Pensions
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Fear an Phobail um Pinsin

# Digest of Cases 2007

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OFFICE OF THE PENSIONS OMBUDSMAN

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MISSION STATEMENT

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

*This publication is available in large print format on request*

# INTRODUCTION

In presenting this Digest of Cases, I have decided to depart slightly from the pattern of previous Digests. I have decided to present together cases involving formal Determinations which I have made and cases which were resolved as a result of mediation or intervention. Not every complaint has to go to determination, and early intervention can sometimes help to prevent the escalation of a difficulty.

The details of the 28 cases given in this edition are in general somewhat briefer than those contained in previous Digests. The main purpose of the Digest is to give those involved in administering pension schemes and PRSAs an indication of the kinds of problem represented by the complaints made to my Office, in the hope that they can learn from determinations made or compromises reached in the resolution of these problems; and to give the public at large a picture of what we do.

Recognising that many complaints are generic in their nature, in that the same old problems tend to crop up again and again, my Office is always pleased to discuss in principle the factors involved in any particular case, provided that that does not breach confidentiality or endanger privacy.

**Paul Kenny**
*Pensions Ombudsman*

June 2008

# SUMMARY OF DETERMINED AND MEDIATED CASES IN 2007

## APPLICATION OF LONG SERVICE INCREMENT TO PENSION

The Complainant claimed that a long service increment granted in 1999 as part of a National Agreement was not applied to his pension. The increment was not applied to his pension on the basis that his completed service prior to his normal retirement date was 16 days short of the minimum service required to qualify him for the increase to his pension.

The Complainant ceased working as an Ambulance Supervisor in June 1985. His normal retirement date in accordance with the Local Government Superannuation Scheme was 12th February 1985. In 1999, as part of a National Agreement, two Long Service Increments were applied to existing pensioners. The pensioner complained about the failure of his employer to apply the increment appropriate to his service in his grade.

The Department of Health and Children confirmed that when the Complainant retired from his employment at age 65 he was at the maximum of the Grade 6 pay scale. As a replacement was not available at that time he was asked to remain on until a replacement could be found. He stayed on in a full time temporary capacity until 24th June 1985. He had received his lump sum in February 1985, and remained on full salary until 24th June 1985, when he was paid his pension, which had been abated in the meantime.

According to the Department the Complainant was 2 years and 349 days at the maximum of the Grade 6 scale, 16 days short of the 3 years required to qualify for the Grade 6 Long Service Increment, when he reached his normal retirement age.

The Complainant had argued that he was never made aware that his employment contract changed at 12th March 1985 from a permanent position to that of a temporary position. He also made the point that his income did not change for the period of temporary employment. The HSE indicated that the Complainant was required to retire at age 65 in accordance with the provisions of the Superannuation Scheme and service after retirement date is not reckonable for pension purposes. They enclosed an extract from the Health Act 1970 which specifically provides that a permanent officer ceases to be such on attaining age 65.

While the Complainant may not have been made aware that the nature of his employment contract changed at the date of his normal retirement, it is clear that service after his retirement date was regarded as temporary. In addition it is clear that all calculations relating to his pension and lump sum were based on service to 12th February 1985 and the Complainant was paid his lump sum in February 1985.

Despite the continuation of employment after normal retirement date, service after this date could not have been taken into account in the benefits granted at his normal retirement date. In order to be entitled to the long service increment in his pension, he would have to have completed the minimum 3 years' service at the top of the pay scale prior to his normal retirement date. It was unfortunate that he was 16 days short of this minimum service requirement.

The complaint could not be upheld.

## CONDUCT OF A WINDING-UP – ALLEGATIONS OF TRUSTEE MISCONDUCT

This complaint was made separately by a number of different individuals. While each member had his own personal complaints, the major issues were shared by all. These were:

- The accrued benefits in respect of past service had been provided in the form of inadequate transfer values contrary to the Trust Deed and Rules, which require the benefits at discontinuance to be provided in annuity form. The amounts of the transfer values offered to members did not match the preserved benefits provided for by the Pensions Act and were not likely to secure the preserved benefit entitlements at Normal Retirement Date, particularly in the case of Members nearing retirement (i.e., the transfer value would not reflect the cost of buying the pension by means of an annuity on the open market).

- Breach of Trust – Invalidity of Trustees' decision to wind up the Defined Benefit Pension Scheme through failure to observe the prescribed requirements of the Trust Deed and Rules.

- Wilful Default and Negligence on the part of the Trustees in failing to secure the benefits to which members were entitled at the date of the Resolution to wind up the Defined Benefit Scheme.

- Maladministration by the Trustees of the Defined Benefits Scheme resulting in pecuniary loss to members.

The facts were that a company had decided to wind up its defined benefit (DB) pension scheme and replace it with a defined contribution scheme. The DB scheme did not meet the solvency requirements of the Pensions Act. In order to effect the change, the company decided that its directors, who had been the scheme Trustees, would resign and be replaced by a professional Trustee company. It further decided that, prior to the formal winding-up resolution, the benefits of the directors would be transferred out, with the transfer values reduced to reflect the solvency position.

When that was done, the company was prepared to inject enough money (estimated at €1 million-plus) to enable the scheme to meet the solvency standard for the rest of the members, but it wished to "buy out" the period of six months' notice required under the trust deed for a "voluntary" winding-up. Members would be credited with this period of service in calculating their benefits.

My investigation showed that it was clear that the transfer values calculated under the Pensions Act solvency requirements would be less than the amounts that would be needed if the entitlements of members were to be guaranteed. However, the members had raised other issues, including the fact that the scheme had "slid" from apparent surplus in 2002 to deficit in 2005 (though this was a common enough occurrence during that period). Essentially, however, they requested this Office to find that the conduct of the winding-up had been unlawful in terms of the trusts of the scheme, and wanted the employer to be compelled to inject enough money into the fund to buy out benefits on a guaranteed basis.

There was a great deal of correspondence in the course of this extensive investigation, and several preliminary issues were disposed of. These included the legality of the appointment of the new Trustees, allegations of breach of the Pensions Act Trustee Regulations, and breach of trust by the new Trustees in agreeing to the early termination of the scheme. In this last case, the Trustees had insisted on an amending deed, which removed the requirement for six months' notice, but also conferred on the employer the specific obligation to make good any shortfall in the assets below the level dictated by the solvency requirements of the Pensions Act. It emerged that the existence of this amending deed was not known to the members and this brought further accusations of breach of trust, etc. The Trustees acknowledged that they had failed to notify the members as required by law, but said that this was inadvertent and they, themselves, had had nothing to gain from it.

I issued a Preliminary View on the matter, and the members requested an extension of time in which to consider this. That was followed by a further very lengthy submission and extensive legal argument, further complaints and extensions to matters already complained of. Submissions were also received on behalf of the Trustees and the employer. When I had considered these, I made my Final Determination, which was to reject the complaints.

**This Determination is the subject of an appeal to the High Court.**

# CONSTRUCTION INDUSTRY CASES

## CONSTRUCTION WORKERS' PENSION SCHEME – DEATH BENEFIT NOT COVERED

In general in these reports, I do not identify the parties involved in a case, though it is inevitable that respondents can sometimes be identified by details of a Complainant's occupation. In this particular case, I have decided to depart from that self-imposed restraint.

I made a determination against Jackman Developments Limited and its directors Mr Patrick Jackman Snr and Mr Patrick Jackman Jr on 8th March 2007 directing that a payment of €63,500 be made to the mother of a deceased scheme member within one month of the date of the Determination. In the course of the determination I recorded the fact that the company concerned, and its directors, had made a dishonest attempt to defraud the pension scheme into paying the mortality benefit, for which it was not liable because the relevant contributions had not been made by Jackman Developments Limited.

I am sorry to say that my Determination was not honoured and enforcement proceedings are now in train through the Circuit Court. Messrs Jackman have forfeited their right to anonymity by their conduct.

I wish all concerned to know that determinations by this office are to be taken seriously, and whatever measures are needed will be taken, to ensure that they are taken seriously.

## CONSTRUCTION CASE 2 - AN OBSTRUCTIVE EMPLOYER

In another construction industry case, a determination was made against an employer who had employed the Complainant, first in its capacity as a sole trader, then as a limited company. The employer made numerous attempts through its solicitor to obstruct and frustrate the investigation, and various misleading information was given to my office regarding the nature of the business being conducted by the employer, which claimed at one point to have been an agricultural contractor rather than a building firm.

The same employer had previously told a Rights Commissioner that a number of employees were not employed by his firm. This was technically correct – he omitted to say that they were employed by him in his personal capacity as a sole trader.

In the event, it was information given by the solicitor in the course of attempts to frustrate my investigation that enabled the case to be solved. The solicitor was subsequently dismissed by the employer concerned. The award in this case was more than €20,000 for the individual who complained. The employer's legal bill may have been somewhere in the same region, because he had gone to significant lengths to try to frustrate the investigation.

My fear is that there may be many more employees in a similar position to this Complainant – there were at one stage 35 people on the payroll of this company. The employer was certainly prepared to go to inordinate lengths to prevent me from investigating the complaint.

## NON-REGISTRATION OF EMPLOYEE

This Complainant had alleged maladministration of the Construction Federation Operatives Pension Scheme by his employer in that he failed to register him in the scheme on commencement of his employment and failed to pay the contributions due for the full period of his employment.

The investigation found that the Complainant was an eligible employee under the Scheme, had been in employment as claimed and his employer had failed to register him with the Scheme or make the necessary contributions. I found in favour of the Complainant and required the employer to make good the shortfall in contributions.

This case is typical of a number of such cases in 2007.

## MORTALITY BENEFIT

The Complainant had alleged maladministration in that her deceased son's employer did not register him as a member of the Construction Federation Operatives' Pension Scheme and, as a result of this, no mortality benefit was payable from the Scheme on the death of her son.

The investigation found that the Complainant's son was an eligible employee under the Scheme, had been in employment as claimed and his employer had failed to register him with the Scheme or make the necessary contributions. I found in favour of the Complainant and required the employer to pay an amount equivalent to the death benefit payable under the Scheme.

Working in the construction industry carries its own inherent risks. There were 18 deaths by accident in the industry in 2007. Obviously, other construction workers died of natural causes, in traffic accidents and by suicide. I do not understand why employers seem to be willing to take the risk that an employee might die with no mortality cover in place. If this happens, the eventual cost to the employer is a large multiple of what they would have paid in contributions if they had treated their workers properly. It is a matter of some concern to me that auditors to these companies seem to see outstanding contributions simply as just another debt, without thought for the downstream consequences of failure to pay that particular type of debt. It is bad risk management. They would not dream of allowing other insurances to go unpaid, but the employer may be at more risk from unpaid contributions than from other perils.

In another case, the Complainant had alleged maladministration in that her deceased husband's employer did not register him as a member of the Construction Federation Operatives' Pension Scheme and, as a result, no death benefit was payable from the Scheme on the death of her husband.

However, of even more concern to me is that the most vulnerable of all in these matters, the dependents who have been deprived of usually the main breadwinner, are put at immense risk.

The investigation found that the Complainant's husband was an eligible employee under the Scheme, had been in employment as claimed and his employer had failed to register him with the Scheme or make the necessary contributions. Early in the investigation the employer, who was a family friend, accepted his responsibility on the matter. Following the intervention of my Office, an agreement was entered into for staged payments, which was acceptable to both sides.

## COORDINATED SERVICE – REPAYMENT OF MARRIAGE GRATUITY

The Complainant in this case had received a marriage gratuity of £1,862 (€2,364.25) when she resigned (compulsorily) from a public sector employer in1973. She was later re-employed by that employer on a part-time basis and eventually joined the Pension Scheme in 2003 on being made a permanent member of staff. As a person appointed to a full-time position after 6th April 1995, she paid Class A PRSI, and was pensionable on an integrated or co-ordinated basis.

The Scheme rules provide for a female member who received a marriage gratuity and is re-employed to reckon her former service by repayment of payment she received on originally leaving service plus compound interest at a rate to be decided by the Actuary, and an amount equal to the gratuity she received on marriage, but based on the up-rated value of the salary on which this benefit was calculated.

Such arrangements are typical in the public sector. The Complainant opted to reckon her pre-marriage service and repaid the due amount, which gained her a credit of 15.06 years. Under the scheme rules this service, which was originally pensioned on an un-coordinated basis, must now be reckoned on a co-ordinated basis. The Complainant argued that this was unfair and inequitable as the original contributions were made on a full salary basis (i.e. no adjustment for coordination). She also contended that she had been advised that the resulting benefit from repaying the marriage gratuity would be paid out on a "pre-1995" (uncoordinated) basis, although there was no evidence of this on file.

The key issue here is that when a person opts to reckon pre-marriage service they essentially buy back a number of *years of service* but not *of pension entitlement.* This is a principle which applies across the public service with regard to the buyback of service. The service bought back falls to be reckoned in accordance with the rules of the particular scheme. In this case persons appointed on or after the 6th April 1995 must pay the full rate of PRSI and their entitlements are coordinated with their Social Welfare entitlements. It was pointed out in the determination under the Internal Disputes Resolution procedure the service which the Complainant bought back must be amalgamated with her benefits under the post-95 Scheme terms and cannot be reckoned as a separate benefit.

Following my investigation I concluded that the Superannuation Scheme regulations had been applied correctly in this case. Under Section 139(2) of the Pensions Act the Pensions Ombudsman is not entitled to make a determination which requires an amendment to the rules of a scheme and in this case is not entitled to overturn the determination that you received under the Internal Disputes Resolution procedure. Under these circumstances I had no option but to disallow this complaint.

## GENERAL COMMENT:

*The repayment with interest of a marriage gratuity means buying back previous service which had been sacrificed in order to receive the gratuity – in many cases, preservation of benefits would not have been available as an option at the time. Things may be slightly different for a person who left an employment with preserved benefits and returns later on to resume employment as a "new entrant". If the preserved benefit was not coordinated, he or she will generally have the option of reckoning the old service as non-coordinated and the new service as coordinated. The old service will, of course, be pensionable by reference to the grade formerly held, while the new service will be pensioned on the person's current grade. Therefore, the question as to which method of dealing with the service is more advantageous may depend on whether the person has been promoted since his or her return. Superannuation personnel will usually work out both alternatives and notify the member at retirement as to which one is better.*

## DEFINED CONTRIBUTION /"TARGET" BENEFIT NOT REVIEWED

The Complainant in this case requested that I follow up his case with the Pensions Board. He explained that he had understood at the time when he joined the scheme that his Pension Benefit was on a Defined Benefit Basis, being 60% of his salary on retirement. He claimed that his colleague, who had a similar entitlement, retired in 2002 with precisely that entitlement. He further maintained that another colleague, who joined the company after him, had received in writing a pension promise of 60%.

It appeared that the rules of the scheme were changed after he joined it, from a Defined Benefit Scheme to a Defined Contribution Scheme. He stated that this change was not agreed or consented to by him "which according to the rules should have been the case". He said that scheme rules had changed again (no dates specified). He also mentioned that the Trustees of the Scheme were changed in 2005 without his agreement or consent.

Following much correspondence, the Pensions Board had made a Determination without an oral hearing that the scheme was a Defined Contribution Scheme. He wished to "strongly appeal this decision" and alleged that the Trustees were not acting in the best interests of the beneficiaries of the scheme. I advised that I cannot be an avenue of appeal against a decision of the Pensions Board, as this is outside my terms of reference; however, he might have had a basis for a complaint if an entitlement which he had was being dishonoured. Prior to investigation, however, the matter would have to be put to Internal Disputes Resolution (IDR).

The Trustees, after a long delay, issued a Notice of Determination, in which they rejected the Complainant's claim to a defined benefit pension, and pointed out that they were not party to any undertakings that might have been given outside the provisions of the scheme rules. They did concede that some errors had been made in notifying the Complainant of his death-in-service benefit. The Complainant rejected this finding and I accepted the complaint for investigation.

I had been supplied with a copy of the rules of the original scheme dating from the 1st June 1979 and it appeared that this was a Defined Benefit Scheme. However, it was also clear that this had been replaced in 1982 by a "target benefit" scheme [a defined contribution scheme which is intended, but not guaranteed, to deliver a certain level of benefit at retirement]. The booklet relating to the 1982 scheme specifically stated that "if you are included in an existing Retirement and Death in Service Benefit Scheme on 31st May 1979 you will have been given details of any special provisions which apply to you". This would seem to indicate that there were some persons who might have been given what the Trustees had referred to as "an undertaking… outside the rules of the scheme". However, the Complainant was not a member of the scheme in 1979 and it was therefore not clear that he would have been given any form of undertaking or promise "outside the rules of the scheme" in 1982 when changes were made.

Nevertheless, a Schedule of Benefits exists dated the 1st of June 1986, showing three staff employees, two of whom, including the Complainant, "will qualify for a pension amounting to 60% of salary" and the third, for "50% of salary". I also saw what appeared to be a letter of appointment [addressee's name deleted] from the employer 1992, offering an appointment for a trial period of 12 months, in which the following paragraph appears: "Pension benefits 60% of salary, Death in Service Benefit, four times salary. Employee contribution 3.5% of actual salary…."

It was apparent then, that the employer was offering prospective employees pensions on what looked to be a Defined Benefit basis as late as 1992. Examination of the documentation led me to believe that the benefits were intended to be set up on a "target" basis, probably from as early as 1982, but it would appear that this was not clear to all members, and in particular to the Complainant. Nevertheless it was also clear that the Complainant himself had received unambiguous information as to the nature of the scheme by 1993.

In 2002 the Complainant received a letter on behalf of the Trustees of the scheme, stating that they had undertaken a review of the scheme with a view to "bringing the scheme up to modern standards". This letter detailed estimated benefits based on current contribution rates (by this time, 14.1% of salary by the employer, and 3.5% from the member), and recommending that the members' contributions be increased to 5%, minimum. It further went on to *advise* him to increase his own contribution to 15%.

There was evidence of the involvement of a trade union in efforts to get the pension scheme improved, and it was also evident that there had been some neglect by the employer and its advisers in keeping the "target" benefits under review, to the extent that what was now available under the scheme would fall considerably short of what members had been led to expect. The essence of a target benefit scheme is that it is technically a defined contribution scheme, but the employer undertakes to fund the scheme in such a way that it is *likely* to produce a benefit of a given amount, or a given fraction or percentage of final salary.

In this case, I have no doubt that the employer's intention was that the original target of 60% of final salary was what the members should receive. It is not, however, clear that the employer understood the precise nature of what it was doing. Reviews need not, perhaps, be as frequent as those required by statute in the case of Defined Benefit Schemes, but it is essential that regular reviews do take place and, in particular, a detailed examination of the scheme and of its capacity to meet its target is needed when external circumstances change. There was no evidence that, over the years, this scheme was reviewed regularly in the light of falling interest rates, greater longevity of pensioners, etc., although the employer's contribution rate did increase over time (possibly in several increments) from 6.5% to 14.1% of salary, so some reviews did take place.

I concluded that the complaint that I was being asked to consider, apart from the notification of the death-in-service benefits, which had been maladministered, was essentially not one of maladministration in relation to a pension scheme. It was about the structure and nature of the scheme, and changes made to it. That was essentially an industrial relations, rather than a pensions, matter and I would not make a determination on it. However, following my Preliminary View, which was critical of the way matters had been handled over the years, the employer wrote to say that he had instructed his advisers to conduct reviews of all scheme members' benefits and to apprise them of the results. The advisers themselves gave their view that, in the current financial climate, improvements would almost certainly require increased member as well as employer participation.

## DISPUTE OVER AUGMENTATION OF BENEFITS

The Complainant in this case joined the employment of a private sector employer at the age of 39. The employer agreed to augment his pension benefit under their plan, subject to three satisfactory performance reviews over the following 10 years, so that "*by age 65 you can be entitled to a full 40/60ths pension*". This offer would grant him 15 years' extra service in the calculation of his pension entitlement at age 65.

Following two successful performance reviews and his potential pension had been confirmed as 35/60ths of salary, payable from age 65. Later he was promoted and understood that with this promotion his Normal Pension Date (NPD) became age 60. It appears that he did not receive clear advice as to how this would affect his pensionable service. Later he went on secondment to another company within the group with his terms and conditions preserved.

Some years later he was advised that his employment was to be terminated under an "early departure programme" and by way of pension benefit was offered: *" Based on your age and service at date of departure………… a revenue maximum preserved pension payable at age 60".* He challenged the calculation basis as he felt his pension should be calculated to allow for (i) nine years actually worked, (ii) 15 extra years promised on satisfactory performance reviews plus (iii)five further years granted when NPD moved to age 60. He also felt that if he were to be provided with the revenue maximum pension the pensionable salary used in this calculation could be increased to account for other earnings such as share option schemes. The Trustees decided against the Complainant in their examination of his complaint under the scheme's IDR process.

Following detailed examination of the case, I found that the employer had promised to credit the Complainant with additional service in the calculation of pension <u>at retirement age</u>. This promise was made under the terms of his employment contract and exceeded what would have been his entitlement under the Pension Plan rules. The employer made provision for securing this additional benefit under the Pension Plan by exercising its discretion and augmenting his benefits, by using what would be considered to be a normal and reasonable method, of funding for the additional years of service over the period to retirement age.

When service was terminated after only 9½ of a potential 20½ years had been served, it followed that only the same proportion of potential pension had been secured. In fact, the employer had gone further than it needed to, in calculating both pensionable service and pensionable pay. I considered that the promise of an additional service credit for pension purposes derived from an employment contract, on which I have no power to adjudicate. Moreover, I could consider the complaint only in terms of how the Complainant had been dealt with under the pension plan. I cannot change the rules of any pension plan or substitute my decision for a properly exercised use of a discretionary power.

In various communications with the Complainant, the employer had clearly set out the scale of augmented pension to be provided at retirement age. However the question of how additional pension benefit would accrue or be dealt with in the event of leaving service before retirement age was not addressed until he actually came to leave. It was a difference of opinion as to the calculation basis to be used in determining pension benefit on leaving service that formed the nub of this dispute. Following what was an exhaustive preliminary examination, I declined to make a finding of fact or of law on this dispute and did not accept it for formal investigation

## ELIGIBILITY AT DISCRETION OF EMPLOYER

The Complainant in this case had joined the business of his employer in the early 1980s and in 1999 had been promoted to factory foreman. As part of his negotiations with his employer at that time, he raised the issue of pension provision. However, he was informed that he would not then be included in the pension plan, but that the issue would be reviewed one year later. At subsequent reviews, the Complainant was advised that it was not possible for the employer to make pension provision for him due to the financial circumstances of the business.

The Complainant argued that he subsequently learned that a colleague had been included in the pension scheme after the employer had advised the Complainant that it was not possible for financial reasons to include the Complainant. Relations between employer and employee became strained and the matter was referred to this Office.

The investigation found that pension provision was a pivotal issue for the Complainant from the point he was offered the position of factory foreman. While it was clear that the employer never provided any written guarantees that pension provision would be made for the Complainant, the Complainant had an expectation that he would be included in a pension scheme.

The documentation governing the pension scheme was considered and it was clear that admission to the scheme was discretionary. The employer was not obliged under the rules of the pension scheme or under the Complainant's employment contract to include him in a pension scheme.

There appeared to have been a good relationship between the employer and the Complainant until the pension issue arose. He was offered promotion by the employer which he accepted, and he accepted the employer's refusal to include him for pension initially and was prepared to wait until the employer's financial circumstances improved.

As stated earlier the employer was not required to include the Complainant in the pension scheme; however the matter should have been dealt with more sensitively and the employer should have made more effort to resolve the situation before relations broke down.

The investigation did not find maladministration resulting in financial loss and so the complaint was not upheld.

It is essential that employers should not make promises that they cannot keep. It is even more important to avoid raising expectations unreasonably. In this case it was not clear whether the dishonorable behaviour of the employer was deliberate, or merely the result of carelessness.

## ESTABLISHING A MEMBER'S ENTITLEMENT TO BENEFIT ON LEAVING SERVICE

A complaint was referred to my office when a former member of a pension scheme discovered that what he had understood to be his entitlement was encashed and a surrender value paid to the employer. I was asked to adjudicate on whether or not the member had an entitlement to the scheme benefit.

The Complainant had been a member of the scheme for less than 5 years, when he left the employer's service in 1994. The proposal form completed by the employer at the scheme's inception did not ask if automatic vesting of benefits in the member was to apply on leaving service. The policy document and rules governing the scheme made no reference to a member having an automatic right to accrued benefits on leaving service, but did state that the employer had discretion to determine if a benefit would be paid to the member. Under the terms of Part III of the Pensions Act 1990 then in place, an employee had to complete 5 years of pension scheme membership to qualify for preserved benefits.

On leaving service, the Complainant did not receive the leaving service options relating to the pension scheme that he was entitled to, although from 1995 onwards he did receive updated statements showing the values of the benefit held under the scheme.

In 2002 the original company was taken over and the new employer undertook to maintain the existing pension scheme in force. In a later review of the scheme the provider noticed that the Claimant had not completed the statutory 5 years scheme membership to qualify for preserved benefits. They brought this to the attention of the new owners and advised that a surrender value could be paid to them if they so requested but did not advise them of the background to the case, namely:-

- That values relating to an "entitlement" had been quoted to the former member over the previous 10 years.
- That the former member had an expectation of entitlement, based on the promise he claimed to have received from his original employer and reinforced by the benefit valuations he had received over the years since he left employment.
- That the employer had discretion under the Rules to determine if a member was to receive benefit on leaving service.
- That the provider had not asked the original employer at inception if automatic vesting was to apply under the scheme, nor had it sought clarification from them in 1994 when the member left service, or when the dispute arose in 2004.

In August 2004 a surrender value was paid by the provider to the new employer. On learning of this the member approached his original employer, which had sold the business to the current owner, and received their confirmation that it had always been the intention that the proceeds of the pension scheme were exclusively for the member's benefit, that they had not issued any instruction to the contrary or ever requested a surrender value from the provider.

I found that there was maladministration on the part of the provider/Administrator in that they had not properly clarified the position ahead of paying out a surrender value in this case. It was inappropriate of them to have placed the responsibility to decide if the member had a pension scheme entitlement on the new employer/Trustee, who had not been a party to the initial decision and whose substitution as the new Principal employer/Trustee had not been fully documented under the pension scheme.

When the matter of the member's entitlement to vested rights was put to the former employer/Trustees they confirmed that the scheme had been set up exclusively for the member's benefit. In upholding the Complainant's entitlement to the pension scheme benefit I directed that the new employer return the surrender value cheque plus interest to the provider, whom I charged with the responsibility of adding to this whatever amount was necessary to bring the Complainant's benefit up to the current value it would have had, had it not been surrendered in 2004.

## ILL HEALTH EARLY RETIREMENT AND AVCs

This Complainant submitted his complaint in two parts and a thorough investigation of both aspects has been undertaken by my Office.

The first related to the process leading up to the granting of an ill-health early retirement pension, and the Complainant's contention that the payment of this enhanced pension should have been backdated to the date when he first retired. I could not uphold that portion of the complaint but did uphold the complaint relating to the administration of his AVC benefit.

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

In this case the Complainant experienced anxiety and stress and incurred expense in making his representations to the employer. However my remit does not empower me to compensate him for such matters – the only award I can make is to ensure that he receives his correct entitlement under the Scheme Rules. He did not have an automatic entitlement under the Scheme Rules to an ill-health early retirement benefit, and the only benefit payable to him is that which the employer, at its discretion, might grant him.

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

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

It was found that there was maladministration in the handling of AVC benefits at retirement and that the Complainant suffered some financial loss as a result. This point was conceded by the Trustees and the employer and a compensatory offer of €3,094 made by the latter in the IDR Determination. This amount was offered in addition to the current value of the AVC money on deposit, (over €98,000). As a conciliatory gesture the employer also offered to pay a fee of up to €300, for the Complainant to obtain independent financial advice regarding the investment of his AVC fund.

In considering the facts of the case I believed that both of these were fair and reasonable offers and I directed the Complainant to accept them, in resolution of the dispute.

## MALADMINISTRATION WAS TOO LONG AGO

This Complainant stated that he had been informed by the financial institutions involved in administering his retirement that he did not have full access to the lump sum which had accumulated following the investment of a redundancy payment from his former employer when he was made redundant in 1990. The key issue in the matter was the fact that the employer's advisors at the time agreed with him in 1990 that he would have "full access" to his lump sum on retirement, which he now found not to be the case. On investigation, it emerged that a retirement bond had been bought with the employer's special contribution, but the main scheme benefits had been left intact.

Having reviewed the correspondence, I came to the conclusion that an act of maladministration had taken place in 1990, in the form of the purchase of the personal retirement bond. As this act of maladministration occurred earlier than the earliest lookback time that I am allowed under the Pensions Act, I could not make any determination on it.

The simple fact is that the bond should never have been bought.

The option to take the proceeds of the single premium as a payment, even subject to tax, never existed. I could not see that it was ever stated that such an option did exist, but the Complainant clearly took the inference that it did.

I determined that this complaint could not be upheld. Maladministration did take place, but the nature of the maladministration was different from the original allegation made by the Complainant and took place too long ago for me to make any determination in respect of it. There was no maladministration in the administration of the bond and no maladministration was alleged against the Trustees in relation to the main scheme benefits.

## INJURY BENEFIT

The Local Government Superannuation scheme contains a provision for payment of an Injury Award in cases where a person is injured in the course of their work through no fault of their own. This benefit may be paid for a temporary period, or even for life, depending on circumstances. I received a complaint from a Local Authority employee that, while he had been severely injured on duty – he had lost a limb as a result - the employer would not concede payment of an injury award.

Enquiries revealed that, while there was no argument about the liability of the employer for the accident which had injured the employee, the Complainant had submitted a claim to the Personal Injuries Assessment Board, and the employer would not pay an injury award under the Superannuation Scheme, as it feared it would not be able to recover any such payments from its insurance company. Meantime, the Complainant alleged that he had been offered three options – a small early retirement pension (his service was relatively short); continuation of sick pay (which had been paid at this stage for far longer than normal); or to leave with nothing at all (this was denied by the employer).

It emerged that the Complainant had been covered by an Occupational Injuries scheme, which was about to terminate payments, with effectively no option other than a small pension payable under the Superannuation Scheme, despite the fact that a mechanism was open to the employer under the Scheme to make an injury award. I was unsure how much discretion the employer had in the matter, so I made enquiries of the Department of the Environment, Heritage and Local Government, who advised that it was a matter for a Local Authority to decide "whether the conditions for payment of an injury award as set out at paragraphs (a), (b) and (c) of Article 109 (1) are met. If they are met, it is our view that an Injury Award should be granted".

The Department referred to Circular Letter S.7/2001, which had devolved responsibility for all Injury Awards on Health Boards and hospitals (many of whose employees, for historical reasons, participate in the Local Government Superannuation Scheme), and which makes this same point. I drew the employer's attention to the phrase, "should be granted". It seemed to me that the only discretion which the employer might have was in deciding whether or not the conditions for an Injury Grant were actually met by the Complainant. There was no question about how the injury in this case occurred and the main problem seemed to be the employer's fear of non-recovery of payments that might be conceded on a permanent basis. However, the employer also alleged that the Complainant had been invited to undertake re-training and had refused, and this was another ground for their refusal to consider an injury award.

I advised the employer not to rely too heavily on this last point, as the Complainant was still undergoing periodic surgery and was classed by the Department of Social and Family Affairs as 100% disabled, and it seemed highly unlikely that he would be able to undertake a retraining course in the foreseeable future. Eventually the employer agreed to make an injury award on a temporary basis, to be reviewed as and when the personal injuries claim was settled. Once that was agreed I was able to suspend the investigation without making a formal Determination.

## GENERAL COMMENT:

> *This is not the only case where a Local Authority has refused to consider an injury award, even though liability for injury might not be in question. Fear of not being able to recover injury award payments seems to lie at the heart of these complaints, and this seems to have its origins in the wording of insurance policies. While it is not a matter in which my Office can intervene, the experience of these complaints would suggest that some examination is needed of the interaction of Local Authority employer's Liability insurance generally and the provisions of the superannuation scheme. The reluctance of Local Authorities to consider injury awards pending the settlement of personal injuries actions brings hardship on the employees concerned, and awards under the rules of Superannuation Schemes are what is known as "collateral benefits" which should not influence the outcome of these claims at all, most particularly where liability is not at issue in the first place.*

## INELIGIBLE TO JOIN THE SCHEME

This Complainant had been refused entry to the pension scheme for the Nominated Health Agencies Superannuation Scheme.

During the course of her employment she was working part time and was not eligible at the time to join the pension scheme. When, eventually, it became possible to join the Pension Scheme in principle, she was in fact over 65 years old. The conditions attaching to membership of the pension scheme included being in the employment and under age 65 at the 1st April 1996, as 65 was the compulsory age of retirement.

This person had attained the age of 65 in the previous year and therefore, unfortunately, was not eligible to be a member of the nominated Health Agencies Superannuation Scheme. However, she was supplied with various circular letters, Option Forms, etc by mistake. It was clear that the employer did not realise that she had already attained age 65 and so these documents were given by mistake.

As I cannot make a determination whose effect would be to change the rules of a pension scheme, I had to reject this complaint. There was no excuse for the conduct of the employer, whose carelessness caused considerable distress to the Complainant.

## PRSA CASE – CLAIM OF MISLEADING INFORMATION

Cases involving PRSAs, while still not common, have become a little more frequent of late. In the context of these complaints, I would like to record that I have received the fullest co-operation from PRSA providers where I have requested it, in reaching solutions to these problems.

This complaint was brought by a man who had signed up for the Government's SSIA Incentive, under which a subsidy was paid by Government to those who paid up to €7500 of the proceeds of an SSIA into a pension arrangement. The man claimed he had been misled, as he was paying tax at the top rate, and did not receive the payment he expected when the PRSA matured after 12 months, the minimum investment period specified by the Government for those availing of the subsidy. The taxable element of the PRSA (75% of the proceeds) was taxed at the higher rate in his case.

It was clear on investigation that the report on the review carried out by the financial adviser states that the Complainant had a salary and a State pension. The report actually drew attention to the fact that those paying top rate tax, unless a very small amount of income was taxed at that rate, was better off making a direct contribution to a pension scheme or PRSA and claming tax relief, rather than using the SSIA pension incentive, which was clearly designed for those on standard rate tax.

It was clear also that the Complainant had formed the view, unsupported by any of the documents he had received, that the PRSA proceeds would all be tax free.

This complaint was rejected. The insurance company involved agreed, at my suggestion, to include specific questions on the tax status of clients in their review documents in future.

## GENERAL COMMENT

> *There seems to have been a widespread belief among pensioners that, because they are investing their own money in the PRSA, the proceeds are automatically tax free. In fact only one quarter can be paid tax free – the rest is taxable and, depending on individual circumstances, might not even be immediately available when the PRSA matures.*
>
> *A number of pensioners who complained to my Office were upset because, by paying into a PRSA, they had brought money which they had owned, after tax, into an area where it was liable to be taxed again. The fact is that the SSIA pension incentive was never designed to be a way of giving a quick profit to people who were already retired, but as a means to encourage small savers to put away some of what they had got from the SSIA, towards their longer-term retirement provision.*

## RECKONING TRAINING SERVICE AS PENSIONABLE

The basis for this complaint was that the Department of Health and Children had refused to reckon as pensionable the training period the Complainant completed as a Trainee Health Inspector between October 1963 and September 1967 under the Local Government (Superannuation)(Consolidation) Scheme 1998.

In August 1963, the Complainant responded to an advertisement for a Diploma Course in Health Inspection. He applied and was accepted onto the course and signed an agreement which outlined the conditions for admission to the course.

The Complainant contended that while participating in the course, he was an employee of the Department of Health, as they had control over his attendance at the course, his training placements with various Health Authorities and the holidays he took each year while on the course. Under the agreement, once he was qualified, he was obliged to obtain work as a Health Inspector and, failing that, to endeavour for five years thereafter to seek employment as a Health Inspector with a local health authority and to continue in employment as a Health Inspector for a period of five years to offset the cost of the training course and the allowance paid during training.

The Department had argued that to date the training years of Health Inspectors had not been reckoned under the Scheme.

The legality of the agreement which the Complainant signed at the commencement of the training course had also been raised as an issue in this complaint. This issue was considered as part of the investigation and a file containing legal advice on the issue was sought and received from the Department of Health. This suggested that while there was certainly a question as to the enforceability of the agreement regarding the repayment of fees if the terms of the agreement were not complied with, the terms of the agreement were technically correct.

The Complainant put forward the examples of trainee Architectural Assistants and laboratory technicians whose service as trainees was subsequently reckoned under the relevant pension schemes. The Complainant claimed significant similarities between his situation and that of his colleague who became a trainee Architectural Assistant. However the conditions governing the application for Architectural Assistant were quite specific, in that they indicated the rates at which the successful candidate were paid, the hours and location of work and training and, most significantly, a guarantee of employment at the end of the course. The Complainant applied for a position on a Diploma Course in Health Inspection. The information provided on the course for an Architectural Assistant stated that applicants would be applying for *"An Open Competition for appointment to the position of TRAINEE ARCHITECTURAL ASSISTANT IN THE CIVIL SERVICE"*. It was my opinion that these two situations were quite different. It is clear for example in the laboratory technician's case that it was only after negotiations with their representative association that such service could be reckoned.

There is currently no provision under the Scheme which allows the training period for Health Inspectors to be made pensionable.

It was not possible for me under the legislation governing my Office to direct that the provisions of the Scheme be altered to allow for the training period of Health Inspectors to be reckoned as pensionable. It is clear that when the Complainant first raised the issue of reckoning his training service, both the Department of Health and Children and the Department of Finance considered whether or not the training period was reckonable. In addition to stating that such service has never been made reckonable under the provisions of the Scheme, they have maintained that a contract of employment did not exist, there was no guarantee of employment once the course was completed and an allowance, as distinct from a salary, was paid to trainees for the duration of the Course.

The complaint was not upheld.

## RECKONABILITY OF SERVICE

This was a case which did not go to Final Determination. An employee of a Nominated Health Agency had been refused permission to buy back service which she had previously completed, and which she wanted to be reckonable for pension purposes.

Her service for the period in question was considered by the Department of Health and Children to be on a *contract for services* and therefore not reckonable under the Nominated Health Agencies Superannuation Scheme (NHASS). She had received a Notice of Determination under the Scheme's IDR procedure from the Department and appealed of this decision to the Pensions Ombudsman.

On preliminary investigation of her complaint, I decided that this complaint raised questions concerning insurability of employment and therefore asked Scope Section of the Department of Social and Family Affairs to consider it. They agreed to investigate and in due course issued a decision that the employee was in fact on a *contract of service* and was insurable at Class A for the period in dispute. Initially the Department of Health and Children contested this decision but, on further consideration by the Trustees of the NHASS it was decided to withdraw that appeal and the employer was notified that the member should be allowed to purchase the service in question.

## RECOGNITION OF PREVIOUS SERVICE. FINDING OF FACT

This complaint concerned the recognition of a period of previous Public Sector service for pension purposes, where no records were available to substantiate the claim. The Complainant maintained that he had worked for a particular institution in the past, but that his claim for this short period to be recognized for pension purposes was being turned down for lack of documentary proof.

Following the investigation, I established that the Complainant was employed for 26 weeks by the institution concerned during the tax year 1979/80. This was the very first year in which computerised PRSI contribution records were available to the Department of Social Welfare. During the previous tax year, the old system of insurance cards was in use and no record was ever kept of the individual employers by whom contributors were employed.

As the Social Welfare records show that he had 16 paid contributions and 31 pre-entry credits for the tax year 1978/79, I reached the conclusion that, on the balance of probabilities, he was employed by the institution concerned during the whole of the period claimed.

Accordingly, I found, as a matter of fact, that his employment by the institution did commence in the tax year 1978/79 and that the total service which he gave to it was 42 weeks which should therefore be recognised as transferable service.

## REFUSAL OF EARLY RETIREMENT

The Complainant's employment was terminated due to compulsory redundancy. He had been employed for 38 years without any break in service by the same company. His complaint was the refusal of the company to grant him early retirement. The Complainant was approaching 60 years of age and stated that because of this he would suffer a substantial financial loss over the coming six years. He stated that even though he was awarded a redundancy payment, this money would not be adequate to meet his financial commitments over this period. At his age he found it extremely difficult to obtain suitable employment.

In September 2005 a communication to all employees stated that 28 redundancies were to take place within the company. Later, a second communication was issued outlining the areas within the company where these redundancies would most likely occur. The fact that early retirement was not an option to members of the Scheme, over 50 years of age, was not referred to in either of these two redundancy directives. A third communication was sent to all employees, outlining expected redundancy entitlements. This communication stated "*It is important to note that early retirement following redundancy is not an entitlement. It is not a guaranteed part of the overall redundancy package, nor is it a contractual term or condition of employment. For members of the Defined Benefits Scheme there is no option for early retirement before an individual's normal retirement date. This is not applicable for members of the Defined Contribution scheme*." Subsequently, the Complainant was informed verbally of his impending compulsory redundancy by his Line Manager.

The Complainant questioned the company about early retirement being made available to him but was informed that this was not an option that was open to him. He was subsequently told that a pension consultant would be in attendance in the Dublin office to discuss pensions options with him. The Complainant met the consultant on this date and was informed once again that early retirement was not an option that was available to him, due to the solvency position of the company's Defined Benefit Pension Scheme.

Following this meeting the Complainant e-mailed the HR Department asking on what date it was decided that the Pension was closed off for early retirement. The HR Department replied that there had been no cut off date and that the rules of the scheme had not been changed. Enclosed with the reply was a copy of a Q&A booklet that had been sent out with the revised members' explanatory booklet in 2004 with particular reference being made to two questions which dealt specifically and in detail with the matter of early retirement, and from which it was clear that it was neither an entitlement nor an automatic option.

The Complainant alleged that, although he has been refused, the Trustees had granted early retirement to several other members.

The investigation revealed that, although this had been the case, it was done only following a large injection of cash from the employer, and because the employees in question had been given a specific understanding that early retirement was an option open to them.

I have a great deal of sympathy for the position of the Complainant in this case. He was made redundant in late 2005 when he was 58 years of age and was not granted early retirement. As he has said himself it is difficult for a man of his age to find suitable employment and he must wait until he has reached the normal retirement age of 65 before he receives his pension. From the information that I received it would appear that the Complainant was the first person over the age of 50 in this company who, on being made redundant, did not receive an early retirement pension.

However, having examined the scheme rules I was clear that the Trustees were not entitled to grant the Complainant an early retirement pension without employer consent. Given that the Scheme is in deficit they could not agree to grant early retirement to the Complainant unless the company was prepared to pay money into the Scheme so as to maintain the solvency level for the non-pensioner liabilities following his retirement. Given that the company was not prepared to do this and clearly indicated this in their announcements of 2005, the Trustees had no option but to refuse the Complainant's request for early retirement.

Under the Pensions Act a direction that I make shall not require either (a) an amendment of the rules of a scheme or (b) the substitution of my decision for that of the Trustees of the scheme in relation to the exercise by the Trustees of a discretionary power under the rules of the scheme. Clearly under these circumstances I could not force either the company or the Trustees to grant the Complainant an early retirement pension. The complaint was therefore disallowed.

In that determination, however, I outlined a number of concerns regarding the handling of this complaint, particularly the delay in issuing a Determination to the Complainant under the Internal Disputes Resolution procedure and the delay by the consultants and administrators in dealing with the queries raised by this Office in relation to this complaint. I also noted that the Trustees did not strictly comply with the requirements of the Occupational Pension Schemes (Disclosure of Information) (No. 2) Regulations, 1998 in that they did not notify members of a material change to the "basic information" about the scheme within four weeks of the date of change. I had already reported this matter, together with the delay in issuing the IDR determination to the Pensions Board. I requested both the Trustees and the administrator of this Scheme to ensure that in future all required deadlines are met.

## REFUSAL TO GRANT EARLY RETIREMENT PENSION

The Complainant claimed that the Trustees reneged on a decision to grant him early retirement at any time prior to normal retirement age.

The Complainant left the company in 2002 and considered two alternative options in relation to his pension – an immediate early retirement pension, or a preserved pension entitlement payable at normal retirement date. Prior to making a decision the Complainant emailed the HR section of the company and asked whether, if he decided to take the preserved pension option, he could at a later date change his mind and opt for an early retirement pension.

The Complainant was advised in writing that, if he opted for a preserved pension he could at any stage change his mind and request early retirement benefits, the amount of which would depend on his age when he actually decided to take benefits.

He opted for a preserved pension on leaving the company, but when he subsequently applied for an early retirement option, he was advised that he could not avail of early retirement as the scheme was then insolvent.

It was clear from the evidence that the Complainant gave serious consideration to his options on leaving the company. He sought and received clarification from his employer and the Trustees regarding his options. The Complainant was of the opinion that he was entitled to get an early retirement pension whenever he decided to apply for it.

The Trustees and the employer argued that they always maintained that the Complainant could request early retirement and that this request must be considered with due regard to all relevant factors and that the overall funding level of the scheme was an extremely relevant factor. The Trust Deed and Rules also provided that the granting of early retirement was subject to the consent of the employer and the Trustees.

Prior to issuing a Final Determination in this case, I issued a Preliminary View and indicated that I intended returning the complaint to the Trustees and the employer and ask that they reconsider the Complainant's request for early retirement. I suggested that they should take into consideration the failure to provide clear limitations on entitlement to early retirement in March 2002; the delay in dealing with his request for early retirement; the fact that a funding proposal was put in place between the dates of his original request and its refusal; and the fact that the funding proposal itself contained a built-in allowance for limited early retirements. A response to the Preliminary View was received from the

Trustees who were of the view that it was inappropriate to exercise their discretionary power in favour of the Complainant in this case, given the solvency position of the pension scheme.

In formulating my Final Determination in this case, I could not ignore the provisions of the Trust Deed and Rules and the provisions of the Social Welfare and Pensions Act 2005 in relation to the requirement for Trustee consent for the payment of early retirement benefits.

The Trustees and employer had maintained that the reason for not granting an early retirement pension was due to the level of solvency in the pension scheme. While accepting this, I took the view that it was possible that, in the absence of a solvency issue, an early retirement benefit might be granted to the Complainant.

My Final Determination directed that a review of the Complainant's case be carried out annually by the Trustees in consultation with the employer, having sought the advice of the Actuary regarding the solvency of the fund and the effect on the solvency if the Complainant was granted early retirement benefits. I directed that the outcome of this annual review be communicated by the Trustees in writing to the Complainant within one month of the review.

## RELIANCE ON HISTORIC DOCUMENTATION FOR PENSION ENTITLEMENT

The Complainant alleged that he was entitled to receive a retirement pension of 2/3rds of final salary, on foot of a letter he received in 1982 promising him that scale of benefit from age 65. In addition, he claimed that he had later volunteered to contribute to the pension scheme in exchange for the employer's consent to his retiring at age 60.

The employer claimed not to have knowledge of the 1982 letter and, when presented with a copy, maintained that it had been issued in error by the company's auditors. The employer declared that the pension scheme was and had always been a defined contribution one, and that they had agreed to the Complainant retiring at age 60 because this would not have a cost implication for the defined contribution scheme. The employer was also the Trustee to the scheme.

In the course of the investigation undertaken at my Office it came to light that :

- The 1982 promise was not for a defined benefit of 2/3rds of final salary but for a target pension of 2/3rds of salary, integrated with State Social Welfare benefits.
- This promise was superseded in 1993 by the introduction of a defined contribution pension scheme and this change was notified to all members.
- Thereafter the Complainant received Annual Benefit Statements showing the nature and value of his scheme benefit.

- The Complainant effectively disregarded the various notifications he received in the mistaken belief that these did not apply to him, as he presumed that the original promise of a 2/3rds pension continued to apply.

- The Trustees were not fully aware of their duties and responsibilities under the scheme.

This was a case that should not have escalated into a complaint that had to be referred to my Office. I would consider that the two main reasons why it did so relate to poor communications and lack of a responsible approach on both sides.

While the Complainant received notifications about his scheme benefits that were at variance with his interpretation of his entitlement, he did not communicate either his expectation or the apparent discrepancy to his employer until the point of retirement. The Complainant did not take responsibility to understand the nature of the scheme of which he was a member, but continued to rely on historic information to the exclusion of all subsequent scheme developments, advices and communications.

The Trustee failed to clarify the background to and evolution of the pension arrangements and hence his correct entitlements, to the Complainant. The Trustee did not shoulder well the responsibility to be familiar with the scheme, to ensure that proper administrative records were kept and arrange that the member receive his correct entitlement, when due. Had the two-way communications been better, and had both parties taken responsibility to understand the nature of the scheme, this matter could have been resolved without my intervention.

I was unable to uphold the complaint as I found that the Complainant did not have an entitlement to a defined benefit pension of 2/3rds of salary. It was established that he was a member of a defined contribution scheme and his entitlement derived from the value of the investment fund held in his respect. I did find that there was maladministration in the management of his retirement benefits and directed that a shortfall uncovered during the investigation be paid to the Complainant.

## SMALL SELF-ADMINISTERED SCHEME WAS NOT A PENSION SCHEME

This complaint as made initially was against a Trustee company, to the effect that it had "grossly misled" the sponsoring employer; that, by lying to them, had "tricked" its directors into setting up two schemes when only one was required; and that the complaints had been treated with "apathy". However, the main complaint was that they had been mis-sold and that what they believed was a self-administered scheme was in fact no such thing. I was advised by the principal Complainant that the scheme he set up was to be a "small self-administered scheme" (SSAS), the main object of which is to allow members greater control over investment decisions, but also has as a secondary objective the leveraging of investments by allowing the scheme to finance investment opportunities by borrowing. The Complainants were two brothers, one of whom was the Managing Director and the other a Director, of the employer company.

When I accepted the complaint for investigation, I made it clear that there were to schemes instead of one which would not stand up. European Pension Directive conditions were in the process of being transposed into Irish law at the time. Member States were given a choice about defining those schemes whose power to borrow would be restricted. In principle, it would have been possible to continue to allow schemes with up to 100 members to borrow, but I was aware, as was the pensions industry at large, that the Irish government intended to confine borrowing to one-member schemes. Therefore, if the scheme were to have power to borrow, there could not be more than one member per scheme. The Trustee company involved maintained that it had always recommended one-member schemes because it avoided conflict between members regarding investment matters and choices in the future, if each was in effective control of the investment of his own fund.

On investigation, it became clear that the directors were under a severe misconception as to the purpose and nature of a SSAS. They were under the impression that they could administer the scheme themselves without outside involvement; that they could take benefits at age 50 without divesting themselves of the ownership or control of their company; and that the contributions were refundable – that they could "get out and pay taxes if they were not satisfied". They were also under a great misconception as to the arrangements for managing the investments. Moreover, the investment as first proposed appeared on the face of it to be less of an investment than an "adventure in the nature of a trade", which could not receive Revenue approval.

There was considerable dispute as to whether the scheme had been "sold" to the directors by the Trustee company or by their own accountant. I have no doubt that the accountant recommended that they take advantage of the tax breaks associated with pension provision, but I am certain that the directors did not understand the need for, much less the existence of, strict rules governing the enjoyment of these tax breaks. It was very clear that the managing director was completely unaware at the inception of the scheme of the detailed and stringent Revenue conditions that attach to the approval of SSASs.

I concluded that what had been decided by the directors in this case was that an amount of money was to be invested – it eventually did not seem important as to what it was invested in, or where. Investments in Portuguese property were also considered when the original investment in South America presented difficulties; the pensioneer Trustee had also recommended consideration of investment in UK or Irish property.

Following the investigation, I advised the Revenue Commissioners that I proposed to determine, ***as a matter of fact***, that the scheme was not a *bona fide* pension scheme.

With regard to the allegations of mis-selling by the Trustee company and/or its agents, I concluded that they could not be considered at all within my jurisdiction, as mis-selling is a matter which falls into the jurisdiction of the Financial Services Ombudsman and possibly the Financial Regulator. I decided that I could not make a finding in relation to this element of the complaint. It was, however, clear that there were questions to be answered surrounding the setting-up of the scheme/s, and doubts were raised in my mind as to whether, in the circumstances, the scheme/s should have been submitted to the Revenue Commissioners for approval at all.

Critical to this was the question of ongoing contributions. It became clear that, apart from the initial amount paid in, the directors had no intention of paying ordinary contributions on an ongoing basis, and the scheme was not submitted on this basis to the Revenue Commissioners. It became clear, also, that no real intention existed of providing "relevant benefits" at Normal Pension Age; on the contrary, it appeared that drawdown at age 50 was contemplated by the directors, in contravention of the Revenue requirements which apply to early retirement of proprietary directors.

In the circumstances, I could only conclude that the purpose of this arrangement was to shelter an ordinary investment from tax on its investment income, obtaining, in the process, Corporation Tax relief for the employer, and avoiding any charge to tax as a benefit-in-kind on the employee/s concerned. It was, however, also clear that this state of affairs was not intentional, but arose from a failure of communication or of understanding, or both. It was my Final Determination that this complaint could not be upheld in its original form. However, I had concluded, *as a matter of fact*, that the pension scheme/s in question were not *bona fide* pension schemes, the sole purpose of which was the provision of "relevant benefits" within the meaning of Section.772(2)(a) of the Taxes consolidation Act 1997. I therefore determined that the scheme or schemes be dismantled from the outset and the contribution/s paid be refunded to the employer forthwith, and tax deducted from the interest accrued on the investment moneys, which had been held on deposit by the Trustees.

## SPECIAL PENSION UNDER THE GARDA SÍOCHÁNA PENSIONS ORDER 1925

The Complainant is a retired member of An Garda Síochána and claimed that he was entitled to a Special Pension under The Garda Síochána Pensions Order 1925 when he retired in 2003 on the grounds of ill-health. The Complainant had received a gratuity and was in receipt of a standard ill-health pension.

There is a distinction between a standard ill-health pension and a Special Pension and, depending on the degree of injury, a Special Pension will sometimes result in the payment of a higher rate of pension than the standard ill-health pension. In order to qualify for a Special Pension, the illness suffered by the individual must be *'an injury received in the execution of his duty without his own default'*.

The Complainant alleged that his ill-health was work related and that the procedures followed by the Garda Síochána and the Department of Justice, Equality and Law Reform when granting him a pension were flawed.

A considerable amount of documentation was submitted by all the parties to this investigation. Some of this information related to the Complainant's work environment prior to his retirement. However, while this information was useful in providing a background to the complaint, it was not within my remit to investigate issues arising from this information or to make a determination on such issues. Similarly, where decisions are made by Trustees or administrators on the basis of medical evidence submitted to them, it is not the function of this Office to evaluate that evidence, but to ensure that the decision-makers followed proper procedures in coming to their conclusions.

The procedures followed by the various parties when considering the Complainant for a Special Pension were reviewed. It was found that even though the Garda Pensions Order provided that input was required from both the Minister for Justice, Equality and Law Reform and the Minister for Finance in determining whether or not the Complainant suffered an injury in the execution of duty, the case had never been referred to either Minister.

In addition while it appeared that the Chief Medical Officer followed the appropriate procedures when medically reviewing the Complainant, there was a flaw in the paperwork.

The complaint was upheld in that maladministration was found in the manner in which the decision was made. I did not find that a Special Pension should have been paid to the Complainant. However I directed that the application should be reassessed in accordance with the Garda Síochána Pensions Order. As part of my determination I recommended that consideration should be given to requesting the advice of at least one independent medical practitioner who had had no previous involvement in the case, as part of the medical review.

## START DATE FOR PENSION PURPOSES

A complaint was investigated regarding the definition of service for the calculation of pension benefits under a scheme, where the original employer had been taken over by another, which was itself the subject of a later takeover. The Complainant had worked for the original firm, but there was no evidence to suggest that he was included in an occupational pension scheme during this time.

When the first firm was taken over he signed a Service Agreement form with the new employer which declared that he would be employed by them "on and from" a current date. There was no reference made in this Agreement to pension provision.

The second employer subsequently set up a pension scheme, which was later absorbed into the pension plan of the ultimate employer. Credit was given to the Complainant for service only from the date specified in the Service Agreement. When the Complainant was later made redundant his redundancy settlement and pension plan entitlements were initially calculated based on service accrued since that date.

He challenged this, and the owner of the second firm could verify that he had been employed by the original firm, prior to its takeover. The employer then conceded that his redundancy payment, but not his pension benefits, would be revised to take account of the earlier service. The later date of his employment by the second firm was the start date shown on Benefit Statements issued to, and not previously challenged by, the Complainant. The Complainant maintained that the start date had not previously been an issue, because he would have had more than forty years' service at age 65, even with the later starting date. It was only when his service was terminated prematurely that the matter became one of concern.

Following investigation, I concluded that the calculation of pensionable service was in accordance with the scheme rules: there was no evidence of pension provision by the original employer, and no exercise by any intermediate employer of a power to augment benefits. I therefore disallowed the complaint.

## GENERAL COMMENT

*As well as making a complaint of financial loss due to maladministration and asking me to adjudicate on a dispute of fact or law under the pension plan, the Complainant alleged that the final employer tried to exert undue pressure on him to sign off on the redundancy deal, which was to lead to his leaving their employment. He maintained that they presented him, on more than one occasion, with a Waiver Form, declaring that they would not release his redundancy cheque until he had signed such a form. The earlier draft of the Waiver Form set out the proposed redundancy benefits to be paid, as did the later one, but the latter also asked him to confirm and agree his "start date for pension purposes", as the later of the two dates in dispute. As he was disputing his service dates with the employer he was naturally reluctant to sign. This is not entirely a pensions matter and as such would not fall within my remit. However, the later Waiver Form, by referring to his service for pension purposes, sought to restrict his pension plan entitlement. I wrote to the employer pointing out that such a waiver would have no effect whatsoever vis-à-vis the Trustees of the pension plan, who are bound to administer its benefits in accordance with the scheme rules. In effect, the inclusion of a reference to pension plan entitlements on such a Waiver Form put additional unnecessary pressure on the Complainant at what was no doubt a worrying time for him. I would caution employers against including any such pension plan references on their leaving service waiver forms.*

## NATURE OF COMPLAINT: ESTABLISHING MEMBER ENTITLEMENTS ON WINDUP

The same complaint was made by several members of a scheme against the Liquidator, who had assumed the role of Pension Scheme Trustee, as the original Trustee was the sponsoring employer.

The employing company was put into liquidation in 2002, and as a consequence, the pension scheme was terminated. No action was taken at that time to wind up the scheme formally and distribute the assets.

In 2004 the members requested to transfer their benefits out of the scheme and this triggered the necessity to wind up the scheme. The liquidation itself should have done this previously. The members alleged that the Liquidator/Trustee was not co-operating with this process and was thereby guilty of maladministration and of causing them financial loss by denying them the opportunity to transfer their benefits out of the scheme.

In the course of the investigation undertaken by this Office it transpired that the impasse had come about because it had not been proven to the satisfaction of the Liquidator/Trustee that the members had full entitlement to the assets accrued under the scheme. The scheme rules did not provide for automatic vesting on leaving service nor did they grant full vested rights on redundancy. Several members had not completed the 2 years scheme membership required for statutory preservation.

Neither the broker nor the Insurer involved could produce the proposal form completed by the employer at the scheme's inception which might have indicated the employer's intention in the matter of granting vested rights on withdrawal. However both confirmed that the scheme had always been administered on the basis of the member having automatic vested rights on leaving service. There was no precedent to rely on as no members had actually withdrawn from the scheme up to its termination in 2002.

In the investigation undertaken by my Office, cognisance was taken of the fact that the pension scheme had been established as an approved trust fund for the benefit of the staff, to be managed separate from the employer's other assets, that employment had been terminated through redundancy and that the members had been advised of their leaving service benefits on the assumption that automatic vesting applied.

The complaint was adjudicated on as a dispute of fact or law. I declared the pension scheme assets to be separate from the other assets of the employer and found that on the balance of probability it had been the employer's intention to provide automatic vested rights on redundancy and that the members had been given an expectation of these. I directed the Trustee to proceed with the wind-up of the scheme on the understanding that all benefits were to be vested in the members.

## INFORMAL INTERVENTION SOLVES A PROBLEM

An employee of a public service body administered by a Government Department complained that her contributions for superannuation had been interrupted for a period of more than three years, without explanation, and she was now liable for very considerably increased amount, reflecting increments and benchmarking in the meantime.

Given that the facts were not in dispute and that putting her through Internal Disputes Resolution was likely to delay matters further, I decided to write to the Department involved on her behalf and, acknowledging that she would have no choice but to repay the contributions that were not deducted, requested that the outstanding contributions be calculated on the basis of historic salaries, and that they should be spread over a period equivalent to the period for which they should have been paid – i.e. three and a quarter years.

After several follow up letters from this Office to the Department requesting an update of her case, a response was received from the Department to my initial enquiry.

The Department informed my Office that the employee had now been given the option of paying the outstanding contributions over 82 instalments based on her historic salaries during the period that her membership was disrupted, that she had accepted this option and that these deductions from salary commenced in March 2007.

It is regrettable that the Department did not feel able to offer an explanation for the termination of her contributions in 2002 and no reason has been given for its failure to notify her that pension deductions from her salary had been stopped. That said, it would be reasonable to expect the member to have checked her own payslips and queried the failure to deduct contributions.

However, given that she had now been given the opportunity to purchase the service in question at an appropriate cost, I considered that the matter had been addressed to her satisfaction and closed the file.

## AVCs NOT ADMINISTERED ON LEAVING SERVICE

This Complainant forwarded a complaint form together with a Letter from her Pension Trustees. They were confirming that, when she left the employment some years previously, she had received a refund of her contributions to the main pension scheme. They stated that she had also made Additional Voluntary Contributions (AVCs). They confirmed that the Revenue require that AVCs be treated in the same way as main scheme contributions, so they stated that "the proceeds of your AVC fund must also have been paid as a refund".

However, the Trustees had discovered that the AVC scheme investment manager held an allocation of funds in her name. They suggested a number of scenarios, including the possibility that the AVC fund was never cashed out or was never paid in full. The Trustees had, with the help of their current scheme advisors, contacted the previous administrators, who advised that they had no record of the Complainant having been a member of the scheme. The matter was referred to my Office for investigation.

On the basis that I did not believe that any useful purpose would be served by an Internal Disputes Resolution process, I decided to take the case for immediate investigation.

Some unproductive correspondence with the former administrator ensued. Eventually, they advised me that the Complainant had been a member of both the main scheme and the AVC scheme. From documentation in their possession, it appeared to them that the sponsoring employer had paid out refunds of contributions to members who left the main pension scheme in the past and that these refunds were paid out directly, without reference to the then Trustees. They suggested that this might explain why they did not hold a record as to whether she had received a refund of her contributions or whether they were held as a deferred benefit within the scheme.

It appears probable that the employer was dealing with withdrawals in bulk and simply notified the Trustees at the end of each scheme year of the total amount that it had paid out in refunds of contributions, recouping this from the pension scheme and letting the Trustees deal with the tax due on the refunds. I then contacted the insurance company concerned which in due course confirmed that they were holding an amount of €5,292.99 to the account of the Complainant.

There was no doubt that there had been maladministration at some stage in the process of the Complainant's withdrawal from employment. It was difficult at this distance to pinpoint where the maladministration took place but it would appear on the face of it that the employer was the most likely source. Instead of simply notifying the Trustees of withdrawals and allowing them to process the refunds of contributions, the employer dealt with this matter itself and probably was not conscious that the Revenue required that ordinary scheme contributions and AVCs must be dealt with simultaneously and in the same manner. Accordingly, no notification was sent to the insurer that the Complainant had left service and required a refund of her AVCs. Nevertheless, it would appear that neither the Trustee nor the insurer had really enquired as to what had happened to her.

I determined that the Complainant was at no financial loss as she had received a reasonable return on her contributions since the time she left service. Application of the Consumer Price Index to the total of her contributions would indicate that their present value should be something of the order of €2,650. In the circumstances, I believed that the amount of €5,292.99 constituted a just return on her investment and I directed that it be paid.

## GENERAL COMMENT:

> *Failure to administer AVCs simultaneously with the main scheme benefit is quite common. It frequently arises where two legally separate schemes are involved, sometimes with different Trustees. In addition, it appears that many Trustees are not conversant with Revenue requirements, and we have had a number of cases where employees have either taken or transferred their main scheme benefits, leaving their AVCs untouched. The most common problem in Public Service arrangements is delay in giving the AVC scheme administrators enough information to enable them to calculate Revenue limits on tax-free cash and on overall benefits, and this often results in a considerable gap between payment of the main scheme benefits and administration of the AVCs. In this particular (private sector) case, the problem seems to have been that the employer was acting as an unofficial administrator and neither the Trustees nor the insurer had a complete picture of what was happening. Although shortcuts of this nature may seem attractive, even efficient, at the time they are taken, trustees should do everything they can to discourage employers from acting as unofficial administrators. Indeed, in the upcoming era of "Registered Administrators", it may be unlawful for arrangements such as this to exist.*