number of complainants seek to advance human rights related arguments either in the substance of their complaints or to support their view that I ought to investigate the matter. Sadly many of these arguments are based on misconceptions of the true substance of the Convention. As to oral hearings, there were three last year (which compares with two the year before) which apparently small number is not the result of my rejecting requests wholesale, since in fact very few parties, whether complainants or respondents, ask for a hearing.

However, the Human Rights Act **has** given some commentators, particularly those who are opposed to a pensions ombudsman in principle, a peg (indeed a whole hat stand) to hang their objections on. One complaint in particular troubles me, because it is founded in misconception if not myth. The following contributions from lawyers (in this case running from junior to High Court Judge) will give the flavour:

> "Firstly, it is common practice to delegate large proportions of work to caseworkers who are appointed by the Ombudsman.
>
> As they are not appointed by the secretary of state or, I believe, closely supervised by the Ombudsman, the involvement appears to breach the fair hearing test.
>
> Secondly, the situation is exacerbated by caseworkers effectively having an undue influence on determinations."[1]

> "The majority of his determinations are not written by him anyway. He just rubber stamps them. … if you have good people around you, then you will have good determinations. No disrespect, but when certain individuals get their hands on a case, you know it's going to go wrong."[2]

> "…his staff investigate complaints as and when received, report to him on them and prepare draft decisions for his considerations and signature. … This is very troubling. This procedure is perfectly normal for an administrative, but not for a judicial, body. For it means not merely that the adjudicator receives privately relevant material through and from his officials but the procedure is calculated to enable him to sign off decisions effectively made by his staff."[3]

It is an intentional virtue of the ombudsman system, and not a vice, that an ombudsman relies on staff to whom work can be delegated. As a team operation the process is not only more efficient but also less vulnerable to the inherent inconsistencies and individual predilections of a single judge in the lower courts. Also, of course a generalist ombudsman looks to people with special experience and expertise in the sector to which the ombudsman scheme relates.

[1] *Human Rights Trouble Watchdog* by Nirmla Sondhi of HammondSuddardsEdge in *FInancial Advisor,* 28 November 2000
[2] Maria Riccio of Blake Lapthorn reported in *Pensions World,* June 2000
[3] *The Pensions Ombudsman and the Courts* Mr Justice Lightman's Lecture to the Association of Pension Lawyers, 27 March 2001

In any event, the advantages of such practices are not unique to ombudsmen. Consider, for example, the comparable use of 'bench memoranda' prepared by judicial assistants for members of the Court of Appeal (explained by Lord Woolf MR in *Parker v The Law Society* (1998 unreported); held memoranda not discloseable to parties). Following this precedent, the Law Lords have recently advertised for Legal Assistants to perform similar functions. Coincidentally, I recently met the President and other Judges of the Supreme Court of Israel when accompanying an official exchange visit of public lawyers in Jerusalem: that Court too employs Legal Assistants whose functions extend to drafting decisions for approval and delivery by Judges.

Thus, at best, the quoted comments show ignorance of the way that we (and others) work, and at worst they confuse delegation with dereliction. My staff, not being merely clerks, are supposed to, and do, investigate on my behalf. They also draft decisions for me. They do not filter the papers before I see them. I never sign a Determination which contains a decision which I would regard as anything but my own. The only rubber stamp regularly used in this office is for dating incoming post. My case workers exist as a cost effective production line for the investigations and Determinations of Dr Farrand. If the wrong product comes off the line, I reject it. If, as is the case, I am able to approve a high proportion, it is because the production line is working well.

Somewhat more realistic objections to present arrangements might be based on the fact that there is only one Pensions Ombudsman and that he is, at present, also the Chairman of the Pensions Compensation Board. Thus a fair hearing arguably might not be available if a matter were remitted to the Ombudsman on appeal (see the comment of Peter Gibson LJ in *Duckitt & Bates v Farrand & Others* discussed as case number 8 in Chapter 4), or if the Pensions Compensation Board had already made a finding as to dishonesty in a case which later came to the Pensions Ombudsman. The latter objection will have been overcome with effect from my retirement from both posts at the end of August as they have been recruited for separately (and during my tenure, I have once withdrawn from the a Compensation Board sitting to allow the other members to reach a decision alone). The former difficulty, if real, can only be dealt with by a change to primary legislation, presumably allowing the appointment of a second or deputy ombudsman either permanently, or to make particular decisions as the need arises.

CHAPTER 3: Cases

It is always difficult to choose a sample of cases from those determined in a year. In my first annual report (1994-1995) I included all of the cases from that year. Then there were only 83, now there are over 600, so it would be testing readers' stamina and powers of concentration for me to be as unselective now as I once could be. In publishing a sample I aim merely to give a flavour of the work we do. A fully representative cross section would probably be neither interesting nor informative. I do disseminate all my Determinations by sending them to the pensions press and professional bodies who then further report and publicise as they see fit, with or without commentaries. From 1 April 2001, Determinations can be downloaded from our website.

My solution to the problem of what to choose for this Report is to delegate! I ask my staff to make and summarise their own selections, after which the chosen cases are categorised in a necessarily fairly arbitrary manner in an attempt to construct a more coherent picture. The style may be impressionistic rather than realistic, but those who need to see the models in the flesh may view the original Determinations which can be obtained from my office on request. For the preservation of modesty and, more to the point, in case the picture is unfairly unflattering, in this chapter the private parties have been hidden behind a fig-leaf of anonymity in all but five cases in which the matter is already in the public domain.

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Discretions and Decisions

The Courts have, in a number of cases (most notably *Edge v Pensions Ombudsman* [2000] Ch 602), considered the extent to which I may interfere with the exercise of discretion by trustees. In *Edge*, the Court of Appeal spoke of:

> "…the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant. If pension fund trustees do that, they cannot be criticised if they reach a decision which appears to prefer the claims of one interest - whether that of employers, current employees or pensioners - over others. The preference will be the result of a proper exercise of the discretionary power." (*per* Chadwick LJ at p627)

This formulation is akin to *Wednesbury*[1] reasonableness required in the public law context when reaching a decision - and of course in many of the cases which reach me the decision maker is in fact a public body in its capacity as employer or manager of a pension scheme. It is arguable in that there is no longer a useful distinction to be drawn between the making of a decision and the exercise of discretion in the way that they must be approached by the body exercising the power or discretion (whether public or private sector). Perhaps the distinction is similarly lost in relation to my ability to review discretions and decisions (though against this, with regard to decisions, there is my jurisdiction to decide disputes of fact or law which must be assumed to have **some** purpose). The following cases concern both discretions and decisions, some accepted as reasonable, some remitted on procedural grounds and one overturned. The first is a case relating to a simple administrative matter - the payment date for pensions.

[1] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

1 K00320

The complainant received a pension from a previous scheme which had been merged with a second scheme in July 1998. In February 1999 the complainant, together with other pensioners of the previous scheme, was informed that the pension payment date was to be brought forward from the seventeenth to the first of the month. The March and April 1999 instalments of his pension were credited to his bank account on 17 March 1999, and subsequent monthly instalments were paid from the first of each month.

The complainant said that the effect of the change in the payment date of his monthly pension was that the April 1999 instalment fell into the 1998-99 tax year instead of the 1999-2000 tax year. He complained that, as all his allowances for that tax year had been accounted for, the income tax deducted from the April 1999 instalment of his pension was approximately £173 more than it would have been if the payment date had not been changed.

It was clear from the deed documenting the merger of the two schemes that certain provisions of the previous scheme, including the payment of pensions, had become governed by the provisions of the rules of the second scheme. The rules of that scheme gave the trustee discretion as to the day of the month on which pensions were paid.

I concluded that it was indeed unfortunate and possibly unjust if the change in the complainant's pension payment date had caused him to pay more tax than he should have. However, I found no grounds for concluding that the trustee in deciding to make this change had asked the wrong question, misdirected itself in law or acted perversely.

In this next case the trustees exercised their discretion where there was none to exercise, and, where there was, exercised it, by their own admission, "hastily". However, on the second attempt they behaved reasonably.

2 J00566-9

This was a group of four complaints, brought by two brothers against the employer and the trustees, that, on the death in retirement of their father, the whole of the death benefit (just over £15,000) was immediately paid to their aunt without reasonable enquiries having been made. The deceased had been receiving pensions under two schemes (the old scheme and the new scheme) and, a month after his death, the value of outstanding instalments for the balance of the guarantee period under both schemes was paid to the aunt. The brothers were legally adopted children of the deceased.

Before I received the complaint, following legal advice the trustees of the old scheme reconsidered their original decision to pay the whole of the amount payable under that scheme (over £11,000) to the aunt. Three nomination forms had been completed, the last one, in 1996, naming the aunt as sole intended beneficiary. The matter was reconsidered, but the original decision was not changed. The balance of just under £4,000 had been paid under the new scheme to the aunt in error and the employer agreed to pay the same amount to the new scheme. This sum should have been paid (and was subsequently paid) to the deceased's estate.

The trustees of the old scheme admitted that the original decision-making process had been "over casual", consisting merely of receipt of a telephone call from the deceased's father and an informal sounding of the trustees' opinions. I considered, however, that the processes involved in endorsing the original decision had been thorough and proper and, in view of the principles regarding the exercise of trustees' discretion, as outlined in the Court of Appeal in *Edge*, could not overturn that decision. The employer had had no part to play in the exercise of discretion and was not guilty of maladministration.

The complaint that follows demonstrates that scheme members should never assume that trustees will follow their expressed wishes as to the recipient of death benefits. The trustees may feel they know better what the result should be than the deceased did - and the pure fact that they have ignored the member's wishes does not make their decision perverse.

3 K00020

The complainant's husband was a senior employee of one of the UK's largest multinational companies and was a member of its pension fund. In mid-1996 he discovered that he was terminally ill and in October 1996 he died. A lump sum death benefit became payable under the pension fund.

When he learnt he was terminally ill, he completed an expression of wish form stating that he wished the trustee to pay 100% of the lump sum death benefit to the complainant, his second wife. He made it clear on the form that he wished none of the benefit to be paid to his first wife, for whom he had already made some provision, but would like the spouse's pension to be paid to his first wife and their eight year old son.

A few days later he completed a second expression of wish form which restated his wish for 100% of the lump sum to be paid to the complainant. Again he made it clear that he wished none of the death benefit to be paid to his first wife. He made no reference to the spouse's pension.

A note to his annual pension fund benefit statement said that death in service lump sums were normally paid to spouses.

After his death the trustee wrote to the complainant for birth and marriage certificates and her husband's death certificate and said it would be obtaining details of her husband's will. Oddly, it did not ask her to provide a copy of the will. I noticed that the tone of the trustee's letter was particularly unfeeling and suspected that the complainant had been surprised and hurt by its tone. Notwithstanding, the complainant sent the certificates and a copy of the will to the trustee.

The trustee replied with a number of questions about her financial position, one of which referred to "property investments". This was intended to reveal whether the complainant had a mortgage on her home or "property investment" although this was not apparent to the complainant. The trustee also wrote to the first wife asking similar questions.

Eventually the trustee decided that none of the lump sum death benefit would be paid to the complainant. Shocked, the complainant asked the trustee for an explanation. It replied that it had made extensive enquiries before exercising its discretion and had decided to pay more than 90% of the death benefit to her husband's first wife and into a trust fund for their son, with the balance being paid to her husband's father.

I concluded that it was very unusual indeed for a trustee to reach a decision as to death benefits which was completely contrary to a deceased's clearly and recently expressed wish in favour of his wife and that the trustee's decision to pay none of the lump sum death benefit to the complainant made a mockery of the two expression of wish forms her husband had completed, not to mention the note to his benefit statement. I expressed the view that the complainant had every reason to feel deeply upset about the trustee's decision.

Nevertheless, it is of the essence of expression of wish forms that they are not binding upon trustees. Furthermore, as a result of the judgment in the Court of Appeal in *Edge*, I may only interfere with the exercise of discretionary power if the trustee had asked itself the wrong questions, or the trustee had misdirected itself in law or its decision was perverse. In the complainant's case, I was unable to find that the trustee had failed any of these tests.

In the circumstances of this case, all that I could do was to suggest that the trustee wrote to the complainant apologising for the unfeeling nature of its correspondence with her.

Ill-health retirement

The most common subject of disputed decisions which I see is when an ill-health pension has not been granted.

4 J00466

The complainant worked as a financial consultant for an insurance company. In 1992 he was severely injured in a road traffic accident. The rules of the company pension scheme provided for payment of an immediate pension in the event of permanent disability or serious and prolonged ill-health. The complainant had three operations, but did not regain his mobility. The doctors treating the complainant considered that he was permanently disabled, as did the doctor appointed by the insurer to examine the complainant. However, the insurer's in-house doctor disagreed, considering that a further operation would cure the problem. He pressed the complainant and his GP to agree to the operation. The complainant was told that he must, as a condition of his employment, see a surgeon recommended by the company doctor, who would carry out the operation. The complainant saw the surgeon but, having taken expert medical advice, declined to have the operation. The insurer refused the complainant a pension and dismissed him. The insurer then arranged for the complainant to be investigated by a "health claims adviser". The adviser concluded that the complainant's disability was genuine, although the complainant was not told this.

The insurer insisted to my office that the operation would be a success and likened the complainant to someone who had earwax and refused to have it treated. I concluded that the insurer had been dictatorial and arrogant and had no right to push the complainant into having an operation, particularly when he had consulted specialists who advised against it, and to refuse him a pension when he did not comply. Given the perversity evident in this case, I did not direct the insurer to reconsider the complainant's application, but directed the payment of a pension backdated to 1996, together with interest.

However, cases such as the above, where I directly overturn a decision, are very rare - and manifest and incurable perversity, such that remitting the decision would be pointless, is necessary before I do so. The following two cases are more typical in that I required the decisions to be revisited.

5 K00180

In November 1998 the complainant applied for an ill-health early retirement pension. His application was considered by Drs W, S and M, respectively the trustees' Chief Medical Officer, the employer's Chief Medical Officer, and the Senior Medical Officer at his workplace. Dr W felt that the complainant did not satisfy the qualifying conditions for the pension but, because he was suffering from fibromyalgia, Dr W decided that he would firstly

take further advice regarding precedents for granting an ill-health pension to an employee with this condition. Drs W, S and M then agreed that the criteria for the pension were not met.

The complainant said that the decision-making process had been defective, because neither Dr W nor Dr S had examined him, nor had they consulted his GP about his condition.

The complainant's trade union arranged for him to be examined by a consultant rheumatologist, Dr C. Dr C concluded that his chance of recovery was almost nil. His GP concurred. However, Dr W did not change his opinion, nor did he see any point in examining the complainant because he felt that he, Dr S and Dr M could rely on other specialists' reports.

Soon afterwards, the complainant was seen by Dr K, another of the company's Senior Medical Examiners, and he was offered severance terms because Dr K felt that he would not return to work. Dr K noted in his report that Dr C was "a consultant of national renown".

I upheld the complaint. The scheme rules required that the member's GP must be given an opportunity to comment before a final decision to refuse an ill-health pension was confirmed, and this was not done. If the GP objected, the rules required that a final and binding report must be obtained from a nominated independent medical practitioner. It was also inconsistent for Dr W to ignore the eminent opinion of Dr C, whilst maintaining that he did not need to examine the complainant because he could rely on the reports from other specialists. I remitted the application for fresh consideration in accordance with the rules.

6 J00595

The complainant had been employed from September 1974 until March 1982, when he was made redundant. In January 1998 he requested early payment of his deferred benefits on the grounds of ill-health. The employer's occupational health unit wrote to the complainant's GP asking for a diagnosis and prognosis, and in particular whether the complainant was incapable of carrying out his former duties and whether he was incapable of any employment. However, they were unable to supply the GP with details of the complainant's former duties. The GP's reply noted that he was unable to answer the particular question because of a lack of information regarding his former employment. On the basis of the GP's letter, the occupational health adviser did not recommend early payment of his deferred benefits.

The complainant appealed against the decision to refuse the early payment of his deferred benefits. The employer considered his appeal on the basis of a submission from the complainant's solicitor, his incapacity for work report and a further report form the occupational health adviser. The occupational health adviser expressed the opinion that the GP's letter had not suggested permanent incapacity and that it was for the

complainant to provide corroborative evidence. He raised the issue of the cost to the employer of seeking opinions other than the members' GPs. The complainant's appeal was not allowed and he further appealed to the Secretary of State. The Secretary of State found that the scheme rules had been applied correctly.

I concluded that, in order to consider the complainant's application properly, it was incumbent upon the employer to seek appropriate medical evidence and that cost should not be a consideration in this. I directed that they should obtain further medical evidence and reconsider the complainant's application.

Insurance Policies

Whereas trustees or managers may often be the decision makers, complaints and disputes sometimes arise in relation to policies of insurance forming the scheme's sole or main investment. The first example followed the decision in *Sun Alliance & London Assurance Co Ltd v Pensions Ombudsman* (unreported) in which it was decided that an increase in contributions did not constitute an "increase in insurance" for the purposes of the relevant policy (the case is dealt with more fully in Chapter 4 as case number 7). This complaint related to a similar policy with the same insurer.

7 J00607/8

My office received two complaints, one each from the employer and the member, which were in essence the same.

The pension scheme was originally invested in a policy which offered guaranteed annuity rates. In 1997 the employer received a letter from a financial adviser acting for Royal & Sun Alliance (**R&SA**). The adviser asked for a meeting with the trustees to discuss forthcoming legislative changes and the effect these would have on the existing policy. A meeting was arranged with the adviser, the employer's accountant and the one remaining member of the pension scheme. At the meeting it was decided that a new policy should be set up and that the existing assets in the old policy should be transferred to the new policy. However, the new policy did not contain any of the guarantees which existed in the old policy.

R&SA explained that the old policy did not satisfy the requirement to provide post 1997 LPI increases. They claimed that this meant that the old policy had to be made paid up, as to do otherwise would have necessitated major changes to the terms of the policy. However, during the course of the investigation they did agree to reverse the transfer.

I concluded that it had not been necessary for the old policy to be made paid up to accommodate the requirements of the *Pensions Act 1995*. The policy was merely the investment vehicle for the pension scheme. The responsibility for providing the benefits lay with the trustees and the employer. They were free to provide some of the benefit, i.e. the LPI element, by some other means. However, R&SA could not be required to accept premiums under the old policy except on the existing terms,

which did not include LPI. To alter the terms of the policy would count as an increase in insurance and the terms of the policy allowed R&SA to refuse to accept premiums in these circumstances.

More commonly than dealing with the closure of a policy I am asked to consider the circumstances in which it was sold as an appropriate investment of the scheme.

8 K00005/6

The two complainants, a husband and wife, were the only members of a small self-administered scheme (or "SSAS") which had been set up for their benefit. The trustees of the SSAS were the complainants and a "pensioneer trustee" as required by the Inland Revenue. In this case the pensioneer trustee was the insurance company the complainants had appointed to invest their employer's contributions and manage the SSAS on their behalf.

The SSAS was set up on the basis that the complainants would retire at age 60. The complainants did not obtain independent advice but instead relied on the insurance company salesman for advice. At the salesman's suggestion, premiums were paid to the insurance company on an annual premium basis for investment in its unitised contracts.

Under the terms of the annual premium contract the insurance company paid very high commission to the salesman during the first two years, with the intention of recovering it over the projected lifetime of the contract i.e. to age 60. Similar arrangements operated when contributions were increased. A decision to retire early would mean a reduction in the lifetime of the contract and therefore a reduction in the time available to the insurance company to recover its high commission costs.

The complainants obtained figures for retirement at age 50 and were very concerned to learn that they would suffer a severe financial penalty. This was because the number of annual premiums from which the insurance company could recover its commission costs had been reduced by 10.

The complainants had given the salesman a free hand in their financial affairs and had believed he was working in their interests. They told me they had told him on many occasions that they intended to retire at age 50 and were very concerned that, in spite of their stated intentions, contributions had been invested in such a way that they would suffer a severe financial penalty if they retired at that age.

The complainants did not provide a copy of any letter, form or other written instructions to the insurance company confirming their wish to retire at age 50. My office obtained copies of a series of salesman's reports which appeared to have been completed at meetings with the complainants. Each report had been signed by the salesman and by one or both of the complainants. Although two of the reports suggested that retirement before age 60 had been discussed, the information available to me gave no indication that the complainants intended to retire at age 50 or that they had told the salesman of their intention to retire at age 50.

I considered the role of the salesman. He was employed by the insurance company to sell its products in exchange for commission. He was unable to sell other companies' products. I concluded that he had not acted unreasonably. I noted that the complainants' problems had been exacerbated by their decision not to obtain independent advice. I was unable to uphold any aspect of the complaints.

The next case also relates to the choice of normal retirement age and appropriateness of investments, although I found that the real cause of dissatisfaction lay elsewhere. It too was not upheld.

9 K00576

The complainant took out a with-profits pension plan in 1988, and selected a normal retirement age (NRA) of 55 (5 April 1999). However, she decided that she would continue working beyond age 55 and her financial adviser asked the insurer in May 1999 to continue to invest the premiums into the with-profits fund, but was informed that premiums paid after the NRA could be invested only into one of the unit-linked funds. The adviser then told the insurer that premiums should be invested into the UK Equity fund. Under the policy conditions, at NRA the existing fund was also switched to unit-linked, but the complainant said that she was unaware that this would happen.

In June 1999 it was announced that the (mutual) insurance company was to be acquired by a bank and would become a plc. All qualifying members received a flat level of compensation, and qualifying with-profits members received additional variable compensation. The average variable compensation was much higher than the flat compensation.

The complainant said that her fund was switched to unit-linked against her wishes and without justification, and the choice of equities exposed her to unwanted investment risk. She claimed that she was not aware that her NRA was 55 and that, if she had been aware of the implications of this, she would have changed it.

However, I took the view that the real reason behind the complaint was that the complainant had realised that her with-profits membership had ended just too soon to enable her to qualify for variable compensation. Her investment was switched

to equities on the instruction of her financial adviser. The policy and benefits statements made it clear that her NRA was 55. Her adviser had known since 1996 that she might want to delay her retirement but he did not advise her of her options or ask the insurer to alter the policy. The insurer had acted in accordance with the policy conditions when it transferred her fund to the unit-linked fund on her normal retirement date. I did not uphold the complaint.

Terms

Though the preceding complaints related to insurance policies, when it comes to the terms on which benefits are to be provided I am more commonly asked to look at the scheme's governing documents. The next two cases called for determination of disputes. The first concerned the definition of "member" and consequent entitlement, the second whether overtime pay was contractual and therefore pensionable.

10 K00247

The disputant worked for the employer and, was a member of the final salary pension scheme, until 1992 when the distribution centre in which he was employed was sold to another company. At the time, the original employer had an agreement with the new employer that the latter would provide the former with distribution services using the existing premises and employees. The disputant retained accrued benefits under the pension scheme and joined his new employer's pension scheme for future service.

In 1996 the employer and the new employer came to a mutual agreement to end the contract and all employees were transferred back to the employment of the employer. On rejoining his original employer, the disputant expected to rejoin their pension scheme. He was informed that the pension scheme had been closed to new entrants since 1994, and was offered membership of a new money purchase scheme, which he joined.

The disputant claimed that he should be allowed to 'unfreeze' his membership of the pension scheme and recommence contributions. He agreed that the rules of the pension scheme were clearly intended to remove the option for new employees to join the pension scheme, but did not believe that its purpose was to prevent existing members from resuming contributing service where a break in active participation arose solely from the actions of the employer.

The definition of "Member" in the pension scheme rules expressly provided that "where appropriate" former employees prospectively entitled to benefits under the pension scheme were included. In addition, there was nothing in the rules of the pension scheme to give the employer discretion to refuse an employee membership of the pension scheme provided he satisfied the eligibility rule.

I concluded that the disputant was a "Member" and fulfilled the conditions of the eligibility rule, and therefore should be allowed to rejoin the pension scheme.

11 K00572

The disputant was employed by a local authority as an estate surveyor until his retirement on 31 March 1996. His employment contract stated that he would not be entitled to enhanced payments for working outside normal working hours except for attendance at evening meetings with residents.

The disputant had claimed and been paid overtime on a contractual basis for attendances at residents' evening committee meetings. Contributions for the scheme were deducted from the payments but after November 1994 the deductions ceased. The council stated that the past overtime payments had been treated as pensionable in error. It maintained that the type of overtime had been non-contractual, and therefore non-pensionable, because his employment contract had not contained a requirement for him to attend a given number of evening meetings on specific days, dates and times. To be contractual the overtime had to be compulsory and frequent, even if only as frequent as once a year. There was no requirement for him to have attended evening meetings with residents and any failure or refusal to have attended any meetings would not have resulted in disciplinary action being taken.

However, the disputant's job description required that he acted as the council's representative and authority for his designated estate, or estates, at residents' panels and *all* other estate-based residents' forums and meetings. That his attendance at the meetings was a normal requirement of the post was also further confirmed by a stipulation of the job description that cover was to be provided by another estate surveyor under a reciprocal "Buddy System". Consequently, in order to fulfil his role properly and professionally, it was both a necessity and a requirement for him to have attended evening residents' meetings. Simply because overtime might have been variable and not guaranteed did not automatically classify it as non-contractual. The council's failure to treat the overtime as contractual appeared to me incorrect and, accordingly, I found the dispute in the disputant's favour.

I directed the council to recalculate the disputant's pensionable remuneration under the scheme and to pay the arrears of benefits, with interest, from 1 April 1996.

In the next two cases the wording under scrutiny was in documents additional to the scheme's rules. In the first, a separate agreement was itself an occupational pensions scheme for the purposes of my legislation. In the second, a term of a letter relating to the pension scheme was contractual.

12 **J00528**

The complainant had been an employee of the respondent since 1973. In 1997, as a result of a restructuring of the respondent's field staff, the complainant was offered alternative employment but he refused this. He was subsequently informed that his service was to be terminated with effect from May 1997 on grounds of redundancy. He was 46 years old at the time.

Earlier, in June 1996, the respondent had, in conjunction with the staff association, drawn up a redundancy compensation agreement which aimed to set out the basis of compensation for field staff who were made redundant. Clause 4 to the agreement provided the basis for calculating compensation payable to an employee in the event of redundancy. The third paragraph of this clause provided, amongst a number of conditions, that the respondent could wholly or partially refuse compensation if in its opinion an employee unreasonably refused an offer of alternative employment. The fourth paragraph provided that an employee who became redundant beyond age 50, and who was a member of the pension scheme, could claim an immediate pension with no actuarial reduction.

An announcement issued in August 1996 said that the agreement enabled anyone being made redundant from age 50 to take an immediate unreduced pension from the pension scheme. The announcement added that an improvement under the pension scheme now extended this arrangement to anyone being made redundant, at whatever age, to allow them to claim an unreduced pension from age 50.

In December 1997 the complainant asked for his preserved pension from the pension scheme to be paid from age 50 without an actuarial reduction. The respondent turned down the complainant's request on the basis that, in its opinion, he had acted unreasonably in refusing an offer of alternative employment.

The respondent initially argued that the agreement was not part of the pension scheme and therefore did not fall within my jurisdiction. I disagreed on the grounds that the agreement itself, in my opinion, fell within the definition of an occupational pension scheme in section 1 of the *Pension Schemes Act 1993*.

The respondent argued that the payment of an unreduced early retirement pension to a member over the age of 50 who had been made redundant, was 'part and parcel' of the compensation outlined in clause 4 to the agreement. It claimed that the

conditions outlined in the third paragraph of clause 4 applied to both the lump sum, referred to earlier in the agreement, and the special pension arrangements.

Whilst I could not disagree that the special pension arrangements were part of the compensation package, I did not agree that they were subject to the conditions in the third paragraph of clause 4 to the agreement. The manner in which the paragraphs of clause 4 were arranged indicated that the conditions in the third paragraph applied to the lump sum described in that clause, and not to the special pension arrangements set out in the paragraph that followed. This view was reinforced by the announcement issued in August 1996, which did not say that early payment of the unreduced preserved pension was subject to the qualification on payment of the lump sum compensation.

I concluded that the complainant's redundancy gave him an entitlement under the agreement to have the respondent exercise its discretion in his favour, and he should therefore receive early payment of his preserved pension from age 50 without a reduction. The respondent's refusal to grant him an unreduced pension from age 50 was a breach of the agreement.

13 K00115

The complainant's pension was abated when he was re-employed by his former employer. Before the complainant accepted the offer of re-employment he queried what would happen in respect of the abatement if, for example, he received a salary increase on promotion. He was advised, in writing, that the abatement was permanent and not variable and would therefore remain the same throughout his employment. However, when he was promoted, the abatement was recalculated and a higher amount deducted.

I had little difficulty in finding that the admitted misrepresentation amounted to maladministration. I further found that as a result the complainant had suffered financial loss, quantified as equating to the increases in his abatement following his promotion.

I further considered that the letter confirming that the abatement was permanent and not variable had formed part of the offer of re-employment, in consideration of which the complainant had re-entered service. I concluded that a breach of contract had arisen when, contrary to the earlier given assurance, the abatement had been recalculated. I directed that the abatement be restored to its original level, that the higher amounts deducted be refunded with interest and £200, a sum previously offered, be paid for distress and inconvenience.

As in the above case, matters of advice given or not given and accuracy of information often come to me. The next example also concerned what the member was told about the scheme, and again I found that contractual rights had been created.

14 K00158

The disputant claimed that her pension should be calculated on a final salary basis. The employer's position was that the disputant was a trustee of its money purchase scheme and was well aware that her pension would be calculated on a money purchase basis.

The disputant worked for an air freight company. She joined its final salary scheme in 1979. In 1990 the company was taken over, the sale and purchase agreement providing for the establishment of a new scheme with terms equivalent to the old one. However, the new scheme was set up on a money purchase basis. The disputant was given forms to sign when she joined the new scheme, one of which appointed her as a trustee, although she did not realise this. An announcement was issued to the disputant stating that her benefits would be related to final salary and that the new scheme was "one of the very best that can be offered by any employer". Annual benefit statements were not issued and the complainant was never invited to attend trustee meetings. In 1998 the disputant transferred her preserved benefit in the old scheme into the new one. Shortly afterwards the scheme administrator pointed out to the disputant that the new scheme was a money purchase arrangement.

I concluded that the disputant had been induced to make payments to the new scheme on the basis that it offered final salary benefits, thus creating contractual rights. The disputant had recently retired and I directed that her pension be calculated on a final salary basis from 1979.

Sometimes the complaint concerns **lack** of advice or information, as in the next case.

15 K00351

The complaint was against the trustees of the scheme. The complainant asserted (amongst other things) that the decision to wind up the scheme in September 1998 might cause his pension to be reduced by 10% with no annual increases as there might be insufficient funds. Had he taken his pension before the scheme went into wind-up he would have been a pensioner (hence likely to receive his full pension). He said that the trustees should have forewarned him of the winding-up date and the implications of taking retirement at normal retirement age as against early retirement.

Having had regard to the relevant statutory regulations, the scheme rules and *NGM Staff Pension Plan Trustees Ltd v Simmons* [1994] OPBLR 1, I did not find that the trustees were under such an obligation or that there was a general duty on the trustees to advise the complainant in this way. I found that in making any decision, the trustees were obliged to consider the interests of all the classes of members and noted their submissions that forewarning a group of members to take early retirement could have adversely affected the remaining members. Finally, I agreed that giving advanced warning to a class of member (or an individual) would defeat the legislative purpose of imposing a statutory system of priority levels where there is a finite pool of assets.

Whilst as the above case illustrates, many complaints concerning lack of advice are not upheld, there being no general duty in law to provide it, the following is an example of an exception.

16 K00346

A father, on behalf of his son who has learning difficulties, complained that his son had failed to join the employer's pension scheme at the first opportunity as he had not been given adequate advice and information by the employer. The son had first become eligible to join the pension scheme in December 1991 but it was not until July 1997 that he became a member. The son's terms and conditions of employment provided that any changes in them would be notified by the employee's supervisor or immediate superior and incorporated in documents published on the company notice boards. The employer explained that changes to terms and conditions of employment were first notified by staff briefings or joint briefings involving the relevant trade union, which resulted in joint statements, and that it was the responsibility of local managers to ensure that, prior to display on notice boards, the contents of joint statements were understood by employees before any ballot was taken.

In 1991 and 1992 joint statements were issued. Both statements dealt with the widening of eligibility to join the pension scheme. The employer also produced memos dated 1991 and 1992 sent to local managers stressing the need for the contents of the respective statements to be communicated to employees. The complainant had no recollection of attending any staff or joint briefings or of being told about changes to eligibility conditions. His membership of the scheme resulted from his father making a general pensions enquiry in 1997.

Whilst I accepted that the employer had in place an effective means of communication to ensure that most of its employees were properly informed of changes to their employment conditions, I noted that considerable responsibility rested upon the diligence of local managers. Given the complainant's learning difficulties, I considered that he could not have been expected to have appreciated the implication of changes to eligibility

conditions without individual attention from his manager and there was no evidence to suggest that such attention had been given. The employer claimed that it was aware of the complainant's learning difficulties.

I concluded that the employer, being admittedly aware of the complainant's learning difficulties, had failed to exercise a sufficient duty of care in notifying the complainant of his eligibility for membership of the pension scheme in either 1991 or 1992. To remedy the financial loss suffered as a result of that maladministration I directed the employer to take steps to ensure that the complainant's benefits under the scheme be uplifted by the trustees to the extent necessary to reflect membership of the pension scheme commencing on the date he first became eligible, subject to the complainant being willing to pay such additional contributions (plus interest) as he would have been required to pay had he been a member during the relevant time. I further directed a payment of £250 for non pecuniary injustice sustained.

From information which should have been given but was not, to information alleged to have been given but which I did not find had been.

17 J00166

The complainant started work for the employer in 1971 and joined the pension scheme. In 1982 he was diagnosed as suffering from Crohn's Disease and underwent surgery following which he was advised that it was unlikely that he would be able to continue to work for more than a further five years. The complainant said that, at that stage, he enquired about the possibility of making Additional Voluntary Contributions (AVCs). He said he had a meeting with someone who dealt with administrative matters in relation to the scheme and was also a trustee of the scheme. The complainant said that he advised that there was no need to make AVCs as, if the complainant worked to his normal retirement date, he would have accrued approximately 40 years' service and would have acquired almost the maximum 40/60ths pension entitlement and, in the event that he had to retire early due to ill-health, prospective service would be taken into account.

The complainant retired on health grounds with effect from 31 August 1997. The pension he was paid did not take into account prospective service. The complainant said that, in reliance upon the advice given, he had acted to his detriment by failing to make AVCs. He requested an oral hearing. As his complaint centred upon a conversation which it was alleged had taken place, I was happy to grant his request.

For the complaint to succeed, the complainant needed to satisfy me, on the balance of probabilities, that the assurance he claimed he relied upon was actually given. That proved to be a

difficult burden to discharge, particularly as some 17 years had elapsed and I concluded, on balance, that I could not say that I was so satisfied. Accordingly, I was unable to uphold the complaint.

Finally in this series of information related summaries, a complaint relating to a family business, where the only part upheld was that information was being withheld by the father from a son and his wife.

18 J00451/2

The complainants worked in the family company and were trustees of its small self-administered scheme together with the pensioneer trustee and the first complainant's brother. The first complainant's father was founder of the family company and one of its directors. He made investment decisions for the scheme, took a close interest in certain aspects of it, and held numerous meetings with the pensioneer trustee. However he was not a trustee himself.

There was a falling-out between the family members, partly as a result of the first complainant's alleged conduct in relation to the scheme. The complainants' employment in the business was terminated and the first complainant took proceedings in the Employment Tribunal against the company in respect of his dismissal. He and his wife subsequently brought lengthy multiple complaints to me, this particular one being made against the other trustees and against the first complainant's father. Since most of the complaint involved matters which were in dispute in front of the Employment Tribunal, the bulk of it lay outside my statutory jurisdiction as it was then, since I was not able to investigate or determine a complaint or dispute where proceedings had been begun in respect of matters which would be the subject of my investigation (as set out in section 146(6) of the *Pension Schemes Act 1993*). However it was clear that the first complainant's brother was disputing various facts which, properly speaking, were not actually in dispute. In other words, he was improperly using the language of dispute to contest what was incontestable. I therefore was able to make certain findings and give directions about matters which, on superficial examination, may have appeared to be outside my jurisdiction.

The complaint against the father was that he had refused to disclose scheme documents. The father denied he had any scheme documents and also contended that he was outside my statutory jurisdiction. However, in my Determination he patently was a person concerned with the administration of the scheme and hence fell within my jurisdiction under Regulation 1 (2) of *The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996*. I therefore gave directions requiring him to make a list of the documents he held relating to the scheme, including computer records, to verify the list on affidavit and then to allow the scheme trustees (including the complainants) access to them.

Transfer Values

In *Miller v Stapleton* [1996] 2 All ER 449 Carnwath J said, in relation to a dispute over what had been intended when a transfer value was offered:

> "Even if pension trustees are under no legal duty to give advice to beneficiaries, it is generally good practice for them to do so; and, when they do, it should be as clear and accurate as possible."

Similarly when information (as distinct from advice) is provided it should be correct and fit for its purpose.

19 K00115

It was admitted that the complainant had been told that, if he transferred benefits accrued in another scheme, he would be credited with 7 years and 81 days extra service. He did transfer his benefits but he was credited with only 6 years and 315 days.

Whilst I accepted that the scheme booklet had made it clear that the service credit initially advised was an estimate and any service credit actually given might differ, I accepted that the complainant had not received a copy of the booklet and that other information given to him had not indicated that the service credit quoted was other than a final and definite figure. I considered that the failure to make the correct position clear amounted to maladministration. The appropriate remedy (in the absence of contractual entitlement) which was available thanks to the co-operation of the trustees of the former scheme would have been the opportunity to reconsider a transfer based on the correct information.

However, the complainant had also argued that he was contractually entitled to the higher, incorrect, service credit of 7 years and 81 days. He said that an offer had been made, which he had accepted and in consideration of which he had transferred his benefits to his new scheme.

In the light of *Nicol & Andrew Ltd v Brinkley* [1996] OPLR 361, I accepted the complainant's argument that a contractual entitlement to the higher, incorrect, service credit had arisen. I therefore directed that the complainant's service credit be increased from 6 years and 315 days to 7 years and 81 days.

In the administrative muddle which follows, there was a lack of information, confused records and a lost transfer value with, in consequence, lost benefits.

20 K00524

In February 1992 the complainant completed an application form to transfer the value of his deferred benefits in the scheme to a personal pension policy. The insurance provider of the personal pension asked the administrator of the scheme, also an

insurance company, for a cheque for the transfer value to be made payable to itself. However, the administrator made the cheque for £4,619.73 payable to the former employer, as that had been the normal procedure at that time, and the cheque was cashed on 14 April 1992. In the meantime the complainant decided not to go ahead with the transfer and he assumed that he had remained a member of the scheme.

Shortly before his normal retirement date in January 2000 the complainant contacted the administrator. He was informed that his record showed that the transfer value had been paid to the employer but also that there was no evidence that a discharge had been completed by the trustee of the scheme. The personal pension provider was unable to find any trace of a payment received and had no policy for him. Further investigation established that the employer no longer existed.

It was apparent that the complainant's employer had failed to notify the administrator of his change of mind about the transfer and that it also failed to return the unwanted payment. This would not have occurred had the administrator made the cheque payable to the personal pension provider, as originally requested, or if the proper authority for the transfer had been obtained from the trustee. The failure to safeguard and preserve the complainant's benefits from the scheme constituted maladministration and, accordingly, I upheld the complaint against the administrator.

I directed the administrator to reinstate the complainant's benefits in the scheme, to pay the arrears of the elected benefits with interest and to reimburse the scheme accordingly.

In the preceding case, under ten years had passed since the relevant events. The one following went back to the late 1950s. Unsurprisingly, recollection of events 40 or so years ago turned out to be inaccurate.

21 K00197

The complainant had been a member of a public sector scheme between 1958 and 1961, and she rejoined in 1985. In 1997 her employer told her that it appeared that she had taken a refund of contributions in respect of her earlier period of membership, and that it would be possible to reinstate this earlier service on very favourable terms, simply by repaying the refunded contributions. However, the administrator/manager of the scheme informed her that she had, in fact, taken a transfer value to another public sector scheme in 1962, and so the possibility of repaying contributions to reinstate her previous service did not arise. She then complained that she had been unaware that a transfer had taken place and so this must have been arranged without her authority.

The investigation revealed that, in 1964, the complainant took a refund of contributions from the second scheme which appeared to amount to the sum of her contributions to both schemes. Therefore, it seemed clear that a transfer of benefits had taken place. Also, a copy of a letter sent in 1962 was shown to me, which stated that the complainant had queried the period of service covered by the transfer value. In view of this I did not uphold the complaint, because it was clear that the complainant was aware in 1962 that a transfer had taken place and so, presumably, had agreed to it. Because she had taken a transfer value, the scheme regulations did not permit her to reinstate the earlier period of service.

The next case concerns the method, and speed, of payment of a transfer value.

22 J00552

In 1996 the complainant left the UK to take up a job in New Zealand and joined his new employer's money purchase pension scheme. In January 1998, confident that he was a permanent resident in New Zealand, he applied to his former scheme for a transfer value quotation, asking it to respond quickly as the NZ$/£ exchange rate was favourable.

His former scheme sent him a transfer value quotation in September 1998, more than eight months after his request, but it was not until November 1998 that it obtained necessary guidance from the relevant government department and clearance to the transfer from the Inland Revenue.

The transfer value was £100,717 and although the complainant had asked his former scheme to make payment by electronic transfer, it said in late November 1998 that a cheque would be sent to him within 14 days. Concerned about yet more delay, the complainant faxed his former scheme pointing out the loss of interest implicit in a transfer by cheque and mail and asking the money to be transferred electronically. The former scheme responded quickly to say that it always settled international payments by cheque. However, the cheque did not arrive when expected and it transpired that it had been sent by sea instead of by airmail. The former scheme promised a new cheque would be airmailed to New Zealand. The cheque eventually arrived at its destination on 11 January 1999. It then took a further 10 to 15 days to verify the cheque. During this period the NZ$ had appreciated sharply with the result that the value of the cheque had fallen by about NZ$10,000. The cheque was finally cleared in New Zealand by 29 January 1999.

Due to circumstances beyond the former scheme's control, it took much too long to provide the complainant with a transfer value quotation. He should by law have received it by 7 July 1998 at the latest but it was not sent to him until a further two months had passed.

Once the complainant had agreed to the transfer value, his former employer had until 7 January 1999 to pay it but it was not until 29 January 1999 that cleared funds became available in New Zealand.

I upheld the complaint and directed the former scheme to recalculate the transfer value as at 7 July 1998, taking into account the financial conditions and related factors applying on that date. Reasoning that the transfer value should have been received by 25 September 1998, I directed the former scheme to put the complainant in the same financial position in which he would have been on the basis of the NZ$/£ exchange rate on 25 September 1998 and the investments which the transfer would have purchased had it been available on 25 September 1998. I also directed the former scheme to pay the complainant a sum by way of compensation.

In the normal course of events exchange rate changes might be too remote a cause of loss for me to direct that a respondent should make it good. However, in this case the former scheme was aware from the outset of the importance of the exchange rate to the complainant and a compensatory direction was appropriate.

Whereas in the previous case the ceding scheme did at least try to pay the transfer value, in the next a transfer value was simply not made available at all.

23 J00570

The complainant was a shareholder of a company of which he was also a director and an employee. His business partner was an equal shareholder and was also a director and an employee. Their relationship deteriorated and the complainant resigned his directorship. The company had set up an individual pension plan for the complainant which was invested in an insurance contract. The company was the trustee. As he was entitled to do under the terms of the plan, the complainant asked for the insurance policy to be assigned to him.

More than 20 months passed but the complainant was unable to exercise his rights either to assignment or a transfer value. From the information available, it appeared that the cause was the intransigence of the complainant's former business partner, as a result of which the company, as trustee, was in breach of statute for not carrying out the complainant's wishes. After my investigation started the former business partner resigned his directorship of the company. It therefore became impossible without independent external action for the company to sign the papers needed to settle the complainant's benefit options.

At my office's suggestion the complainant applied to the Occupational Pensions Regulatory Authority (**Opra**) to be appointed a trustee of the plan under section 7 of the *Pensions*

Act 1995. Opra duly appointed him trustee in accordance with its statutory powers and the complainant was able to exercise his leaving service rights under the plan.

The complainant undoubtedly suffered distress and inconvenience at the hands of the company and normally I would have directed the company to pay him a modest sum in compensation. However, it had no directors and was no longer trading and there would therefore be no point in a direction to this effect.

Surplus and Deficit

Complaints concerning scheme surpluses are actually quite rare, though they may have a high profile due to the amounts of money occasionally at stake. The first of this year's examples follows on from the case above in that much of the reason for the complaint arising lay in an apparent conflict of interest between the dual roles of trustee and sponsoring employer when shared by the same body.

24 K00439

The company had been the original trustee of the scheme, but was subsequently replaced by individual trustees, the majority of whom were directors of the company. The complaint was that a surplus had been removed from the scheme and had been given to the company, which was not in the members' best interests. A further complaint was that expenses charged to the scheme by one of the director trustees (for dealing with the many letters of complaint received from the complainant) were exorbitant and that details of a windfall payment made to the scheme when Norwich Union had demutualised were withheld from the scheme members. Other members of the scheme appeared to have had similar complaints, but this was the only complaint brought to my office.

It had been decided to wind up the scheme as at 31 March 1997 and to replace it with a group personal pension scheme. Two directors, Mr and Mrs W, then replaced the company as the trustees of the original scheme. The scheme received windfall shares from Norwich Union worth some £75,000 and sold these shares. Members were told that the original scheme was being wound up and that there was an "overfunding" of nearly £100,000, which was to be returned to the company. A group of members, of whom the complainant was the spokesman, appealed against the decision and asked for an IDR procedure to be set up to consider their objections. They also wrote to Opra. The members exercised their right to require Mr and Mrs W to hold an election for a member-nominated trustee (MNT). A former employee (and a member of the complainant's group) was elected, but was told that the scheme documentation did not cater for the election of an MNT. A fresh MNT (another

member of the complainant's group) was then elected, but refused to agree to the refund of surplus to the company. A trustee resolution was then passed (by two votes to one) to the effect that the majority of the trustees agreed that a notice informing members of the decision to refund the surplus to the company should be signed by one trustee on behalf of all the trustees. An invoice from Mr W for over £6,000 for "correspondence and other related costs" was also passed for payment, again by a majority of two votes to one. The Inland Revenue then agreed that 80% of the surplus, less tax, could be paid to the company. OPRA pointed out to Mr W various failures to comply with the requirements of the *Pensions Act 1995*, but decided to take no further action.

Scheme documents had had to be requested from Mr W several times before they were produced and scheme accounts had not been produced and audited on time. The appointment of trustees had been defective and an IDR procedure had not been set up on time or correctly followed once it had been set up. The value of the Norwich Union shares only came to light once the second MNT had been appointed.

I found maladministration, but no quantifiable injustice to the complainant. Mr W was entitled to have his expenses refunded, even if the complainant thought them exorbitant. The rules of the scheme allowed majority decisions of the trustees to be taken. I could not uphold the complaint.

In the next rather unusual case there was a surplus which was to be retained within the scheme. I had to decide whether the contributions made by church congregations were intended to create the surplus.

25 K00186

The complainant, who was a minister of a Scottish church, complained against the trustees and the administrator in that they failed to warn him or his congregations (as his employer) that, in the event of his own benefits being over funded, his congregations' contributions to the scheme would not be returned to them, but transferred within the scheme to another fund not for his benefit.

I found that the payments made by the congregations and accepted by the scheme were not permitted, and more particularly that the trustees were put on notice of the over provision and yet they allowed the contributions to continue. I found that they failed adequately to discharge their obligations of good administration and sound scheme governance both in monitoring the contributions being paid and in accepting obvious overpayments.

I found that this amounted to maladministration causing injustice (ie deprivation of the value of congregational contributions paid for the complainant's benefit). I also found maladministration in respect of the administrator's actions.

The effect of applying *Merrett Holdings v Pension Ombudsman* [1999] 4 PBLR 18 to the circumstances of this case was that the sums could have been paid only on one of two bases - either because the congregations intended to put the scheme in surplus (there being no possibility under the rules of a refund) or on a provisional basis, as a payment on account.

I found on the balance of probabilities that the payments were made on account, for the sole purpose and intention of benefiting the complainant alone. There was no evidence that there was an intention to provide surplus funds for the scheme generally. Accordingly, following the decision in *Merrett*, I considered that a refund of the congregational contributions could not properly be regarded as a refund of surplus. It was simply a return of contributions paid on account which turned out not to have been necessary.

As the congregations were not a party to my Determination it would not have been proper to make any direction in relation to them. In any event I found that no financial loss had been suffered by the congregations themselves - given the purpose of the payments, the congregations were not beneficially entitled to the contributions. The quantifiable injustice in consequence of the maladministration was entirely suffered by the complainant, ie the deprivation of the congregational contributions. I concluded that the appropriate steps were for the complainant to be compensated for the injustice he suffered.

In the almost exactly opposite case below, benefits were under funded due to inadequate contributions and I had to decide whether they should be made up.

26 J00511

The complaint concerned a scheme which, though originally argued by the complainant to be a final salary scheme, I found was a money purchase scheme which targeted to provide defined salary benefits. He asserted (amongst other things) that the calculation of the scheme premiums had left him with no pension provision to speak of because realistic premiums were never paid, therefore target benefits could not be realised. The employer and the trustees failed to take any steps to ensure that the scheme would provide members with the benefits promised.

The employer stated that it understood that it had always been the view of the administrator (and still was) that the scheme was capable of providing target benefits. The administrator confirmed this to be the case when it was liaising with OPAS, the pensions advisory service, on the matter. On enquiry by my investigator, it confirmed that, assuming assumptions adopted were met in practice, the funding rate would have provided the target pension at normal retirement.

In 1994 the administrator advised that the yield assumed in carrying out the targeting exercise was considered to be on the high side in the current investment climate. In 1997 it advised

the trustees that, given the trend of reduced investment returns and lower interest rates, any continuing target scheme adopts a revised set of assumptions. It suggested that the revised assumptions be adopted in the 1996 renewal data.

The evidence was that revised assumptions were not adopted for 1996. Having regard to the scheme rules, I found that the trustees, in consultation with the administrator, were obliged to ensure that the yield assumptions adopted were reasonable. In examining what actions the trustees took, I considered the principles confirmed in *Edge v Pensions Ombudsman* [2000] Ch 602. The trustees had submitted that they relied solely upon the administrator to calculate and review the annual premiums. I found that no reasonable trustee operating a target benefit scheme would have failed to adopt the suggestion of its administrator (being the person upon whom it relied) and not reviewed its assumptions over the period. The injustice suffered by the complainant was that lesser contributions were paid to the scheme than otherwise would have been the case.

I directed that the trustees revise the assumptions for 1996. I further directed that the trustees, in consultation with the administrator, adopt such revised assumptions as they considered reasonable for 1994 and 1995 and for every year after 1996.

Where there **is** a surplus its distribution may become a bone of contention.

27 J00396

In this case the complainant died during the investigation of his complaint, and the complaint was pursued by the executors of his estate.

The complainant had been a member of a pension scheme, from which benefits were transferred into another scheme (the second scheme) in 1989. The principal employer under the second scheme went into liquidation in 1990, triggering the winding-up of the second scheme. The complainant was a member of the team which carried out a management buy-out and set up a new company. A new, third, pension scheme was established in 1990 and the complainant joined it, transferring into it past service benefits from the second scheme. As that scheme had been under funded, transfer values paid from it were insufficient to fund fully members' past service benefits. The employers agreed with the trustees to pay additional contributions, so that members' past service benefits would be met in full by normal retirement date.

The complainant had been a trustee of the new scheme from 1992 to early 1997, when he said he was forced to resign from the company and from his position as a trustee. He said he was also forced to sign a compromise agreement, agreeing to receive a payment in full and final settlement of all claims against the company, including pension rights. He said he was advised by the

scheme's pensions consultant to opt for deferred pension benefits, so that he would benefit in the future once the new scheme was fully funded.

An actuarial report revealed that the scheme was in surplus and additional contributions were discontinued. The company directed the trustees to apply some £700,000 of the surplus to provide full payment of past service credits "for active members, deferred pensioners and pensioners who are not Founder Shareholders or who did not reach a special arrangement with the Company at the time of leaving service."

Not only was the complainant to receive no further augmentation out of the surplus, but his early retirement pension had reduced significantly from a figure previously quoted to him, as the scheme actuary had recommended less generous rates.

The complainant advised the trustees that no special arrangement had been made for him when he left service, he had merely received £30,000 compensation for loss of office.

The trustees had agreed not to grant any of the surplus to founder shareholders, as they had each received about £1.6 million from the sale of their shares. In any event, the trustees said, they were obliged to follow the directions of the company. The founder shareholders had also received dividends of some £50,000 pa. To have provided full past service credits for all active and deferred members would have used up nearly all the surplus, and it had been thought prudent to maintain a reserve. The company was entitled to consider its own interests.

I considered the dividends that founder shareholders had received, the price they had received for the sale of their shares and the existence of special arrangements with the company on leaving service, to be employment matters which should not have been taken into account in determining the distribution of the surplus. The complaint against the company could not, however, succeed, because of the wording of the compromise agreement the complainant had signed. The company **was** also entitled to consider its own interests. The trustees were obliged to follow the company's instructions in augmenting benefits and could not be faulted for having carried out these instructions.

The various aspects of the complaint were not upheld.

Whereas in the above case (past) senior employees were selected **not** to receive a share of surplus, in the following case the pattern was more usual in that the managing director was to be preferred over other members - and even rejoined the scheme specifically to enable himself to benefit.

28 G00445

The complainant left the scheme in 1986 and, together with its other directors, joined another of the company's pension schemes. In 1992 the directors were considering terminating the

first scheme and were told that there was a large funding surplus. Because they would not be able to share in this if they were not members, they rejoined. The complainant was so anxious to rejoin before it was too late that he did so without knowing how much surplus might be allocated to him, or whether he could be included in the surplus distribution at all.

After the company/trustee used £70,000 of the surplus to increase a bulk transfer value for 18 members, it then moved to switch as much as possible of the residual surplus into a private pension plan for its managing director. Over £110,000 had already been transferred, and the company/trustee was intending to transfer even more, when the complainant threatened legal action against the insurer if it released further funds.

I concluded that a breach of trust had occurred because the managing director's full entitlement had already been transferred out of the scheme and so he was no longer a member. The company/trustee could not subsequently purport to augment his benefits and pay out additional transfer values based on the augmented benefits. I directed the return of the £110,000 and required the trustee then to distribute the total surplus to the membership (including the complainant) in accordance with the rules.

Although I upheld the complaint, I found it ironic that the complainant's sole reason for rejoining the scheme was, like the managing director's, to share in the surplus, and his complaint was that he had not been granted a share. It appeared that he rejoined believing that the bulk of the surplus would be allocated to a fairly small group of key directors and shareholders, including himself.

The company/trustee, in defending its actions, said:

"We submit that the trustees have acted [in granting the managing director additional benefits] in what they honestly considered to be the best financial interests of the scheme beneficiaries and in what they honestly believed to be a fair and equitable way as between the scheme beneficiaries."

I commented on this as follows:

"I am sure that the other members will be gratified to hear this, and will understand why the trustees wanted surplus assets built up over their many years of membership not to be awarded to them but to be awarded entirely to the company's managing director, who previously left the scheme and only rejoined it several years later, when it suited him to do so, because the company was planning to terminate it."

Last in my selection of funding related cases is one in which improper loans were made at a time when surplus changed to deficit.

29 **J00144**

The scheme had been in surplus, and the trustees had made an unsecured loan to the employer which was ultimately offset against the surplus which otherwise could have been returned to the employer under the scheme rules. This transaction depleted the entire surplus identified in the actuarial report. The scheme's assets were also reducing yearly because the employer was taking a contributions holiday. Furthermore, the value of a property which formed one of the scheme's assets, had reduced since the last actuarial valuation by almost half.

Against this background the employer asked the trustees (one of whom had recently been appointed and had not been involved with the earlier loan) to make it another unsecured loan of £375,000, at a rate of interest which was less favourable than could be obtained in a high street building society at the time. Without taking any professional advice, either about the loan or about whether there actually was a surplus, the trustees agreed. However, the employer was aware that the actuary had advised that the scheme assets might be insufficient to buy out deferred annuities at accrued levels for all members.

The trustees subsequently agreed to the loan being extended for a further period and to have the interest due rolled up to the date of ultimate repayment.

At the time of the loan and its subsequent extension, the majority of scheme members were pensioners or deferred pensioners who had no interest in the continued existence of the employer in terms of hoping for continued employment. Moreover (not surprisingly) the employer was in financial difficulties. Before repayment was due, receivers were called in. The loan will not be repaid and the scheme's assets have therefore been depleted by the amount of the loan and interest.

Clearly this was a foolish and improvident transaction in every respect. I had no difficulty in concluding that the trustees were in breach of trust and had committed serious maladministration. However the scheme had an exoneration clause which exonerated each trustee from liability for acts and omissions "not due to his own wilful neglect or default". I therefore decided to hold an oral hearing to hear the trustees' evidence as to the relevant events in order to establish the validity (or otherwise) of their respective contentions that each of them should be given the benefit of the exoneration clause.

Four of the five trustees attended the oral hearing, and gave their evidence. I was able to conclude that they were each entitled to the benefit of the exoneration clause. The fifth trustee, who was an accountant and the employer's financial director, did not attend the hearing. I found that the written evidence and submissions he had made were in places untrue, misleading and disingenuous. I concluded that he did not have an

honest belief that the transactions were in the best interests of the beneficiaries, and also that, if he did genuinely believe that the scheme was in surplus, it could only be because he had deliberately closed his eyes and refrained from asking the proper questions, recklessly ploughing on regardless. Finally, I found that if he did honestly believe that the employer would be able to repay the loan, nevertheless, no reasonable financial director/trustee knowing the same facts and the imponderables would have had the same belief, let alone a financial director who was also an accountant.

I therefore determined that the fifth trustee was guilty of wilful neglect and/or default constituting dishonesty. I thus upheld the complaint against all the trustees but found that the fifth trustee alone was liable to reimburse the scheme.

Note - The Determination has been appealed.

Lien

Whereas, in the preceding case, loans were made, the following concerned a straightforward matter of theft from the scheme. I was not called upon to deal with it directly - the criminal courts already had. However, the thief himself came to me arguing that he ought to receive benefits from the scheme.

30 J00547

The complainant was the chairman and majority shareholder of a furniture company. He was also a trustee of the firm's pension scheme, which had about 140 members. The complainant, assisted by his solicitor, stole approximately £700,000 from the scheme to support his lavish lifestyle. The complainant was made criminally bankrupt and sentenced to four years' imprisonment, the judge expressing the view that the complainant should not receive any benefit from the scheme. The solicitor was jailed for one year and struck off.

The independent trustee appointed to wind up the scheme refused to pay the complainant a pension, which included a guaranteed minimum pension (**GMP**) on the grounds that he had not made good his breach of trust. The complainant applied to me over four years later and his complaint about the pension was therefore out of time. The complainant made other allegations of maladministration against the independent trustee, which were within time, but I did not uphold them. However, even if I had been able to determine that part of the complaint which related to non payment of pension, I would not have been minded to do so in the complainant's favour. The pension included a GMP and s159 of the *Pension Schemes Act 1993* established the inalienability of GMPs. However, the complainant's gains from his breaches of trust far outweighed the benefits he was claiming and he could, therefore, be treated as having already received them, including the GMP.

In contrast to that case, where I concluded that the complainant should not receive his benefits, in the following I decided that the attempt to cancel or reduce benefits was improper.

31 J00604/5

The complainants had worked for the same employer from 1980 and 1986 respectively. The employer, which was also the trustee, operated a money purchase pension scheme. In August 1996 both complainants were dismissed for theft, an allegation they denied. No legal action was taken by the employer, although the complainants received police cautions.

The scheme rules provided that a lien on benefits could not be taken unless the amount was recoverable pursuant to a court judgment or arbitration award. However, the scheme's administrator, an independent financial adviser (**IFA**), informed the complainants that all their pension benefits had been cancelled. £50,000 was obtained from the insurer by the IFA and passed to the employer.

Following pressure from OPAS, the IFA quoted transfer values totalling £43,000. In addition to the disappearance of £7,000, the IFA proposed to make a further deduction "for work done". The complainants then referred the matter to me.

My office established that the transfer values should total £77,000 plus interest. I directed that payment should be made within 28 days. I expressed concern at the ease with which the IFA had obtained pension scheme money from the insurer and passed it to the firm, whose dual role as employer and trustee, although permissible in law, undoubtedly involved a conflict of interest.

"Returns"

For a range of reasons, I may be called upon to revisit the same, or related, issues. The following cases (also referred to in Chapter 2) are examples. Because they relate to ground already trodden, and so open to public scrutiny, they are not anonymised.

32 H00414, H00419, H00423, H00489, H00504, H00570, H00596

This is the finale for the complaints relating to Westminster City Council which started with my Determination of Mr Haywood's first complaint in July 1995. I summarised the then position on page 17 of my Annual Report for 1999-2000. The seven complainants had complained to me prior to the decision of the Court of Appeal which meant that I did not then have jurisdiction to investigate them. The complainants, like Mr Haywood, reapplied to my office following the (re) extension of my jurisdiction but the investigation of their complaints was delayed pending Mr Justice Lightman's decision in *Haywood* No 2 (a commentary on his judgment can be found in Chapter 4 of my 1999-2000 Annual Report).

Confident of my jurisdiction, I decided to investigate these complaints at least to the stage of reaching my preliminary conclusions, despite Westminster obtaining permission to appeal to the Court of Appeal against Lightman J's judgment in *Haywood* No 2.

In all but one of the cases I was unable to find that Westminster was guilty of maladministration in offering its employees benefits which subsequently were considered to be beyond its legal powers. In those six cases the employees had left service at a time when I considered it reasonable for Westminster not to have been aware of the legal uncertainties surrounding the payments. As pronounced by Mr Justice Robert Walker in *Haywood* No 1, it is not necessarily maladministration to act on a wrong interpretation of the law.

In the seventh case the employee left at a time when Westminster ought, at the very least, to have warned him of legal uncertainties surrounding the payment and I found that it was maladministration not to warn him of this. However, I concluded that although the complainant wished to remain an employee of Westminster, his job was deleted at the last moment and he had no option but to leave. He did not therefore act to his detriment as a result of the maladministration and I could not find that he had suffered injustice as a result. In all seven cases I found that the reduction by Westminster of benefits in 1993 without warning was maladministration but that as none of the complainants had been required to repay the overpayments of benefits they had received they had already been adequately compensated for the distress and inconvenience suffered.

Thus, whilst upholding all the complaints at least to some extent, no directions were made against Westminster to compensate any of the seven complainants.

At the time of writing, Westminster has indicated an intention to stay its appeal to the Court of Appeal in *Haywood* No2.

33 J00273

Mr Matthews complained that legal costs incurred by the trustee, Mr Gurr, in responding to a previous complaint (G00535) should not be paid from the assets of the scheme. In the Determination of G00535 I had found Mr Gurr guilty of maladministration in the excessive time it had taken to wind up the scheme but had not found that he had deducted excessive expenses. Following that Determination he presented the scheme's administrator (who also managed the assets) with an invoice for £17,337.17 representing his legal costs in defending the first complaint. The administrator declined to pay the invoice. This caused a further delay in winding up the scheme and the member complained to me.

I found that the scheme documents did not give Mr Gurr an express right to reimbursement of his legal expenses but did find that, as a matter of general principle, trustees are entitled to take legal advice in respect of their duties (including legal advice on an investigation by my office) and to be reimbursed from the scheme for their reasonable costs of so doing. I decided, on the facts of this complaint, that the trustee should not be reimbursed for his legal costs. Whilst I concluded that the costs had been incurred by the trustee in the execution of the trust they were incurred as a result of Mr Gurr's own misconduct (in effect he had brought the first complaint on himself) and he had lost the right to reimbursement.

34 **J00321**

Dr Waterhouse first complained to my office in 1995. The NHS Pensions Agency had given him an inaccurate quotation for early retirement benefits and he claimed to have retired in reliance on it. In October 1995 I issued my Determination (E00026) upholding the complaint. The NHS Pensions Agency appealed and on 1 April 1996 it was ordered by Mr Justice Carnwath, by consent, that the matter be remitted to me. On 9 March 1998 I issued my second Determination (G00168) directing the NHS Pensions Agency to pay Dr Waterhouse the sum representing his loss of earnings as a result of retiring early plus the difference between the lump sum he actually received and the one he would have received had he not retired early. The Determination provided that any compensation would be capped at "…the capital value of the excess of the benefits (pension and lump sum) on which [Dr Waterhouse] relied over the capital value of the benefits [he] has actually been paid…"

There followed lengthy correspondence between Dr Waterhouse and the NHS Pensions Agency as to the appropriate sum for compensation. It was not until June 1999 that the Agency were advised by the Government Actuary's Department that the "cap" should apply and they suggested two possible methods of calculation. Negotiations continued with no agreement and on 24 September 1999 Dr Waterhouse referred a dispute to me requesting a binding decision on the exact compensation payable to him.

I considered that when calculating a capital figure for compensation in respect of "lost" income there was no one right answer and that as long as the method adopted by the NHS Pensions Agency was a reasonable one (and correctly calculated) then they would have complied with my original direction. Having taken my own independent actuarial advice I concluded that either of the two methods suggested by the NHS Pensions Agency was acceptable but that the first, less

generous one, was more appropriate in the circumstances of this case. In fact the NHS Pensions Agency had offered Dr Waterhouse compensation based on the second, more generous method, and that offer remained open. I therefore determined that compensation must be paid on the less generous basis but noted that Dr Waterhouse would be well advised to accept the offer on the table. I understand that this is indeed what he did.

35 J00349

In 1998 I issued a series of Determinations in relation to the H H Robertson (UK) Limited Retirement Benefits Plan (1978) concerning waivers which members had been required to sign on taking early retirement. The result of those Determinations was that, because of a defect in the drafting and administration of the waivers, some scheme members received higher benefits then the trustee had intended. As the scheme is winding up in deficit this had a direct adverse impact on those in lower priority groups. One of those members complained to me. I found that the administrator had been responsible for drafting and administering the waivers. The administrator was guilty of maladministration in failing to warn the trustees of the possible problems with operating them and in failing to ensure they were properly administered. I directed the administrator to reimburse the scheme for the additional benefits the trustee had had to pay as a result of the maladministration and to bear the costs of recalculating the benefits.

CHAPTER 4: Appeals

In the ten years during which the Office of the Pensions Ombudsman has investigated complaints and disputes, well over 3000 have been determined. The first appeal to the Court, against a Determination of my predecessor, was *Dolphin Packaging Materials Ltd v Pensions Ombudsman* (1993), as a result of which I am the Pensions Ombudsman is permitted to participate in hearings and to pay costs on 'losing' (although not, apparently, allowed to appeal). At the end of the ten years, adjusting for multiples, a total of 115 appeals had been lodged. Of these, 42 have been withdrawn and 49 finally decided (appeal allowed in 28). As a percentage of 3000 Determinations, these figures for appeals may be regarded as perfectly acceptable, but the impact of appeals on the work – also budget – of the Office is, of course, entirely disproportionate. Even more undermining of our role must be the impact on otherwise successful complainants who see their cases taken from an Ombudsman to a Court of Law where they cannot ordinarily afford to participate and often lose. However, 20 of the 115 appeals were actually by complainants (most withdrawing and none of the rest yet winning).

This last year, 13 appeals have been heard in the Courts and in only 3 was my Determination upheld. These 3 failed appeals were all by unsuccessful complainants but it is not clear what if anything can be deduced from this. The 13 also include two cases from the past, one now in the Court of Appeal (No 8 below – *Duckitt & Bates*) and one reaching the House of Lords (No 13 below – *National Grid*). So, set against over 600 Determinations, the numbers, although significant, are hardlyscarcely enormous.

What follows is an account of all these appeals, not as complete casenotes, but from the 'worm's-eye view' of an Ombudsman involved as if subject-matter more than party. The overall impression seems depressing, not least for complainants in the hands if not the minds of the Courts. As for myself, it has been suggested that the decisions should be found reassuring in one respect: they show that I am not suffering from paranoia.

An asterisk (*) after the case name indicates that the Pensions Ombudsman did not participate in the appeal.

1 *Rushton & Stone v Pensions Ombudsman* (10 May 2000, High Court, England - Laddie J)

Because of concerns expressed about the topic in the House of Lords, the Lord Chancellor has referred *'trustee exclusion clauses'* to the Law Commission (see 35th Annual Report para.1.42). These concerns are essentially as to the seemingly over-easy escape route available to pension scheme trustees in blatant breach of their duties. In general, only if they can be found to have been in 'wilful default' will they be liable to compensate members for losses. But since 'wilful default' is akin to dishonesty, standards of proof are high and defences of unfairness or of ignorance of the law (ie of trusts) frequently succeed in Court.

This first case is an unusual illustration (but cp *Duckitt & Bates* below). Two trustees effectively lent £350,000 of pension scheme money to themselves and subsequently wrote the loan off. I found that the "conflict of interest in the matter of the loan must have been glaringly obvious to both [trustees]". Accordingly, I held them both in wilful default and so outside the protection of an exoneration clause. I also held that the statutory limitation period had not run in their favour, observing that: "In my judgment, the breaches committed by both Mr Rushton and Mr Stone are so serious that they fall within the [words 'in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy']".

Both trustees appealed and one ground was that there had been no oral hearing even though Mr Stone had asked for one. Although actually supporting my Determination, I applied for it to be set aside by consent and remitted for an oral hearing. This application being opposed, it was heard as a preliminary issue. Mr Justice Laddie ruled that it would not be appropriate to remit the matter to me, saying that he would give a detailed judgment in due course. At this my Counsel stated that it would not be proper for me to take any further part in the appeal. So the learned judge said that, as one of the grounds of appeal had been made out, he need not decide anything else. He then enquired whether any of the parties wished him to give his reasons for his decision and, when no one pressed for a detailed judgment, he said he would allow the appeal.

None of the nine complainants who were Respondents (and therefore parties) to the appeal was present and his lordship was evidently unmindful of them as well as of his duty to publish a reasoned judgment in compliance with Article 6 of the European Convention on Human Rights. He had appeared from the outset particularly exercised that remitting the matter to me might be in breach of that Article's requirement of a fair hearing because I had already made adverse findings. However, my Counsel had reassured him as to this by quoting from the leading case about allegations of bias, *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

She first pointed out that it was not sufficient indication of bias that I had merely made an adverse finding. It had to be shown that I had previously in the proceedings expressed my views "in such extreme and unbalanced terms as to throw doubt on [my] ability to try the issue with an objective judicial mind". She quoted the most relevant sentence from the judgment of the Court (at p480):

> "The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or a witness to be unreliable, would not without more found a sustainable objection."

Since he has not delivered any judgment, we cannot know why Laddie J was unwilling to follow this authoritative guidance: his reasons may or may not be rational but they are certainly unarticulated. And two trustees escaped scott-free.

2 *Blake v Pensions Ombudsman and Buckinghamshire County Council* (17 May 2000, High Court, England - Lightman J)*

As well as demonstrating the correct attitude to essentially factual appeals, two procedural points of some significance emerged from this case.

My Determination had been twofold: (1) Buckinghamshire CC had been guilty of maladministration in giving Mr Blake incorrect information as to the effect of further employment on his pension entitlement. There was no appeal against this. But (2) Mr Blake had not sustained injustice in consequence, so his complaint failed. After an oral hearing, attended by Mr and Mrs Blake, I had not accepted that he had acted to his detriment in reliance on the misinformation by taking a part-time job (at £8,500 pa) instead of a full-time job (at £30,000). Essentially, my finding was that he had been influenced by the avoidance of pressure and stress rather than financial considerations. Mr Blake appealed on two grounds.

The first ground was that the decision "is perverse unsupported by any or any sufficient evidence." Very properly, it was judicially recognised that an appeal only lies against an error of law:

> "It is not open to this court to apply its own judgment to the facts and substitute its own view for that of the PO. This court can only interfere if the PO misdirected himself in law or reached a conclusion beyond the range available to a reasonable decision maker."

Accordingly, in light of the oral hearing, although the issue could have been decided either way, the learned judge concluded: "I cannot possibly hold that the Determination was wrong or unsupported by the evidence." However, he added the criticism that "Mr Blake's case is made the more difficult (if not practically impossible) by the lack of a full record of the hearing before the PO and the evidence given before him". Paying due regard to this expression of judicial anxiety to scrutinise our proceedings without being limited to my virtually illegible notes, arrangements are now always made for full recordings of oral hearings, copies of which can be requested or transcripts bespoken.

> "The second ground [of appeal] was that the PO breached rules of natural justice and (contrary to Article 6(1) of the European Convention on Human Rights) failed in his duty of fairness by reason of the fact that the PO did not give to Mr Blake before the Determination any indication that he was minded to reach a decision adverse to Blake's [evidence] on this issue."

The reference to Article 6 was dismissed as adding nothing and no breach of natural justice was perceived since it had been made plain to Mr Blake what he had to prove. Beyond this:

> "There was no duty on the part of the PO to reach his decision on this question in stages: give a preliminary view on which he should invite further representations and (in the light of those representations) only then make a final decision."

In practice, it is our ordinary procedure to issue a Notification of Preliminary Conclusions in all investigations *except* those few involving an oral hearing where the issues have been addressed by both (or all) sides. It would certainly have seemed surprising for our ordinary procedures (ie issuing a preliminary or draft determination for comment) to become obligatory where the courts' own procedures are different (ie no such preliminaries). However, our two-stage procedure has in practice proved popular with parties (so much so that in Appeal No 12 – *Save & Prosper* – a second preliminary determination was sought). As a method of avoiding factual errors and considering submissions properly before going final, perhaps its adoption should be considered by the courts.

3 *Mitre Pensions Ltd v Pensions Ombudsman* (28 May 2000, Court of Session, Scotland - Lords Kirkwood, Weir and McCluskey) now reported at [2000] SLT 1386

Two interesting questions of law were raised in this appeal about delays in winding-up a scheme. The first question was as to an independent trustee's powers to remove a couple of uncooperative trustees so as not to delay winding-up (section 121(2) of the *Pensions Schemes Act 1993* was said to be too obscure for confidence). The second was whether an independent trustee would be bound to complete the winding-up (in Scotland – "denude") before being formally exonerated and discharged by all the members.

However, these questions were not answered since this distinguished Court instead simply substituted its own view of the facts. At the outset of its 'reasoning', the Court observed that that there was no statutory definition of "maladministration" and that it had been conceded that, in appropriate circumstances, delay could amount to maladministration. It then pronounced that "each case must depend on its own individual circumstances and in our opinion delay will not be able to constitute maladministration unless the delay has been culpable and unjustified". Eventually, after retelling the tale, the Court concluded: "On the whole matter, principally on the basis that the Ombudsman was not entitled, on the facts, to find that the winding-up should have been completed by the end of 1995, we shall quash the directions …". Does it matter that there is not supposed to be any appeal on findings of fact?

4 *Brooks v Civil Aviation Authority & Another* (30 June 2000, Court of Session, Scotland – again, this time by way of Case Stated – Lords President, Bonomy and Cowie)*

Here one fundamental aspect of my Determination was challenged and another overlooked. The challenge (by Mr Brooks who had complained to me initially) asserted that I was duty-bound to re-investigate facts on which decisions had already been reached by an Industrial Tribunal (plus the Employment Appeal Tribunal) and by an Arbitrator. The factual dispute was about whether Mr Brook's employment had terminated because of 'conduct and capability' – as the previous decisions found - or because of ill-health entitling him to an early pension. However, the Court held that "it was entirely appropriate for the Ombudsman to make that decision [ie as to the real reason for Mr Brook's dismissal] in this case on the basis of a review of the existing material". Of course, it might be thought even more appropriate for me to have exercised my discretion to decline to accept the case for 'investigation' in the first place.

The aspect overlooked was that this was a complaint of injustice caused by maladministration on the part of the employer and trustees, not the referral of a dispute of fact or law. Since it is now quite clear that it is not for me to examine the merits and substitute my own decision (remember *Edge*), the correct question was whether it was wrong of the employer and trustees, not me, to follow the tribunal and arbitral decisions without more enquiry. My only proper concern was not whether they were right but whether or not they were guilty of maladministration. On this basis, obviously enough they had to be acquitted.

5 *Kay v Swiss Re Life and Health Ltd & Pensions Ombudsman* (20th July 2000, High Court, England - Park J)*

The complainant's life was affected by ill-health (a heart attack at 50). But Swiss Re reacted sympathetically: they would still employ him at the same salary and adapt his duties. This meant that he was not leaving his employment due to his ill-health and that his earning capacity was not impaired by it. In other words, he did not satisfy the requirements for an early, unreduced ill-health pension (**IHP**). Unhappily, he was also, less sympathetically perhaps, made redundant. My Determination was that this made no relevant difference: he was still not entitled to an IHP.

In a lengthy, evidently unreserved judgment, Mr Kay's appeal was dismissed. The judge, properly limiting himself to questions of law, essentially held that I had correctly applied the scheme rule re IHPs to the facts found. However, he was not happy about one strictly irrelevant aspect, namely my finding as to Mr Kay's earning capacity in other employments. Further, the learned judge was willing to (but could not or did not) give permission to appeal.

6 *Wirral Borough Council v Evans & Pensions Ombudsman* (31 July 2000, High Court, England - Evans-Lombe J)

This decision touches on a sore point: the (dis)missed distinction between a legal duty to advise and the reasonable requirements/legitimate expectations of good administrative practice. The judiciary persist in imposing their court-centric view that only breach of an established legal duty can conceivably constitute maladministration. Unfortunately, this persistence depends on ignorance of considerable contrary authority (cited at pages 51-52 of my Annual Report 1998-99).

Here Mr Evans complained that he had been "allowed to take the decision whether or not to transfer his BT pension benefits without having explained to him the difference between '*reckonable*' service and '*qualifying*' service so as to understand that in the calculation of the amount of credit which would be passed to the new scheme on transfer only 'reckonable' service would be taken into account. Thus he did not understand that the credit resulting from his service for 19 years with BT would only, on transfer, produce a credit of 9 years 162 days '*reckonable*' service equivalent under the Scheme. In other words, the Administrators (Wirral Borough Council) did not explain to him on what disadvantageous terms the transfer would be made." The exclamation 'misselling', never mind 'maladministration', must surely spring to lips!

But no, respectfully following a then still unreported decision of the Court of Appeal (*Outram v Academy Plastics* [2001] ICR 367 – *not* about 'maladministration' at all), the judge held that there was no duty – ie of care in *tort* – to give the advice (or explanation even?) which would have prevented a transfer "on such unfavourable terms". His lordship never considered mere maladministration causing injustice – my statutory remit.

However, a telephone conversation had been alleged, proffering advice and assuming (as well as breaching) a duty to advise Mr Evans competently. Since this would "clearly constitute maladministration", the matter was remitted to me, in effect, for an oral hearing. In the light of this, depending on the outcome, my defective order for compensation could be "formulated". Appeals can become games of two halves!

7 *Sun Alliance & London Assurance Co Ltd v Pensions Ombudsman* (17 October 2000, High Court, England - Sir Andrew Morritt, Vice-Chancellor)

Guaranteed annuity rates have hit the headlines with personal pensions as at least one insurer has tried to avoid honouring an ill-advised sales gimmick. Similar issues, however, have arisen with occupational pension schemes but, so far, with different outcomes. Regrettably, the result in this next case appeared readily predictable given the learned judge's restrictive construction approach in *Equitable Life Assurance Society v Hyman* [2000] 2 WLR 798 Court of Appeal, affirmed by the House of Lords at [2000] 3 All ER 961. But there he was dissenting and here there was no liberal majority or 'ombudsman-like' lawlords to take a bigger view.

Everything turned on the meaning of one phrase: "increase in insurance", since this called for the insurer's consent. Sun Alliance had announced the withdrawal of its guarantee not only for new members of the scheme but for future increases in premiums paid by existing members (ie higher contributions following salary raises). The employer's complaint had been upheld, particularly because of the absence of any definition of the phrase in the policy and in the light of the sales literature.

The Vice-Chancellor's approach on appeal still involved a restrictive construction of the policy, disregarding sales assurances, and what follows is really the whole of his *ratio:*

> "I can express my conclusion relatively shortly. I take the ordinary meaning of 'insurance' to be an agreement in consideration of one or more premiums to pay on the occurrence of a specified future event, sums or benefits calculated in accordance with the terms of the policy. This, of course, assumes that the insured has a sufficient or insurable interest. Thus, there are two elements – the premium payable by the insured, and the benefit payable by the insurer. An increase in such insurance must, in principle, involve an increase in both those elements. I cannot accept the alternative meaning ascribed to the phrase by counsel for the Pensions Ombudsman for a change in quality or type of risk would involve a change in insurance not an increase in it."

No authority whatsoever for this counter-intuitive construction was cited. In my experience (as a former Insurance Ombudsman), most people - including insurers - would regard the risk as the primary element in insurance. An elementary illustration should suffice: household fire and theft policy – the premium and the sum insured may each keep pace with inflation or other indices but the change to an 'all risks' policy or to cover a second home would genuinely involve an 'increase in insurance'. So here, for example, additional ill-health cover or benefits for other dependants could properly be regarded as increasing the risk and therefore the insurance, just as new members would, whilst rising salaries and percentage contributions should not. As it is, despite the merits, Sun Alliance was let off the hook of its own guarantee.

8 *Duckitt & Bates v Farrand & Others* (20 November 2000, Court of Appeal, England)

Although this case decided nothing of substance, since it only dealt with an application for permission to appeal, its implications are exceptionally unsatisfactory and should be addressed seriously. Reference may be made to my Annual Report 1999-2000 (at pp.62-63) for an outline of what had happened so far in relation to the 35 complaints following their acceptance for investigation in 1994. However, the position reached was (1) two trustees had committed breaches of trust causing a loss of approximately £350,000 to the pension scheme, but (2) my Determination, after an oral hearing, that the breaches had been 'deliberate and culpable' so that they were not protected by an exoneration clause was reversed by Lightman J on the ground that insufficient reasons had been given. The 35 complainants were not participating in the Court proceedings because of the legal costs, so I sought to appeal.

My application was first heard 'without notice' by Mummery LJ (14th April 2000) who considered a number of options:

> "First, I could refuse permission to appeal. I am not inclined to do that because I am of the view that there is a public interest element raised by the arguments of the Ombudsman which would justify the hearing of an appeal, subject to it being appropriate for the Ombudsman to bring it."

Not wishing to give permission to me without representations from the two trustees, he stood my application over to a full Court with the appeal itself to be heard immediately if permission were given.

However, the full Court (Peter Gibson and Arden LLJ plus Collins J), without adverting to Mummery LJ's view of the "public interest element" or even hearing the trustees' representations, speedily refused me permission to appeal. In this, they adopted the discouraging approach of Chadwick LJ in *Edge v Pensions Ombudsman* [2000] Ch 602 (at p.644):

> "Unless there is some point of principle in relation to which conflicting decisions of the High Court make it difficult for him to perform his proper functions without further guidance from this court, it is difficult to see why he should not accept and act upon the decisions of that court – to which Parliament has entrusted the task of hearing appeals from his determinations."

Accordingly, the Pensions Ombudsman will not be given permission to appeal on the ground that the judge's decision was incorrect but only to raise points of principle and the court did not accept that there were any: Lightman J had not stated the law as to reasons for determinations incorrectly and it was irrelevant (for the purposes of my application) that he might not have applied that law correctly. As Peter Gibson LJ explained (at para.25):

> "In conclusion, I would make it clear that, for my part, I am not saying that the judge's decision was necessarily correct. In particular, I note that no point has been taken on the fact that the judge, having found that the Ombudsman's decision could not stand, went on to substitute his own conclusion, that is to say that [the exoneration clause] applied without ordering any further remitter to the Ombudsman or, as I suspect would have had to happen in this case, without ordering the case to be remitted to someone else exercising the functions of the Ombudsman for this specific purpose."

If it is made legally possible, it would certainly be preferable for cases to be remitted to 'someone else' than not remitted at all (cp Appeal No 1 above – *Rushton & Stone v Pensions Ombudsman*). Lady Justice Arden mentioned other aspects (at para. 31):

> "In conclusion, as I see it, in reality the Pensions Ombudsman seeks to persuade the court that the approach of the learned judge was wrong in this particular case on the facts as found by him. This may be illustrated by [Counsel's] submission that, if the Pensions Ombudsman could not find dishonesty here, then when can he? As I see it, such a challenge should be left to the parties interested, that is the beneficiaries. We understand that the members cannot afford to bring an appeal. But it may be that, if hereafter an application for legal aid or for pro bono assistance is made, there might be such an appeal."

In practice, this perceptive speculation, like the proceedings as a whole, can only afford comfort for dishonest trustees.

9 Barclays Bank Plc v Holmes & Others (21 November 2000, High Court, England - Neuberger J)* now reported at [2000] PLR 339

"Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form" (per Romilly MR in *Parkin v Thorold* 1852) – unless, of course, the case concerns a pension scheme or two.

The material facts can be shortly summarised. The Bank was running a final salary/defined benefit scheme with a surplus of £1bn. It established a money purchase/defined contributions scheme for new entrants and used the surplus to justify making *nil* contributions to both schemes. A member of the FS/DB scheme complained about the 'cross-subsidy' and I upheld the complaint (reported at [2000] PLR 203). This meant rejecting the argument that amendment of the FS/DB scheme had produced two sections of one scheme (which would validate the *nil* contributions): that was merely a matter of form. Following the similar decision of Rimer J in *Kemble v Hicks* [1999] PLR 287, I found that the surplus had been misused because two schemes had been created as a matter of substance.

However, after a detailed examination of the documents, including Inland Revenue Practice Notes (IR12), and adopting a few subtle distinctions, notably between "credit" and "pay" in announcements about contributions, the learned judge held there to be two sections of a single trust fund. So the 'cross-subsidy' was good and my Determination bad. Nevertheless, he did say (para.98):

> "It is only fair to the Ombudsman, who relied strongly on the decision in *Kemble* … to recognise that the way in which Rimer J expressed himself … might appear to be based on a wider reason than the precise terms of the amending deed in that case."

True enough, but here the precise terms prevailed over any wider reasoning. The message is that pensions lawyers acting for employees in such situations need to be careful, not about the substance, but only about the form of the documentation: two schemes, bad; but one scheme with two sections, good – ie for the employer.

As an end note, this decision brought to mind an earlier appeal, *Westminster City Council v Haywood* [1998] Ch.377, where the first jurisdictional issue was: 'One scheme or two?' Lord Justice Millett (reversing Robert Walker J at first instance) saw the substance (at p.409):

> "There is, in my judgment, no evidence that the two schemes were administered as one. The fact that the two monthly payments were paid together and charged in the first instance to the council's payroll is not evidence of this. That was purely a matter of administrative convenience."

Misguided readers have found this a curiously amusing way of finding two schemes, but it was good – ie for the employer.

10 *Royal Masonic Hospital v Pensions Ombudsman & Zarate* (20 December 2000, High Court, England - Rimer J) now reported at [2001] PLR 31

Occasionally, statutory provisions and policy appear as unclear to me as the merits are clear. But others disagree.

Miss Nenita Zarate had been employed by the Hospital for 20 years until she was made redundant in 1994 at the age of 48. On enquiring about her pension entitlement, she was told by the Hospital's Receiver that, since its scheme was unfunded, employees like her who left before their retirement age (even though involuntarily) had no pension entitlement whatsoever. This consequence was based upon a section 69(3) of the *Pension Schemes Act 1993* saying that the 'Protection For Early Leavers Chapter' –

> "…applies to any occupational pension scheme whose resources are derived in whole or in part from -
>
> payments being made or to be made by one or more employers to whom the scheme applies, being payments either –
>
> under an actual or contingent legal obligation;…" etc

It still seems to me reasonable to read this as simply assuming rather than requiring that all schemes have resources and as designed to exclude purely gratuitous or discretionary pension arrangements. It also seemed plausible to regard the pension promise itself as a resource within the section. My Determination, therefore, held that Miss Zarate did have the pension entitlement she deserved.

However, the learned judge first accepted (para.7) that: "The point is of considerable importance to [the Appellant-Hospital]. Miss Zarate's case is not an isolated one: there are many other former employees of the Hospital who are in a like position." Then he observed (para.11) that: "The language of section 69(3) appears to me to speak with unambiguous clarity and to point unanswerably to the interpretation…" – no preservation requirements for unfunded schemes. Every bit of reasoning on my behalf (not to mention Miss Zarate's for whom the point was *not* said to be of considerable importance) was entirely rejected, much of it as not understood.

Here one substantive point may be worth featuring. In the Determination I had stated: "For an unfunded scheme established under trust, its resources are (or include) the employer's promise to make payments to the scheme." As to this the judge said:

> "I do not follow how an unfunded scheme can be established under trust, since a trust requires trust property and in the case of an unfunded scheme such as this one there is none: there is merely the employer's contractual promise."

But a Chancery lawyer should understand that a *chose in action* (such as a contractual promise) is unquestionably capable of constituting trust property (see eg *Don King Productions Inc v Warren* [2000] Ch 291). Maybe Rimer nodded.

11 *Marsh & McLennan Companies UK Ltd v Pensions Ombudsman & Another* (23 February 2001, High Court, England - Rimer J) reported at [2001] PLR 51

Aka *Williamson's GMP* case, this has caused continuing consternation. My Determination (reported at [2000] PLR 117) had concluded with a deceptively straightforward direction:

> "The Trustee and the Holding Company shall, as soon as reasonably practicable, ensure that GMPs are equalised in accordance with the equal treatment rule of section 62 of the 1995 Act."

This apparently inconvenient conclusion was completely consistent with Parliament's intention as evidenced by the speech in the House of Lords' debate about the section (when still just a clause in the Bill) made by the relevant Minister, Lord Mackay of Ardbrecknish (who by sad coincidence died on the eve of Rimer J's judgment).

Although theoretically enforceable in the County Court (section 151(4) of the *Pension Schemes Act 1993*), realistically actual enforcement of the direction cannot seriously have been contemplated. My expectation was that it would be taken as a pronouncement prompting serious discussion within the pensions industry of *how* rather than *whether* to comply with section 62 of the *Pensions Act 1995*. Indeed, to my knowledge, there are schemes which had already duly equalised GMPs (eg Tate & Lyle's) but there was more than one way of so doing. Nevertheless, the employer and also the trustees wished to avoid the inconvenience and so appealed.

However, the appeal merely secured provisional avoidance of compliance with section 62 (but definitely not of discussion) without clarifying the legal position. The learned judge quashed the direction for want of jurisdiction and expressly decided nothing else.

The jurisdiction point was disturbing. Because other scheme members were affected, Rimer J purportedly applied the decision in *Edge v Pensions Ombudsman* [2000] Ch 602 CA (see comment as to unsatisfactory aspects in my Annual Report 1999-2000 pp.56-60). He seemed not to realise that that decision did not deprive me of jurisdiction in such cases but left it a matter for the exercise of my discretion which could not properly be fettered by *obiter* judicial utterances. Here, I had exercised my discretion to investigate and determine Mr Williamson's dispute generally on the basis that other members could not be affected *adversely*. This could hardly be said to be a perverse exercise in that no reasonable ombudsman could have done the same, and indeed this was not said.

Nevertheless the learned judge was persuaded to believe that there might have been numerous fellow members desiring to submit representations against the equalisation of GMPs. This was a belief never substantiated by the identification of any such member, not even a witness statement being produced to dispel suspicions about figments of imagination. Further, the representations envisaged by his lordship (largely as to employees not wishing employers to suffer the expense to the scheme of equalisation) were not only fanciful but also wholly immaterial to the determination of this dispute of law.

Nor did Rimer J seem to realise that, in so far as the *Edge* decision depended on judicial inferences about Parliament's intention, subsequent legislation had made explicit Parliament's actual intention that there should be jurisdiction in these cases. In particular the extensions of jurisdiction by the *Pensions Act 1995* (post the *Edge* facts) and the procedural provisions of the *Child Support, Pensions and Social Security Act 2000* ('CSPSSA', reversing the *Edge* decision) render completely untenable the learned judge's assertion that I "embarked on an inquiry which cannot have been intended by the legislation under which [I] was acting."

After this, Rimer J proceeded to do what, it had been submitted for the Appellants, no court would do (see para. 49) and embarked on a consideration of the substantive point without any representations from other members or from Mr Williamson as to new arguments raised on the appeal. However, since he reached no decisive conclusions, this may not be of concern beyond the expensive time spent (Jonathan Sumption QC was for one of the Appellants whose bill of costs exceeded £1/4m). As I understand the extensive *obiter* re merits, my less expensive Counsel (Brian Langstaff QC) won – or, at least, did not lose - the argument (not worth rehearsing here except to note the absence of any mention of Lord Mackay's speech), but my direction was condemned as "imprecise and

uncertain". This was because, unlike a court, I had not made it clear exactly what had to be done (para. 93). Helpfully, however, the learned judge added:

> "As it seems to me, he ought to have gone no further than at most to make a determination that the trustee and employer must have regard to the potentially discriminatory effects of the GMP regulations in ensuring that pension payments to members were not discriminatory. How the trustee and employer might then go about coping with the problem would be a matter for them to consider and decide. If they found it an insoluble one, they could always apply to the court for directions."

Accordingly, next time a GMP equalisation dispute is referred to my Office, by another member if not by Mr Williamson himself, and investigated by virtue of the representative procedures prescribed by the Regulations made under section 54 of the CSPSSA 2000, we may gratefully adopt this guidance as to an appropriate direction. No doubt readers will regard it as perfectly precise and certain and will know exactly what to do!

By way of a footnote, "A Critical Analysis" of this decision produced by Sean Jones of Counsel appears in *Pension Lawyer* (the Journal of the Association of Pension Lawyers) Special Edition (No.88) May 2001 at pages 16-20. The conclusion expressed (at page 20) is –

> "The *Williamson* decision does not resolve the long-standing controversy as to whether or not trustees have to eliminate the effects of the discriminatory aspects of the GMP rules. However, insofar as the *obiter* passages indicate the approach that a court is likely to take, trustees and employers should be prepared to take steps immediately and not simply to insist on waiting to see how matters ultimately turn out."

12 *Save & Prosper Group Ltd & Anor. v Scoot Ltd* (29 March 2001, High Court, England - Hart J)*

Farcical confusion over nomenclature featured prominently here. The appellant called '*& Anor.*' was actually *Save & Prosper Insurance Ltd* which was the trustee of a pension scheme consisting of a policy issued by *Save & Prosper Pensions Ltd*. For the purposes of the appeal the *Save & Prosper* people indulged in much unimpressive singing and dancing of the 'We're all different legal entities' kind. On top of this *Scoot*, the complaining employer, had changed its name from *Loot* and was referred to as *Loot*, not *Scoot*, throughout the judgment. Observers might think this an Ortonesque performance more suited to the theatre than to court.

The basis of the case was in contrast essentially straightforward. *Save & Prosper Investment* as trustee was obliged by the scheme's rules to "invest the contributions received into the Scheme only as premiums under Policies issued by [*Save & Prosper Pensions*]". Accordingly it invested in a policy called PRA 89. Then *Save & Prosper Pensions* introduced a better policy called PRA 95 (lower charges). But no-one informed *Loot*/*Scoot* and no change in investment occurred for subsequent contributions.

Remembering the now notorious bank 'scam' of introducing higher rate accounts but neglecting to tell existing depositors in case they changed their accounts, I had little difficulty in finding maladministration on the part of *Save & Prosper Insurance* as well also as *Save & Prosper Group* as manager of the scheme. However, and arguably wrongly, I made

no directions whatsoever against any of the *Save & Prosper* entities because the complainant, *Loot/Scoot*, as employer had suffered no financial loss – it was a money purchase scheme under which, naturally, the members bore the risks. Nevertheless, the *Save & Prosper* entities both appealed, presumably in defence of their inalienable, if not inhuman, right to deal dubiously with savers so that shareholders may prosper.

Their bill of costs was revealed as being "over £70,000" (but this was held to be "disproportionate and unreasonable" and they were only allowed to recover £11,250). As to this bill before reduction, Counsel for *Loot/Scoot* intimated that had some warning been given, his clients would have given serious consideration to throwing their hands in. Hart J perceptively observed:

> "That is a consideration which has a number of implications. One implication is that an appellant from the Ombudsman may be able, by the expenditure of a large sum of money and by its ability to invoke the court's jurisdiction over costs, so to terrorise a respondent as to procure concessions from it in relation to the determination. That would clearly be a highly undesirable practice to encourage. As I say, in this case, that is in no way suggested; indeed, the complaint is that no warning was given at all."

Nevertheless, the respondent must have had an inkling of the likely costs bill from the fact that the appellants instructed Linklaters who instructed a QC. And, in fact, a concession had been made before the hearing by *Scoot/Loot* that *Save & Prosper Group* was only concerned with marketing and so was not a 'manager' within my jurisdiction. His lordship remarked, despite the absence of argument, that "This concession was, I am satisfied, rightly made." As we were not participating, we were not consulted (nor liable for any costs).

However, what all this expenditure purchased as a judgment on the one issue of substance should surely not be seen as satisfactory by anyone involved. The learned judge was unable to construe the rule about investing only in *Save & Prosper* policies as supporting either side's submissions: for *Save & Prosper* it had been submitted (artificially?) that this restricted investment to the policy originally chosen; against *Save & Prosper* it was submitted (in effect and less artificially!) that 'policies' meant policies in the plural which comprehended any policy issued by *Save & Prosper* and that within this narrow range of authorised investments the ordinary trustee duties applied. Notwithstanding his construction difficulties, his lordship favoured the *Save & Prosper* submission. He did so by hanging his judgment on a peculiarly loose peg:

> "I find myself driven back simply to the finding made by the Ombudsman in para.9(d) of the determination where he records (and does not subsequently challenge) what his investigator has been told by [Save & Prosper Group], namely:
>
> 'Individual members joining the Scheme are given benefit illustrations and so know the terms of the contract before they decide to join. The employer is responsible for choosing the contract to be offered.'"

Let it be noted that -

- this does not purport to be a finding by me but merely repeats a statement by a non-party (conceded, although not by me, not within my jurisdiction);

- it was implicitly contradicted by my subsequent conclusions as to the trustee's responsibility (which was what the appeal was about);

- at most it was a finding of *fact* (ie it was a statement of practice) whereas the question for the judge to decide was one of *law* – who carried the legal responsibility for choosing investments?

Nevertheless the learned judge concluded with a classic *non sequitur*:

> "I can see no basis ***in trust law*** for saying that [*Save & Prosper Insurance*] as the intended trustee in relation to those contributions had a duty to inform the employer that another policy might also be considered." (Emphasis supplied).

But the complaint was about *Save & Prosper Insurance* as an actual trustee and my Determination was not based upon trust law but upon a finding of ***maladministration***. Ample considered authority for this crucial distinction was referred to in my Annual Report 1998-99 (at pp.52-54) but Hart J appears not to have received the message. That this was particularly regrettable in the present case emerges from his lordship's belated recognition of reality in continuing:

> "That is not to say that *Loot* did not have cause to be dissatisfied by the fact that it never was informed of the available options. Any purchaser of any financial product will be understandably angry if he subsequently discovers that the provider of the product would have been willing, if asked, to sell a more attractive product."

Nevertheless, the learned judge apparently attributed any blame to the original salesman who had since become an independent financial adviser, although giving no advice to *Scoot/Loot*. So he still held that I had been "wrong in law" in determining that one *Save & Prosper* entity was under a duty to members to inform the employer, *Scoot/Loot*, that a new – better – policy was available from another *Save & Prosper* entity.

This decision on substance meant that Hart J had no need to address a procedural ground of appeal, but he did and here common-sense prevailed. Briefly, because of the nomenclature confusion, *Save & Prosper Insurance* were only named as a respondent at our preliminary determination stage. This was held to involve no formal defect and no unfairness since a full opportunity had been afforded to respond to all points. Indeed the complaint on appeal was not about unmade submissions but about being "entitled as a matter of legitimate expectation" to receive for comment a *second* preliminary determination. The complaint – of maladministration rather than law? – was rejected by the judge:

> "That procedure of issuing preliminary determinations is itself not one that is mandated by the relevant regulations and it is a matter for judgment by the Ombudsman in the final analysis as to the extent to which parties are given an opportunity to come back with further submissions in relation to his provisional conclusions."

Although helpful in this secondary procedural aspect (see also Appeal No.2 above - *Blake*), generally this was another disappointing decision in that the learned judge strictly restricted himself to legal duties evidently without appreciating that the issue for me is 'injustice caused by maladministration'. However, the real mystery is why the *Save & Prosper* entities thought the appeal worthwhile: no directions had been made against them and the case depended on its own facts which might be found differently in the event of a future complaint. Otherwise, the appeal further exposed for adverse publicity what might be regarded as unacceptably sharp practice by *Save & Prosper*.

13 *National Grid v Mayes & Others* (4 April 2001, House of Lords) now reported at [2001] 1WLR 864*

Heard within but decided without the reporting year, this case involved vast amounts of money (£47m-£2bn) but very little else of legal or other interest. Their [House of] Lordships unanimously reversed the unanimous decision of the Court of Appeal which had, in effect, restored my Determination which had differed from my investigator's draft but then been quashed at first instance (see running commentary in Annual Reports 1998-99 at pp.55-57 and 1997-98 at pp.39-40). However, the reasoning at this highest judicial level involved such a significant clarification of the issue that lower levels should be leap-frogged.

Although no fewer than nine QCs were involved in the four day hearing, essentially the case concerned the proper construction of only five words: "*make arrangements…to deal with*". This is what the employer had to do in relation to any actuarial surplus. The submission made to me was that this was a 'free-standing' provision which would empower the employer, in effect, to require (re)payment of the surplus to it. In fact, only part of the surplus had been allocated by the employer for its own benefit, in particular to discharge its liabilities due to the scheme to pay for early retirements because of redundancy. I determined that this discharge amounted to paying the employer the equivalent sum which was not allowed by the provision and which also breached the employer's duty of good faith.

With regard to this last aspect, as Lord Hoffman put it (giving the leading 'speech' in the Lords, at para.11):

> "The judge held that the Ombudsman had interpreted the implied duty of good faith too strictly. The employer was not a trustee. He [*sic*] was entitled to act in his own interests provided that he had regard to the reasonable expectations of the members. The arrangements satisfied that requirement. On this point the members now accept that the judge was right."

The premature retirement of Lord Browne-Wilkinson has deprived us of a reasonable expectation that he would seize an opportunity to define or refine what he meant in *Imperial Tobacco Group Pension Trust v Imperial Tobacco Ltd* [1991] 1 WLR 589.

With regard to the primary aspect, his Lordship Hoffman concluded (at para.25):

> "I therefore agree with the tentative view of the Court of Appeal that the release of an accrued debt owed by the employer is not a payment to the employer out of the moneys of the fund. This is contrary to the opinion of Vinelott J in *British Coal Corporation v British Coal Staff Superannuation Scheme Trustees Ltd* [1994] ICR 537, a decision which was very properly followed by the Ombudsman."

Lord Scott in his concise speech also explicitly stated that he regarded the *British Coal* case as wrongly decided. So was this litigation all Vinelott J's fault? No, it was down to the way counsel (Edward Nugee QC) had argued the case in front of him, not drawing his attention to the fiscal background but presenting him instead with an "ingeniously constructed balance sheet" as to the economic effect – "Not surprisingly he rejected the submission" (per Lord Hoffman, at para.25).

Then Lord Hoffman continued (at para.26):

> "This conclusion means that whether the Ombudsman was right in thinking that a prohibition on payments to the employer was a fundamental principle of the scheme or whether the Court of Appeal was right in thinking that the arrangements could be effected only by amendment, the employers had, one way or another, power to do what they did. The arrangements did not infringe any express or implied restriction on the powers of the employer. The only question is the formalities which should have been adopted."

The answer at this point was that substance prevailed over form: the arrangements were valid without relying on any amendment. Incidentally, Lord Scott confirmed, in effect, that I was right (at para.78(5)):

> "Arrangements made under [the quoted provision] cannot take the form of a payment out of the pension fund to the employer. Absent an amendment to the scheme, the trustees could not justify making such a payment. And an amendment authorising such a payment would be barred by clause 41(2)(b)."

However, the release of an employer's accrued debt is all right because it does not constitute a payment to him. Readers remaining unmoved by the fiscal background may, perhaps, regard this final result as form prevailing over substance.

CHAPTER 5: Management

In what has been a relatively quiet year in management terms, the most important development has been our new website (www.pensions-ombudsman.org.uk). I have not infrequently grumbled about the poor IT support that my office receives from the organisations which DSS (as was) require us to use. For website development, however, we were able to go outside, to a small private sector business. The difference was marked as well as refreshing, and the results entirely satisfactory. Most of the work was done towards the end of the year under report, with the site going live in April 2001.

Staff turnover has, as in previous years, been pleasingly low, with only one change right at the end of the year.

Unsurprisingly (since I am obliged to make decisions which are almost invariably unsatisfactory to at least one person) I receive complaints about the way that we deal with matters. Provided it is a complaint that does not go to a decision, for example, that a member of my staff has been rude, or that there has been excessive delay, I have a procedure to deal with it. (Details are in the office's Charter, reproduced as Appendix 4). In the year under report five such complaints were logged, none of which were upheld. My office also comes within the jurisdiction of the Parliamentary Ombudsman, but I am not aware of any complaints that reached him.

Financially we were within our budget, in fact our spending of just over £1.4m was £2,000 less than last year. More detail is included at Appendix 4.

Pensions Ombudsman's Jurisdiction after 1/12/2000

Type of scheme	Referrer	Possible reference	Possible respondents	First effective date of jurisdiction	Current source
Occupational pension schemes	Actual or Potential Beneficiary, or Appropriate person	complaint alleging injustice or dispute	Trustees Managers Employer	6/4/1991	s146(1)(a)&(c) & s146(3) PSA93
	Actual or Potential Beneficiary, or Appropriate person	complaint alleging injustice	Administrator	1/7/1996	s146(1)(a) PSA93 and Reg 2 of POPS(PO)R 1996
	Employer	complaint or dispute	Trustees or managers in relation to same scheme	6/4/1997	s146(1)(b)(i) and (d)(i) of PSA93
	Manager	complaint dispute complaint or dispute	Employer in relation to same scheme Employer in relation to same scheme Trustees or managers of different scheme	6/4/1997 1/12/2000 6/4/1997	s146(1)(b)(i) of PSA93 s146(1)(d)(i) of PSA93 s146(1)(b)(ii) and (d)(ii) of PSA93
	Trustees	complaint dispute complaint or dispute	Employer in relation to same scheme Employer in relation to same scheme Trustees or managers of different scheme	6/4/1997 1/12/2000 6/4/1997	s146(1)(b)(i) of PSA93 s146(1)(d)(i) of PSA93 s146(1)(b)(ii) and (d)(ii) of PSA93
	Trustees ((a) not Statutory Independent Trustees; (b) at least half of trustees)	dispute	Other trustees of same scheme	1/12/2000	s146(1)(e) of PSA93
	Sole trustee	question concerning carrying out of its function		1/12/2000	s146(1)(g) of PSA93
	Statutory Independent Trustee or Opra appointed replacements for Statutory Independent Trustee	complaint, or dispute relating to time when insolvency provisions apply	Other trustees of same scheme who are/were not Statutory Independent Trustees or Opra replacements therefor	1/12/2000	s146(1)(ba)&(f) of PSA93
Personal pension schemes	Actual or Potential Beneficiary, or Appropriate person	complaint alleging injustice or dispute if not in PIAOB's jurisdiction	Trustees or managers	6/4/1991	s146(1)(a)&(c) & s146(3) PSA93 & MoU with PIAOB
	Actual or Potential Beneficiary, or Appropriate person	complaint alleging injustice or dispute	Employer	1/12/2000	s146(1)(a)&(c) & s146(3) PSA93

Definitions		First effective date	Current source
Actual or Potential Beneficiary	A member (which includes (a) a person who is or has been in pensionable service or treated as in pensionable service under s 181(4) of PSA93 or s 176(3) of PS(NI)A93 and (b) from 12/1/1998 a person who is or has been entitled to payment of benefits)	6/4/1991 except (b) from 12/1/1998	ss146(7)(a) and 147(8) PSA93 and Reg 1A of POPS(PO)R 1996
	The widow, widower or surviving dependant of a deceased member	6/4/1991	s146(7)(b) PSA93
	A person entitled to a pension credit (on divorce) from the scheme	1/12/2000	s146(7)(ba) PSA93
	A person claiming to be a member or a widow, widower or surviving dependant of a member (where the complaint or dispute relates to that claim)	6/4/1991	s146(7)(c)(i)PSA93
	A person claiming to be entitled to a pension credit (on divorce) from the scheme (where the complaint or dispute relates to that claim)	1/12/2000	s146(7)(c)(i)PSA93
	A person claiming to be entitled to become a member (where the complaint or dispute relates to that claim)	6/4/1991	s146(7)(c)(ii)PSA93
Appropriate person	The personal representatives of an actual or potential beneficiary who has died	6/4/1991	s147(2)(a) PSA93
	A member of an actual or potential beneficiary's family or some body or individual suitable to represent him or her where the actual or potential beneficiary is a minor or otherwise unable to act for himself or herself	6/4/1991	s147(2)(b) PSA93
Trustees	Includes past or present trustees (if respondents)		*Wild v Smith*
Managers	Take as generally including insurer of fully insured personal or occupational scheme also includes administrator of public service scheme		*Century v PO* s146(8) PSA93
Employer	Includes an employer who is or has been an employer in relation to the scheme or treated as an employer in relation to the scheme under s 181(2) of PSA93 or s 176(2) of PS(NI)A93 for the purposes of those Acts	6/4/1991	s146(8) PSA93
Statutory Independent Trustee	A trustee appointed by an insolvency practitioner or official receiver under s23(1)(b) of PA95	1/12/2000	s146(8) PSA93
Administrator	A person concerned with the administration of the scheme who is not trustee, manager or employer	1/7/1996	Reg 1(2) POPS(PO)R 1996

Abbreviations: PSA93 - *Pension Schemes Act 1993*, POPS(PO)R 1996 – *The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996,* PS(NI)A93 - *Pension Schemes (Northern Ireland) Act 1993*, PA95 - *Pensions Act 1995*

Appendix 2 - Staff in post at time of publication

Pensions Ombudsman	Dr Julian Farrand QC*
Personal Secretary	Jean Heaney
Casework Director	Tony King

Special Legal Adviser	Sarah Jacobs*†	**Legal Adviser and Investigator**	Susan Jones*
Legal Adviser and Investigator	Claire Ryan*	**"In-house" Litigation Solicitor (retained)**	John Yolland*
Team Leader, Investigations	Lesley Stead*†	**Team Leader, Applications & Enquiries**	Peter O'Brien
Investigators	Tom Bick Marc Coe Graham Evans Rod Joyce Tony Krishna Caroline Leal Patrick Mills Geoff Naldrett	**Applications & Enquiries Officers**	Nelson Kumaravel Carl Monk Vasanthy Vijayaratna

Administrator	Mike Lydon
Office Supervisor	Peter Watkins
Administrative Officers	Leroy Hanson Kai Lau Mariam Zaheer

* Solicitor

† Part-time

Appendix 3 - Expenditure

	2000/2001 £'000	1999/2000 £'000
Staff	952	(899)
Accommodation	132	(119)
Telecoms/Computers	20	(47)
Printing/Stationery/Postages	48	(57)
Legal Costs	117	(181)
Other	110	(89)
Total Running Costs	1,379	(1,392)
Capital Expenses	24	(13)
Total Expenditure	1,403	(1,405)

There were no legal costs recovered in the year (1999/2000, £13,410)

Appendix 4 - Charter

Our role is to provide an impartial, efficient and effective method of resolving complaints and disputes concerning pension arrangements referred to our office under our governing legislation. We will write to you wherever possible in plain English although sometimes we may need to refer to legislation or to court judgments. We will deal courteously and constructively with all people having contact with the office.

If you are making an initial enquiry or complaint, we will

- acknowledge it within two working days of receipt
- advise you what to do if we cannot deal with the matter

If a complaint or dispute is accepted for investigation, we will

- process it as quickly as possible (our target is that the average time of all investigations from application to final decision will not be more than 12 months)
- review the file at least monthly to minimise delays
- keep all parties informed of progress and, if delays cannot be avoided, tell you and indicate the likely timescale

You can telephone us

- on normal working days between 9 am and 5 pm, and outside these hours you may leave a message on our answer phone which we will deal with on the next working day
- we will answer the telephone promptly, usually within 5 rings

If you are unhappy with our service

- please let the person you are dealing with know

If you wish to complain formally about our service (but not about decisions reached), please write to:

The Casework Director,
Office of the Pensions Ombudsman,
11 Belgrave Road,
London,
SW1V 1RB

We will acknowledge your letter within two working days unless we can provide a full reply within four working days. We will normally reply in full within seven working days. If we cannot do so, we will explain why, and when we expect to be able to issue a full reply.

If you remain unhappy about our service you can ask a Member of Parliament to refer the matter to the Parliamentary Ombudsman. He may review the way that the case was handled but will not consider formal decisions made by the Pensions Ombudsman or his staff.