DIGEST OF CASES
2004

Pensions
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Introduction

The purpose of this document, which should be read in conjunction with my 2004 Annual Report, is to draw attention to some of the more interesting complaints that have been dealt with by my Office to date. During 2004 I issued 23 final determinations under Section 139 of the Pensions Act and I have included summaries of 19 of these cases below.

In addition, 33 cases were solved during 2004 by the process of mediation or intervention and I have included summaries of 9 of these cases.

I hope that these cases will be of practical benefit to those working in the industry. Copies of these summaries will soon be available on my Office's website.

Paul Kenny
Pensions Ombudsman

June 2005

Final Determinations

Value of AVC Fund being lower than projected

BACKGROUND

The complainant had been contributing to an Additional Voluntary Contribution plan (AVC) for 11 years prior to her retirement, at age 60 in August 2004.

She was displeased with the administration service, advice and the rate of investment return she had received over the term, as well as being disappointed with the ultimate value of her AVC fund. She levelled her complaint against the insurer who invested the funds and the broker who administered the plan.

OUTCOME

Following an investigation I found that:

- while the errors that occurred in the administrative process were irksome to the complainant (e.g., delay in producing, and incorrect details on, Benefit Statements) they had not caused her any financial loss
- the advice she received was reasonable and was not a contributory factor in the value of her AVC fund being lower than she expected
- she could not be deemed to have suffered a financial loss because her AVC fund was less than various quotations/projections had assumed it might be. In reality, the assumptions had not been borne out
- the factors that most affected the maturity value of the complainant's AVC fund were the investment choices she made, the shortened term of her contribution payment and the timing of her retirement.

Having considered all the facts of the case I disallowed the complaint on the basis that the complainant had not suffered any financial loss because of maladministration under the AVC plan.

Pensionable allowances in An Garda Síochána

BACKGROUND

The complainant was a retired member of An Garda Síochána who retired from active service in 1983. His complaint was that a special allowance that he received, while on active duties, for night duty and weekend work was not taken into account when calculating his pension entitlements.

The Garda Superannuation Scheme was introduced in 1925 by way of the Garda Síochána Pensions Order, No. 63 of 1925. Various changes have been made over the years by way of Statutory Instrument, Agreed Reports of the Conciliation and Arbitration Scheme, Arbitration Board report, etc. Before any changes are made there are consultations with the Associations representing Gardaí. Changes to the Superannuation Scheme often form part of a wider deal involving pay and conditions.

Rostered Unsocial Hours Allowances have been in existence since 1970. They were made pensionable in respect of those who retired on or after 1 January 1993 under an Agreed Report of the Conciliation and Arbitration Scheme. The Commission on Public Service Pensions also considered the question of their extension to those who had retired prior to the introduction of pensionability but did not recommend such an extension. This was purely on fiscal grounds.

The complainant's application for a recalculation of his pension was also disallowed by the Minister for Justice, Equality and Law Reform on the basis that it is a core element of public service pensions policy that, when an allowance is being made pensionable for serving personnel, the benefit does not apply to existing pensioners.

OUTCOME

Following my examination of the complaint I was satisfied that the complainant's pension was being calculated correctly in compliance with the rules of the Garda Superannuation Scheme and in compliance with public service pensions policy. It was not within my jurisdiction to alter those rules or to rule on whether the non-inclusion of the Rostered Unsocial Hours Allowances for pension purposes was fair or otherwise. I disallowed the complaint on this basis.

Entitlement to professional added years

BACKGROUND

The complainant worked as a senior lecturer in a University since 1983. He retired from the University in September 2004 when he had approximately 21 years service with the University. From 1959 to 1974 he worked for various periods of time in various organisations from where he transferred a total of 10 years service into the University pension scheme. He also had nine years service which was deemed to be non-transferable.

In 1997 the complainant applied to the Pensions Committee of the University for an award of professional added years under the terms of the scheme for the grant of "Professional Added Years" for superannuation purposes to Faculty/Staff of the University. The Committee decided to make a "Nil Award" to the complainant under the terms of the scheme. The basis for this decision was as follows: awards of professional added years are calculated through a formula which is set out in the rules of the scheme. This formula is 18 plus credit for qualifications plus credit for experience minus 25. In the complainant's case this was calculated to be 18 plus 6 plus 10 minus 25 giving him an initial award of 9 years. However the rules of the scheme provided that the award must be abated by the amount of service which an employee transfers into the University. In the complainant's case the transfer amounted to 9.79 years (subsequently increased to 10 years) and as this amount exceeded the amount awarded by formula, this resulted in a nil award.

The complainant subsequently contested this decision on the basis that he felt that the decision was unfair and unjust. He felt that Clause 8 – "Limits of Entitlement and Abatement" appeared to have been misinterpreted by the Pensions Committee. This clause states, inter alia "In order to avoid any benefit on the double, the gross added years entitlement will be appropriately reduced where (i) service is transferred or could have been transferred into the University." The complainant believed that the decision of the Committee represented an overly parsimonious interpretation of this clause. He did not agree that he had benefited on the double in that, for more than nine years before joining the University, he was engaged in "service" which was not and could not be "transferred into the University". However, he argued that it was partly on the basis of this service that he had been invited to join the staff of the University. He believed that the Committee's interpretation of this clause was not the intended purpose of the scheme. The complainant's appeal was ultimately refused by the Minister for Education and Science on the basis that his entitlements had been calculated strictly in accordance with the rules of the scheme.

OUTCOME

Following my investigation of the complaint I too concluded that the complainant's entitlements had been calculated strictly in accordance with the rules of the Professional Added Years scheme, and disallowed his complaint on this basis. However, I felt that there was merit in the arguments being put forward by the complainant in relation to this complaint. I noted in particular that the provisions of the revised 1997 scheme for the award of professional, technical and specialist added years to certain civil servants, which provides for reduced abatement in certain circumstances, was a fairer way of dealing with this issue. I understand that this system has now been extended to other public service schemes.

Incorrect calculation of preserved benefits

BACKGROUND

The complainant, who worked as a care worker, resigned from his employment on 31 August 1985, aged 46 years. On his resignation he was informed by the Department of Education and Science that, provided his service could not be reckoned by him in another employment, he would be entitled to a lump sum and preserved pension on application on reaching age 60 years under Section 12 of the Special Schools Superannuation Scheme.

Over the period 1985 to 1999 the complainant requested and received updates on the estimated value of his preserved benefits under the scheme. The Department initially calculated these updates by increasing the original pension and lump sum values by the percentage amount of general round pay increases. They later revised this system and replaced it with a new system of calculating updated preserved benefits by reference to the current salary rate of an equivalent employee multiplied by what is known as an administration decimal. The Special Schools Superannuation Scheme is an integrated scheme in that the pensions payable are integrated with the State Social Insurance system. Under this system, when the complainant's pension became payable in 1999, his pensionable remuneration was offset by twice the single rate of Old Age (Contributory) Pension based on the September 1999 rates.

The complainant commenced receiving a pension at age 60 but disagreed with the method of calculation and contended that Section 12 of the Pension Scheme made no provision for the use of administration decimals and that the deduction in respect of the Old Age (Contributory) Pension should have been based on the rate in payment on the date he resigned.

The Department then conducted a full review of the complainant's entitlements and concluded that his pension had been incorrectly calculated on his retirement in 1999 in that the deduction in respect of the Old Age (Contributory) Pension had been based on the rate in payment in 1999 rather than the date on which he resigned. The Department then wrote to him on 19 February 2004 telling him that his pension had been incorrectly calculated and informing him of a new rate of pension entitlement, backdated to the date of receipt of his pension. However, the new rate of pension was lower than the incorrectly estimated pension entitlement. The complainant appealed this decision to the Minister for Finance. The Minister issued a Notice of Determination in this regard on 17 November 2004 and confirmed that the revised pension as notified to the complainant by the Department on 19 February 2004 was correct and that the amount of pension actually paid to the complainant for the period 24 September 1999 to 31 December 2003 was incorrect because the system used to calculate it was incorrect. The Minister made no explicit reference to the assessment or recovery of any resulting overpayment. The complainant then complained to this Office.

OUTCOME

I found that there had been a history of maladministration in the manner in which the Department of Education and Science had administered the benefits due to the complainant under the superannuation scheme. They failed to calculate preserved benefits as per the rules of the scheme and added to this maladministration by consistently informing the complainant over the years that their method of calculation was correct even though it was readily apparent that the calculation formula under S. 12.2 of the scheme rules was not being complied with.

I was informed that the issue of recovery of any overpayment on the scheme was an administrative matter for the relevant Department. On enquiry with them, the Department correctly stated that they are obliged to attempt recovery of public monies. However, I informed them that I considered that where overpayments such as this occur, the merits of each particular case must be looked at individually. I note that the Department does not now intend recovering any overpayment from the complainant except by way of offsetting against any supplementary pension to which he may be entitled. I considered this to be a reasonable and practical solution to the situation and found accordingly.

On this basis I found that there was no financial loss to the complainant as a result of the maladministration of the scheme by the Department and he is now in receipt of his correct entitlement.

Eligibility for an incapacity pension

BACKGROUND

The complainant alleged that he had been wrongly denied an incapacity pension by his employers. He had worked as an insurance salesman for an insurance company for several years. In *August 2001*, he felt unwell and went to his GP for a medical examination, who diagnosed that his blood pressure was very high and referred him to a consultant cardiologist for further examination. An exercise ECG was carried out and this proved normal. He was admitted for a few days to hospital for further tests but while these, apparently, demonstrated that he was HPLO positive, no cause for his hypertension was found. In *January 2002*, the complainant applied to his employers for early retirement on medical grounds, as his hypertension still had not come under control. The company referred him to another consultant cardiologist for an examination which was carried out in *February 2002*. He concluded that he was suffering from moderate hypertension which should be controllable with medical therapy and in itself should not interfere with his ability to carry on his work. On the basis of this the complainant's employer refused his application for an ill-health pension in *April 2002*.

The complainant appealed this decision and his case was referred to a UK based Occupational Health Services and Consultancy firm. This company referred the complainant for a medical examination to a specialist in occupational medicine, who concluded that the complainant had moderately severe hypertension and a strong family history of ischaemic heart disease. However he was not convinced on the evidence provided that his hypertension was work related. He concluded that there was no doubt in his mind that the "complainant was capable of other forms of work and indeed other similar forms of work and would be so capable if his exercise ECG proved normal". On the basis of this report the Occupational Health Services firm concluded that the complainant did not have grounds for retiring for reasons of ill-health.

The complainant again appealed this decision and produced medical reports from both his GP and a consultant psychiatrist which indicated that it was inadvisable for him to return to work. The company referred the case again to the Occupational Health Services firm which, following a review of all the available medical evidence, concluded that with such a common condition as high blood pressure and no other underlying cardiac problems, it would be inappropriate to advise the company that the complainant should receive an ill-health pension on either total or partial incapacity grounds. The company finally disallowed the appeal in July 2003.

OUTCOME

The rules of the pension scheme in relation to the granting of an incapacity pension were very clear – the Principal Employer "may permit a Member to retire on pension in accordance with the provisions of this rule before Normal

Retirement Date if he is in the opinion of the Principal Employer suffering from Total Incapacity or Incapacity as the case may be." In this regard **"Total Incapacity"** is defined in the rules of the scheme as meaning "physical or mental deterioration which is serious enough to prevent the individual from following his normal employment or which seriously impairs his earning capacity and in addition is likely to involve permanent inability to earn anything or anything more than modest amounts from employment provided for remedial activity"; whereas **"Incapacity"** means "physical or mental deterioration which is serious enough to prevent the individual from following his normal employment or which seriously impairs his earning capacity where the employer does not have any suitable employment available to offer to an individual, but the individual is not totally incapable of some form of remunerative work."

Following my investigation of this complaint I concluded that there was a conflict of medical opinion, not as to the complainant's medical condition, but as to whether he was capable of "following his normal employment" as a result of his condition. In my opinion this conflict had never been resolved satisfactorily. In my preliminary determination I had suggested to the Committee of Management of the company that it should arrange for a further examination to be carried out on the complainant by an independent medical consultant, acceptable to both parties, who had not been involved in the case up until that point. The reason I made this recommendation was that I had concerns that the medical report on the complainant carried out by the Occupational Health Specialist in October 2002 and subsequent reports by the Occupational Health Services firm, appeared to place undue emphasis on whether the complainant's medical condition was work related or not. Clearly the rules of the pension scheme made no reference to a medical condition having to be work related.

In their response to the preliminary determination the respondents clarified the position in relation to this point and confirmed that the Occupational Health Specialist who carried out the final examination on the complainant had been supplied with a copy of the relevant section of the superannuation rules relating to ill-health retirement and copies of relevant correspondence and instructions on the points to be addressed in his report. The respondents also pointed out that the scheme rules provided that the decision as to whether a member was entitled to an ill-health early retirement pension or not rested completely with the Committee of Management of the company. They argued that in this context it could be expected that on occasion the opinions of an employee's GP and the employer's medical advisor might, although given in good faith, nevertheless differ. In this situation the conflict was resolved by a decision of the employer which had the discretionary power to make the decision. In the case in point the employer had made its decision having reviewed the medical opinions and the recommendation of the Occupational Health Services firm. They finally argued that if, under the rules of the scheme, their decision not to grant an ill-health pension in this instance could not be overturned, they could see little point in agreeing and appointing yet another medical specialist to review the evidence so far, as this would simply prolong this case without any real prospect of the complainant getting the result that he desired.

Following the response to the preliminary determination I was still of the opinion that there was a clear conflict in the existing medical opinion as to whether the complainant was capable of "following his normal employment" as a result of his medical condition. However, I accepted that in this situation, under the rules of the scheme, the employer had the discretionary power to resolve the dispute and to decide on this basis whether the complainant should be entitled to an incapacity pension. I was satisfied that the employer had reached its decision in good faith, having reviewed all the medical opinions and the recommendation of the Occupational Health Specialist firm. On this basis I disallowed the complaint.

Actuarial value of a transfer payment and entitlement to benefit under an amended rule

BACKGROUND

The complainant took up employment with his employer on 1 October 1982 and was made permanent on 1 October 1983. On becoming employed on 1 October 1982, conditions for membership under the scheme were provided for under Clause 1 of Appendix II of the scheme. Under this rule, the complainant would have become eligible to join the pension scheme on 1 October 1984. Benefits under the rules of the scheme at this time also provided for a pension of two thirds of final pensionable remuneration provided the member had at least 20 years completed service.

However, revised scheme rules were introduced on 5 September 1983 with effect from 1 October 1983. The two year service requirement for membership was abolished and this allowed the complainant to become a member of the scheme with effect from 1 October 1983. Benefits under the scheme were also revised at this time and the revised rules now provided for a full pension for 20 years service <u>for members contributing to the scheme prior to 1 October 1983</u> and a pension of 1/60th of final salary for each year of service up to a maximum of 40/60ths <u>for members who commence contributing to the scheme on or after 1 October 1983</u>.

The complainant also had over 14 years service with a company that went into liquidation in the early 1980s. A number of people employed by this company later became employed with the respondents, including the complainant. A sum of £2,092.18 was paid into the respondent's scheme in respect of this service for the complainant in January and February 1984. The complainant was advised by the trustees that this had resulted in an additional 2 years and 6 months pensionable service credit and that he would accrue 1/60th of pensionable salary in respect of each year of service completed under the scheme.

The trustees stated that, over the years of his employment, the complainant had made a number of enquiries to the employer regarding a redundancy package and the possibility of an ill-health retirement pension and when he eventually retired on 31 October 1998 it was on a voluntary basis under the scheme rules. According to the trustees, the complainant had an entitlement to a pension of £5,268 p.a. which, following lengthy discussion between the parties, was augmented to an annual pension of £6,000 p.a. and an additional lump sum payment of £9,000. These benefits excluded entitlements under AVCs available to supplement this level of benefit.

The complainant raised the issue of the service credit and benefit entitlements purchased by the transfer value with the trustees on a number of occasions during his employment. The complainant also brought a complaint to the Pensions Board on these matters. The Board concluded that the trustees of the scheme had acted appropriately in dealing with his entitlements and that the dispute regarding the amount of service that the transfer value purchased might have actually lain with the trustees of his former employer's pension scheme in that the transfer value from this scheme did not appear to reflect his fourteen years service. They noted, however, that, as the scheme in question was wound-up circa 1983, the trustees of that scheme were not subject to the provisions of the Pensions Act, 1990 and that the Board did not therefore have any remit to investigate that aspect of the complaint.

OUTCOME

Having considered all the evidence brought to my attention during the investigation of the complaint I was satisfied that the respondents acted properly in the application of the actuarial value of the complainant's transfer payment into the scheme. I considered that the real complaint lay with the actual transfer value from his previous employer's pension scheme and not with the actuarial value placed on it by his subsequent employer. I therefore found that the respondents had nothing to answer in this aspect of the complaint.

The complainant clearly became a member of the scheme on or after 1 October 1983 and the amended Clause 2 of Appendix II of the Rule therefore applied. I was therefore satisfied that there was no maladministration or error in fact or law by the trustees in their application of the rules relating to the complainant's benefits.

The complaint was therefore disallowed.

Failure to properly apply the early retirement rules of a scheme

BACKGROUND

The complainant was a member of the pension scheme from 15 April 1963 to 30 April 1988 and was working with an associated company of the main employer when it was sold in 1988. As a result he ceased membership of the scheme with deferred membership entitlements based on 25 years' service. The complainant alleged maladministration of the scheme in relation to his entitlement to early retirement credit under the scheme rules. He complained that the rules of the scheme provide that members with 20 years' service, or 10 years' service prior to 1994, could retire at age 60 instead of age 65 and receive credit for service up to age 65. However, the trustees of the scheme refused his application for this service credit, stating that it applied to active members of the scheme only and that, as the complainant was a deferred member, this rule did not apply to him. The complainant further alleged that the rules did not differentiate between active and deferred members.

OUTCOME

The complainant ceased contributing to the scheme on 30 April 1988 with an entitlement to preserved benefits. At that time Rule 7 of the scheme provided for members' benefits. Normal retirement age was defined as age 65. An internal memorandum from the Secretary of the company dated 18 March 1987 which issued to all members of staff in the scheme outlined changes in the scheme rules with immediate and, in some cases, retrospective effect. It noted that certain legal formalities had to be observed before the changes were fully documented. Paragraph 2(a) of this memo stated that members with more than 10 years' service could retire after age 60 and get credit for additional service up to age 65 and be allowed to go on pension immediately. Paragraph 5 provided that members could preserve benefits after 2 years' service and that cost of living reviews applied to preserved benefits. This change in the rules was formally introduced by a Deed of Amendment dated 2 November 1994 which was effective from 6 April 1994.

As the complainant only ceased contributing as a member of the scheme on 30 April 1988 I found that the March 1987 internal memorandum applied to him at that time. The trustees advised me that the scheme was operated *in practice* in accordance with paragraph 2(a) in relation to active members of the scheme only until it was formally documented in November 1994. They stated that the memorandum was only ever intended for active members, was issued only to active members and was not provided to members with preserved entitlements. Following investigation I was satisfied that the March 1987 internal memorandum applied to active members only. The important phrase in the paragraph concerned was *"…may retire after age 60 and get credit for additional service".* In order to retire from a company, I considered that it was necessary to be working for that company. I was conscious that the complainant had argued that he had been forced out of the company pension scheme through no fault of his own, i.e., the sale of the subsidiary company for which he worked. However, the fact was that he was not an employee of the company at age 60 and therefore could not retire from it and benefit under the early retirement option.

However, I did find that the trustees, in refusing the complainant's application for early retirement, had based their decision on an incorrect rule of the scheme. They compounded this error when they again cited an incorrect rule in informing the complainant of his preserved entitlements. These errors led the complainant to doubt the treatment he was receiving at the trustees' hands.

I determined that the trustees were guilty of maladministration on this basis. However, as the complainant had suffered no direct financial loss as a result of this maladministration I did not order any financial redress. While the trustees clearly erred in their decision by relying on an incorrect rule of the scheme this in itself did not confer any additional benefit entitlements on the complainant.

Failure to adequately explain how benefits under the pension scheme are calculated; issuing of misleading benefit statements; introduction of changes to the benefit structure in breach of the rules

BACKGROUND

The complainant was employed by the company from 1950 to 1999 and was a member of their defined benefit scheme. However, he went on sick leave in 1986 and did not resume work before reaching normal retirement age. However, he was a member of the staff Income Continuance Plan (ICP) which paid out benefits in accordance with its terms. As part of this plan, a Pension Premium Allocation (PPA) had been paid to the employer since 1987 in order to help maintain the complainant's pension entitlements. This PPA started at £1,958 p.a. and increased by 5% p.a. compound thereafter. The complainant contended that he had been informed by the Chairman of the company that his pension entitlement, as at 1 January 1987, was £9,224 and that this would increase by 5% p.a. compound and be in the region of £16,000 when he retired at age 65.

The complainant assumed on this basis that either his pre-disablement salary, on which his final pension would be based, would be increased by 5% p.a. to normal retirement age or that there would be an increase of 5% p.a. in the pension of £9,224 quoted to him in January 1987. Either way he expected a final pension of around £16,000 p.a. at normal retirement age.

However, in June 1991 the complainant was quoted a much reduced expected benefit entitlement of £6,182 p.a. at normal retirement age. When he queried this with the administrators of the scheme, he was informed that there were two reasons for the reduction: firstly integration with social welfare benefits had been introduced to the scheme with effect from January 1989 and this explained the drop in pension expectation from £9,224 p.a. to £6,182 p.a.; secondly under the rules of the pension scheme, he was not in fact entitled to the increase of 5% p.a. that he claimed he had been promised back in 1987. The complainant appealed this decision and, as a compromise, the company agreed to fund his pension to give him a final entitlement of £10,212, including his social welfare entitlements. The complainant further appealed the decision to integrate his pension entitlements with social welfare benefits on the basis that this was clearly in breach of the scheme rules which required the members' express written consent for any change which involved diminution of benefits already accrued. The decision to integrate the complainant's benefit entitlements with social welfare benefits was finally reversed but the complainant was then quoted a final benefit entitlement of only £9,224 rather than the increased figure of £10,212 that he had been previously promised.

OUTCOME

Following my investigation of this complaint I was not satisfied that the complainant had been dealt with as professionally as he should have been, especially in the early stages of his complaint to the trustees. There was general confusion around certain key terms, such as *escalation* and *notional increases*, which were open to interpretation. Failure by the trustees and administrators to explain in simple terms what exactly was meant by these terms amounted, in my opinion, to maladministration. This maladministration was compounded by misleading and inconsistent correspondence and by a disregard for the scheme rules relating to the change to integration.

I made a final determination in this complaint that there was maladministration of the scheme on the part of the employer, trustees and former administrators, on the following counts:

- by introducing integration of the complainaint's benefits with the State Social Welfare scheme in 1989 without prior consultation and discussion with him, and apparently without checking whether such an amendment might reduce his accrued benefits without his consent, in contravention of the scheme rules;
- by misleading him as to how his benefits were calculated by use of phrases such as *"notionally increasing his salary"* and by presenting a series of pension figures showing his pension increasing by 5% p.a. from 1992 to 1999 when integration was involved and dropping reference to this when integration was reversed. This understandably led to him believing that his pension rose at the rate of 5% p.a. compound from the date it was calculated in 1987 regardless of whether integration was involved or not;
- by failing to explain adequately to him that his benefits had to be calculated as per the rules of the scheme and that any additional benefits were discretionary to the employer and the trustees;
- by failing to explain adequately to him that the pension premium allocation under the Income Continuance Plan was totally immaterial to his pension benefits and that he would be entitled to the same benefits regardless of the amount of the pension premium allocation.

I also determined that the complainant's *entitlement* to pension at his normal pension date was £9,224 (€11,712.06) p.a.; however, since he has at various stages in the proceedings been promised a pension of £10,212 (€12,966.57) at normal pension age, I was of the view that this is what ought to be paid, given the agreement of the company to fund this. The trustees agreed to this.

Application of pension increases on a parity basis

BACKGROUND

The complainant was a pensioner from a large state-sponsored body. He maintained that the annual review of pensions in the company followed the norms applying in the public service and state-sponsored employment generally. The well established method of implementing the review consisted of establishing the current salary for the grade at which the pensioner had retired and adjusting his pension as if the pensioner was now retiring at that salary level. The fund on the occasion of the July 2002 review, chose instead, to implement a lesser amount, by excluding from the pensions review, a salary increase, relating to a productivity agreement which had been awarded to the active staff between 1st July 2001 and 30th June 2002, thereby breaching the well established basis for pension reviews.

Under the rules of the pension scheme initial pension entitlements at the time of retirement were a charge against the superannuation fund itself while subsequent pension increases were met year-on-year out of the company's revenue. However, there was no security for the pension increases which were granted annually by the Board of the Company on an ex-gratia basis. This was identified by the trade unions concerned as a weakness in the scheme and they asked that a rule be introduced that would provide greater security to pensioners. In 2000 the rules of the scheme were changed to provide for a formal annual review of pensions in payment to be carried out by the Board. In deciding what increases were to be applied the Board would have to take into consideration the maximum increases authorised by the relevant Minister, increases in the rates of pay for the employees of the company and the financial condition of the fund. The new rules also provided, that with retrospective effect to 1 January 1994, all pension increases would also be paid out of the pension fund rather than out of the company's revenue. This in effect meant that the full capital cost of each pension increase would have to be charged immediately against the assets of the fund.

During 2001 a new productivity deal was negotiated with the unions within the company. This provided for a change in work practices together with the merger of a number of grades. As part of this deal the salaried staff received increases of approximately 15%. Previous productivity deals had been extended to include pensioners, with the cost being charged against the savings being generated by the deal. This in effect meant that there was less money to be shared between the existing employees. On this occasion the unions decided that the benefits of the deal would not be extended to the pensioners.

OUTCOME

The complainant had raised various issues in his complaint, some of which fell outside of my jurisdiction. However, the major issue raised was that the company had breached the well established basis for pension reviews in the July 2002 review, in that, up to that time, the basis on which the pensions were reviewed was by reference to the rates of pay in force on 1st July each year. In effect the complainant maintained that the company had a legal obligation to grant pension increases on the basis of parity with existing employees. He further claimed that his entitlements could not be diminished unilaterally by the company without his involvement in any such changes.

Following my investigation I concluded that the company had departed from, but not breached the well established basis for pension increases in the review for July 2002. The reason they did this was because of the productivity agreement concluded with the active staff. However, I concluded that there was not a legal obligation on the company to grant pension increases on a parity basis, nor had the complainant a legal entitlement on this basis. Indeed, prior to the change in the rules of the scheme in 2000 there was no legal obligation to grant increases on any basis. I further concluded that the company had carried out the pension review strictly in accordance with the rules of the pension scheme and there was no evidence of maladministration in relation to the operation of the pension scheme. On this basis I disallowed the complaint.

Purchase of notional added years

BACKGROUND

The complainant was a 57 year old employee of a semi-state body who started to contribute to its Notional (Added) Years Scheme in 1991, with a view to securing 6.66 additional years of service on retirement at age 65.

The original quotation assumed that payment would be spread over the term to age 65 but included two apparently contradictory statements:

(1) "In the event of retirement/death before purchase has been completed pro-rata amount of service only would apply for benefits"

(2) "In other words the proportion of service actually purchased would be allowed"

Benefit statements were issued in 1993 and 1999 showing 5.07 years as the pro-rata number of years of additional service that could be credited at age 60. Subsequently the benefit statement issued in 2002 showed reduced notional service at age 60 of 4.12 years. The complainant queried this with the employer and was told that the 2002 statement was correct and only 4.12 years of notional service would be credited in the event of early retirement at age 60. It was explained that this figure was arrived at by applying an early retirement factor, in line with actuarial advice and within the terms of the Scheme Regulations which declared "that the member shall meet the full cost of the notional years".

The complainant believed that the basis of valuing notional service on early retirement had been changed by stealth to his detriment. On investigating the complaint it came to light that the method used had not altered since 1991 but that this method was not made clear to the complainant, and the issue of erroneous benefit statements in 1993 and 1999 had compounded the confusion.

OUTCOME

I did not find for the complainant on the grounds that, while the notional service at age 60 would be less than he expected it to be, he had not suffered any financial loss, because this service had been correctly calculated in accordance with the Scheme Regulations.

Pension entitlements on leaving service

BACKGROUND

The complainant was out ill when the employer announced a redundancy programme in late 2003. He applied for and was accepted under this programme, which offered him a lump sum from the employer and an enhanced pension from the pension plan. On being advised of his redundancy benefits and having accepted these he then applied for an ill-health retirement pension and had his GP submit a medical report in support of his claim.

He was advised that the ill-health early retirement option was not open to him but the reason for this was not made clear to him. In December 2003 he received his redundancy lump sum. In spite of telling him that an ill-health early retirement option was not open to him, the medical officer of the pension plan examined the report submitted by his GP and on foot of this turned down the request for an ill-health early retirement pension, on medical grounds in January 2004.

The complainant challenged this decision, advising that he had recently attended an independent consultant in connection with a successful concurrent ill-health retirement claim he made under another pension arrangement (an industry-wide scheme in which the employer also participated). He submitted the independent consultant's report to the trustees while applying for a decision under their Internal Dispute Resolution (IDR) procedure.

The trustees did not find for him in the IDR determination issued in April 2004, and chose to ignore the revised opinion their medical officer had come to in the meantime after seeing the aforementioned consultant's report. The complainant did not accept the IDR determination and complained to this Office in September 2004.

OUTCOME

Having examined the facts presented I found that the complainant was not entitled to both a redundancy package and a further ill-health pension.

However, I felt that the complainant should have been given the option of choosing which of these withdrawal options would be preferable or most suitable to him. I instructed that he now be given this choice and that appropriate steps be taken to implement his final decision on the type of benefit he wished to avail of.

Parity/Pension increases under the Programme for Prosperity and Fairness

BACKGROUND

The complainant, a retired staff member of a private sector company, complained that the 1% lump sum negotiated as part of the Programme for Prosperity and Fairness (PPF) was not applied to his pension. Active staff employed by the same company did receive the 1% lump sum.

The National Implementation Body which was set up as part of the PPF agreed on 1st April 2002 that the agreement to pay a 1% lump sum was to be interpreted as applying to annual basic pay. The 1% lump sum was paid to public service pensioners, but most companies in the private sector did not pay the 1% to their pensioners which was in line with IBEC's interpretation of the agreement.

OUTCOME

Under the pension scheme, pensions were increased at the discretion of the company, on a parity basis with increases applied to salaries of serving staff. According to the company this policy had been in operation for many years and had not changed.

Salary was defined for pension purposes under the rules as "the annual rate at the relevant date of basic salary from the employer". The company took the view that the 1% lump sum did not constitute an increase in the pensionable salary of staff but was a once off payment with the same status as other once off payments that the company often paid to its serving staff e.g. bonuses, performance related payments etc. On this basis the company did not request the trustees to make any payment to pensioners in respect of the 1% lump sum.

Having considered the facts I disallowed the complaint. Pension increases were paid at the discretion of the company, therefore the company was not required under the Trust Deed and Rules to authorise the payment of the 1% lump sum negotiated under the PPF to its pensioners.

The trustees did not have a unilateral power to pay pension increases and could only pay pension increases where the company requested or consented to the payment of such increases. As the company did not request the trustees to pay this 1% lump sum to pensioners, under the Trust Deed and Rules the trustees did not have the power to make this payment.

Alleged reduction in preserved pension benefit

BACKGROUND

The complainant left employment in November 1987, aged 44, having completed 17 years and 10 months of service. He had been a member of the defined benefit pension plan for the duration of his employment. On leaving, he became entitled to a deferred pension benefit under the occupational pension plan, payable from his 60th birthday.

This pension plan was subsequently subsumed into another plan, the terms and benefits of which were inferior to the original plan. On reaching age 60, the complainant was offered retirement benefits by his former employer which he felt were calculated in accordance with the latter plan's rules and were therefore undervalued.

OUTCOME

On investigating the complaint I found that the benefits accrued under the original pension plan were held intact under a separate section of the newer plan. The correct calculation basis, as set out in the rules of the pre-1987 pension plan, was used in computing retirement benefits for the complainant, and therefore no financial loss or maladministration had occurred. On this basis I disallowed the complaint.

Application of pay parity in a public service pension scheme involving a re-grading of the post

BACKGROUND

The complainant, a retired public servant, became aware of an increase in the salary applicable to the current post holder of the position he retired from. He then enquired as to whether his pension would be reviewed as a result and was informed that the scheme rules and public service pension policy generally, precluded the application of a re-grading increase to the pensions of persons already retired.

OUTCOME

The principle of pay parity is now well established in public service pension policy. Pay parity policy is that pension increases are generally linked to the relevant pay increases applicable to serving staff in the grade from which they retired, and such increases are effective from the same dates as the pay increases. All general pay increases (e.g. increases under national pay agreements) are applied as a matter of course. Special pay increases (i.e. increases pertaining to specific grades or posts) are normally also applicable to pensions subject to the following conditions:

- the increase must apply to all staff serving in the grades or posts concerned
- assimilation of serving staff to the revised pay scales must be on the basis of "corresponding points" (i.e. not on "starting pay on promotion" or "re-grading'' terms)
- the increase must not have been awarded in consequence of a substantial restructuring or alteration of duties which, in effect, constitutes re-grading of the posts or grades concerned
- the increase must not have been awarded in respect of increased productivity from serving staff
- the increase must be a permanent feature of the pay scale.

In this case the complainant contended that it was the salary of the post which was in fact re-graded and not the post itself. He quoted from the Submission for Re-Grading and from the sanction letter from the relevant Government Department to support this. The pension authority disagreed and contended that it was in fact a re-grading of the post. I considered the relevant Circular letters that related to the administration of the scheme, the submissions for the re-grading and the sanction letters from the governing public Department and I was satisfied that this increase was sought and sanctioned as a re-grading of the post.

I then considered whether or not maladministration took place in dealing with the complainant. Maladministration is not easy to define, but essentially, an Ombudsman can look at the way in which decisions are taken or policies are implemented, but not at the merits of the decisions or policies themselves. The main test of whether there has been maladministration is whether the authority or body has acted reasonably in accordance with the law, its own policies and generally accepted standards of administration.

In this particular case the pension authority operated within well established public sector guidelines and precedent, and within the statutory framework of the pension scheme itself. I therefore found no evidence of maladministration in this complaint nor any error in the interpretation the employer made with regard to the statutory scheme rules.

Duties of trustees in relation to the investment of pension funds

BACKGROUND

The complainant was employed by a freight company and was due to retire in October 2002. He was a member of the company pension and life assurance scheme since 1979. This scheme had commenced on 1 January 1976 and operated as a defined benefit scheme until 1 January 1997 when it converted to a defined contribution basis. The company was sold in 2000 and the new owners, in the course of a due diligence exercise, went into dispute with the former shareholders regarding the status of the pension scheme. In September 2001, the trustees of the scheme requested the Pensions Board to determine whether the scheme was a defined contribution or a defined benefit scheme. Following written submissions by interested parties, the Board issued its final determination on 19 December 2002 which concluded that the scheme had validly changed into a defined contribution scheme within the meaning of the Pensions Act as and from 1 January 1997. However, at this point in time the new owners were still in dispute with the former owners on a number of issues, some of which concerned the pension scheme. These issues were not finally resolved until June 2003. During the period of the investigation and subsequent arbitration from September 2001 to June 2003, the pension scheme had been frozen and it had not been possible to administer the complainant's pension benefits when he was due to retire in October 2002. Because of this the company decided to extend the complainant's service on a month by month basis beyond his normal retirement date of October 2002, but on the basis that he would not be accruing additional retirement benefits beyond this date. The complainant remained in the employment of the company until 31 December 2003. He initially declined to draw his retirement benefits but subsequently decided to do so.

The complainant raised a number of separate issues in relation to his complaint. The most interesting aspect of the complaint was the allegation that the trustees of the scheme were negligent in that, despite their being clearly aware of his circumstances with regard to the imminent maturing of his pension fund, no action had been taken to either allow the release of his funds, or to hedge the fund against a falling market. The complainant maintained that, without his writing, cognisance of his circumstances should have been taken into account before the fund was frozen.

OUTCOME

Following my investigation of the complaint I concluded that the complainant has not, in fact, suffered any financial loss as a direct result of the pension scheme having been frozen. During the period between the complainant's normal retirement date of 22nd October 2002 and the day when he finally drew down his retirement benefits – 31 December 2003 – the value of his pension fund had increased in line with pension funds generally. In addition, during this period, his fund had not incurred any pension payment withdrawals or deductions. Not only had the full value of his fund been preserved, but his fund had actually increased by additional company contributions, made after his normal retirement date. The complainant had thus benefited financially in that he had received the full value of his pension entitlement under the scheme up to his actual retirement date plus the benefit of additional company contributions to his fund after his normal retirement date (and the investment return thereon) and related benefits.

The complainant had also claimed that, without his writing, cognisance of his circumstances should have been taken into account before the fund was frozen and that the trustees should have taken action to either release his funds or to take suitable steps to hedge against a falling market. The complainant had clearly felt that the trustees had failed in this duty by not hedging his fund. The trustees, on the other hand, argued that the complainant had received adequate advice, both from the former administrators of the scheme and a former trustee of the scheme, regarding the hedging of his fund and that it was up to him to act on this advice. The question therefore arose as to whether the duties of the trustee extended to hedging the complainant's fund without being instructed to do so. I concluded that their duties did not extend that far. The complainant had argued with the benefit of hindsight that his fund should have been hedged. However, the counter argument to this was that if, during the period in question, the trustees had hedged his fund without his asking, and the equity markets, instead of collapsing, had continued to rise, the complainant would have argued the opposite case. In my opinion the duties of the trustees in this regard were to ensure that the complainant received adequate advice to enable him to make an informed decision regarding his investments. The complainant had clearly received expert advice both from the administrators and the trustees of the scheme and it was up to him to act on this advice in whatever way he thought best. The fact that he had not given any instructions, amounted in itself to an investment decision, i.e. to maintain the status quo.

On this basis I disallowed his complaint.

Interpretation of rules for membership of scheme; date from which membership of scheme begins

BACKGROUND

The complainant commenced employment with the company on 23 April 1990. He became eligible to join the company pension scheme on 23 April 1995 having completed 5 years' continuous service, as required by the scheme rules, and having satisfied the age requirement. He ceased employment under a Voluntary Parting Scheme on 24 April 2000 and had 10 years of service at that point. The complainant requested that his pensionable service be transferred to his new employer but was informed that as he had only become a member of the pension scheme on 1 January 1996 (the 1st January following completion of five years' continuous service) he had less than 5 years' reckonable service at the date of resignation, and he therefore had no entitlement to deferred pension benefits under the rules of the scheme (or to preservation under the Pensions Act).

The complainant alleged maladministration in the manner in which his qualifying years of service were calculated and claimed that he should have had over five years' scheme membership.

OUTCOME

The scheme rules provided for qualifying employees to become members on the next review date of the scheme which is defined *"1 January or other such dates as the Employers shall agree with the Trustees in each year"*. As such the complainant only became a member on the 1 January following his meeting of the membership criteria (age 23 and 5 years' service).

I found that the complainant's membership was in line with the rules of the scheme and therefore his complaint could not be upheld. However, there was a degree of maladministration in the manner in which the company ran the pension scheme which led to the misunderstanding of effective membership dates:

- The Members' Handbook did not clearly state that membership only begins on the "next review date" and an explanation of "review date" was not included

- A memo of 19 May 1995 from the Personnel Section to the complainant should have clearly stated that he was now eligible for membership and would join from the next "review date"

- The failure to provide a copy of the Members' Handbook to the complainant when he became a member and failure to provide him with a Certificate of Membership showing his effective date of membership also constituted maladministration.

However, I did not consider that the complainant had suffered any financial loss as a result of this maladministration, as his membership was always in line with the rules of the scheme and he received a number of opportunities by way of benefit statement over the years to query his "effective membership date" which he failed to do until after he left employment.

Loss in value of AVC fund due to delay by respondents in providing superannuation details

BACKGROUND

The complainant was a member of a Health Board Additional Voluntary Contribution (AVC) scheme. She retired from the Health Board on 30th March 2002, the day before her 65th birthday. On the date of her retirement the value of her AVC fund was €38,535.24. However, as the AVC scheme was attached to the main superannuation scheme and was subject to Revenue regulations, the amount that the complainant could take tax free from the fund had to be calculated. On 11th March 2002 the administrators of the AVC scheme requested from the Health Board the complainant's main superannuation details. However, these were not finally supplied until 1st July 2002. By this time the value of the complainant's AVC fund had fallen by €3,398.72 to €35,136.52. The complainant's complaint was against the Health Board for its delay in providing the superannuation details to the administrators of the scheme. However I subsequently decided that the trustees of the AVC scheme should also be included as respondents in this case.

OUTCOME

There were three parties that were potentially responsible for the loss suffered in this case:

- The insurance company which was responsible for investing the funds under the AVC scheme

- The trustees of the scheme and the administrators administering the scheme on their behalf

- The Health Board which was the complainant's employer.

The insurance company was responsible for investing the funds under the AVC scheme. In this regard the company's contract was with the trustees of the scheme who were the policy holders. The monies were in the fund until instructions were received from the trustees in June 2002 and the company was not empowered to encash them earlier. I found, therefore, that the company had fulfilled its contract with the trustees and acted properly in accordance with the instructions that it received.

The trustees of the scheme had delegated the day to day administration of the scheme to the administrators of the scheme. However while the scheme is administered in this way, the trustees still retain responsibility for the scheme and must ensure that all their duties are carried out under both the Pensions Act and the rules of the AVC scheme.

I found that the administrators of the scheme had acted promptly at all times. When informed by the complainant in March 2002 of her forthcoming retirement they immediately contacted the Health Board and requested the main superannuation details in respect of the complainant and when there was a delay in receiving these, they issued three separate reminders. When the administrators finally received the superannuation details from the complainant herself on 21st June 2002 they ensured that these were forwarded immediately to the insurance company and that the complainant received her entitlements from the AVC fund without any further delay.

However, it is clear that, under the rules of the AVC scheme, and in trust law generally, the trustees had the responsibility, not just for paying the benefits as provided for under the rules of the scheme as they become due, but also for safeguarding the investments of the member of the AVC fund and making sure that the member got the value of her investment on the date of her retirement. At a time of falling markets, as was the case in 2002, the trustees had a particular duty of care to ensure that the complainant received what she was entitled to from the date of the event giving rise to the pension, i.e. 30th March 2002. In my opinion they could have done this in two ways:

- Firstly, the administrators acting on behalf of the trustees, should have made more strenuous efforts to obtain the main superannuation details in respect of the complainant. While they wrote to the Health Board on 11th March 2002 to obtain the complainant's superannuation details, and subsequently issued three separate reminders, at no time did they tell the Health Board how important this information was and that a delay could result in a fall in the value of the benefits due to the complainant. In my opinion they should also have contacted the Health Board by phone and explained to them how important it was to receive this information on time

- Secondly, while accepting the arguments put forward by the trustees that they ought not to apply an investment decision across the board in respect of all members who reach normal pension date on the assumption that they would take their AVCs in lump sum format, nevertheless the trustees should have taken some action to protect the investment of the member. For example the trustees, could have asked the insurance company for a valuation of the complainant's AVC fund as at 30th March 2002 – her retirement date. They could then have informed her of the value of her fund, warned her about the volatility of the markets at that time and offered her the option of converting her fund into less volatile investment forms, until her retirement options had been finalised.

The fact that neither the trustees nor the administrators acting on their behalf did either of the above amounted, in my opinion, to maladministration.

I also found that the Health Board was guilty of maladministration insofar as it did not provide the required details regarding the complainant's main superannuation entitlements to the administrators of the scheme within a reasonable time period.

Having considered all the facts of the case I determined that the trustees of the scheme and the Health Board were equally culpable for the loss suffered by the complainant. My final determination, therefore, was that

- The complaint was to be upheld

- The complainant was to be compensated for the loss in value of her AVC fund between the date of her retirement on 30th March 2002, which was €38,535.24, and the date when her retirement options were issued on 3rd July 2002, which was €35,172.52, a loss of €3,362.72

- Taking into account that the complainant had actually invested the residue of her AVC fund in an Approved Minimum Retirement Fund (AMRF) whose investment structure was not dissimilar to that of the AVC fund, I determined that the current value of this amount was to be calculated on the basis of the number of units in the AMRF investment fund that the member would have secured had it been invested in the AMRF on the same day that the balance of her lump sum of €28,145.29 was invested. This amount was then to be invested in the AMRF on the complainant's behalf

- The compensation due to the complainant was to be funded equally by the trustees of the scheme and by the Health Board.

Calculation of enhanced pension entitlements

BACKGROUND

The complainant worked for a construction firm from 1959 to July 1989. When he left the company he elected to defer his pension benefits until his 65th birthday, which was in March 2001. At that stage, i.e. 31 July 1989, he received a statement of his Early Retirement Benefits from the trustees of the plan which showed him as being entitled to a "paid up" deferred pension at 65 of £13,430 p.a. based on a notional salary of £32,301 and a notional pensionable salary of £27,871.

In 1999 the complainant wrote to the company and requested an enhancement of his pension based on 40 years duration. The company then wrote to the administrators of the plan, who had only taken over this role in July 1997, and asked them to prepare estimates of the cost of giving the complainant an enhanced pension. It was not evident from the documentation available on what basis they were asked to do this but it was assumed that it was to be based on 40 years service, i.e. 66.67% of his final pensionable salary at withdrawal.

The administrators based their original calculation for an enhanced pension for the complainant on his final salary figure as per the records they had received from the previous administrators. This was £23,500, which in turn gave an enhanced pension at age 65 of £15,666.96. However the complainant contended that, had all relevant documentation been available to the administrators in August 1999, i.e. the documentation dated 31 July 1989 setting out his Early Retirement Benefits, they would have calculated his enhanced pension entitlements, on the notional pensionable salary of £27,871, which was the salary used to calculate his deferred pension in the first place. This in turn would have given an enhanced pension of £18,582 p.a., rather than the pension of £15,666.96 that he actually received.

OUTCOME

The complainant had named only the administrators of the scheme as respondents in this case but I decided to add the construction firm as an additional respondent. Following an investigation into the matter the construction firm informed me that, while they had agreed to a request from the complainant to increase his benefits on a discretionary basis, they had never agreed or committed to increase his benefits to an amount equal to two thirds of his final pensionable salary. They had originally informed the administrators that they would agree to an enhancement of the complainant's pension up to a maximum cost to the company of £20,000. Following further consultation with the administrators they subsequently agreed to an enhancement of the member's benefits to £15,667 p.a. based on a cost of £26,000 and this was now their final position in relation to the matter. Given the entirely discretionary nature of the increase and the fact that the construction firm had made it clear that an enhanced pension of £15,667 p.a. was its final decision, my final determination was that this complaint should be disallowed.

Alleged incorrect treatment of a single premium payment by the employer following a Redundancy Settlement. Complainant alleged it should be treated as a personal AVC

BACKGROUND

The complainant was employed with the company from November 1992 to May 1997 at which point he availed of a voluntary retirement package. He was a member of the company defined benefit pension scheme from March 1993 to the date he left employment and also had 24 years extra service in the scheme purchased by a transfer value and had bought an additional four years of service.

The complainant was assisted in the redundancy negotiations by his trade union. His employer indicated that while they would not get involved in his pension scheme, they would negotiate a lump sum with him and provide external pension advice as part of "an outplacement package". His trade union representative requested that any payment be made in the most tax efficient manner possible and that tax advice be made available to him.

A severance package of £75,000 was agreed in April 1997 as follows: (a) £1,800 in respect of statutory redundancy entitlements; (b) £8,000 in respect of an ex-gratia severance payment; and (c) £65,200 to be paid into the pension fund. The employer then forwarded a business cheque for £65,200 to the trustees, informing them that the complainant would cease employment on 30 May 1997 and intended leaving the pension scheme *"as fully paid-up"*. An issue then arose over whether this was an employer's single premium payment into the complainant's pension fund or whether in fact it was an additional voluntary contribution from the complainant himself. The complainant considers that it was always intended to be an additional voluntary contribution. If it had been so invested, (effectively as an AVC), he could then have availed of an Approved Retirement Fund (ARF) at the time they were introduced. This would have suited the complainant as he had a handicapped daughter whom he wished to provide for after his death.

The complainant alleged financial loss as a result of maladministration by the trustees, and by the administrators. He alleged he had suffered this loss as a result of maladministration in the manner in which he was advised and in the manner in which a lump-sum was invested on his behalf by the trustees and administrators of the scheme.

OUTCOME

It was clear that the £65,200 payment to the pension fund formed an integral part of the redundancy agreement. The employer contended that the £65,200 was considered an employer contribution and processed it accordingly. The objective of the trustees and the administrators was to maximise the retirement benefits for the complainant as a result of the lump sum investment to his pension fund. The £65,200 was used to maximise his retirement benefits within revenue allowable limits **plus** purchase a spouse's pension and additional post retirement increases. It is also important to note that a central plank of the complaint rested with the danger of over-funding and the resulting return of any unused funding to the main scheme. There was no evidence of over-funding at this point, as the administrators had provided for additional benefits (spouse's pension and escalation) to "use up" any excess over his Revenue limits. It was considered highly unlikely that there would be any excess over this.

In conclusion, I found that there had been misrepresentation by the complainant of his understanding as to the exact status of the £65,200 contribution to his pension fund. This was an employer contribution and it is clear that it was always intended as such. It was arranged in this manner in an attempt to provide him with a tax efficient way of dealing with his redundancy payment. I was satisfied that the complainant was aware of this from the start as he received financial advice from an independent company (paid for by the employer) before ceasing employment which clearly showed tax liability on the full redundancy payment – had it been paid to him.

The complainant then sought written confirmation from his employer in September 1998 that the contribution was an AVC in order to make a false tax declaration. This became apparent in 2002 when the trustees attempted to have the employer contribution “recast” as an AVC. The Revenue Commissioners rejected this attempt, informing the trustees that the complainant had applied for tax relief on the amount as an AVC subsequent to the initial transaction and in the full knowledge that the initial transaction had been handled for tax purposes as an employer contribution.

The complaint was disallowed.

Cases solved by mediation

Delay in dealing with reasonable queries

The complainant contacted me after spending the best part of 4 months attempting to get answers from an Insurance Company about apparent incorrect premium allocations. She was concerned that a financial institution should take nearly 4 months to deal with a matter relating to "a missing premium payment" to the pension fund.

I contacted the Insurance Company and explained the situation and asked that the matter be dealt with without further delay. The Insurance Company responded and appointed a senior member of staff to take responsibility for getting the matter resolved. Within 4 weeks of my getting involved all matters were successfully dealt with and a detailed explanation as to how premium payments were allocated was provided.

Pension scheme trustees, or those charged with the administration of pension schemes, must avoid undue delay in resolving outstanding issues – particularly in cases where practical difficulties may arise for the individual member or where uncertainty may be created as a result of these delays. This complaint is another example of poor communication causing problems and should never have arisen and could have been easily resolved by the provision of a decent explanation and apology in a timely manner.

Maladministration – transfer values – conditions of employment – waiver of claims – authority to investigate

The complainant alleged that when he commenced employment with the company, it was agreed, as part of his terms and conditions, that arrangements would be made for the transfer of his pension fund from a previous employment and that this would be used to *"purchase back service"*. He later ceased employment with the company, after less than 2 years' actual service with them, and the trustees contended that, as a result of this, he had no pension entitlement under the scheme rules. The scheme rules at that time included a five year preservation of benefits rule. The complainant expressed surprise that the transfer of his pension fund from his previous employment had not taken place and that had this transfer taken place he would have satisfied the five year preservation rule, as the Pensions Act includes service that has been the subject of a transfer-in payment as "qualifying" service for preservation purposes.

The trustees confirmed to the complainant that the transfer payment from his previous employer had never been effected and argued that it was normal practice for the employee to arrange such transfer. The complainant responded that he had provided the company with his Options Letter from his previous employment and an internal memorandum to him from the company clearly stated that the company was applying for the transfer and that they would inform him of the back service that this would purchase. The trustees continued to argue that the responsibility for arranging the transfer rested with the complainant under Section 34(3) of the Pensions Act, 1990.

The complainant made a complaint to the Pensions Board but the Pensions Board concluded that they could find no breach of the Pensions Act in the way that the trustees had handled the transfer. The complainant then wrote to me.

On receipt of the complaint, I immediately wrote to the employer and received by return a letter from their solicitors informing me that the complainant had signed a Form of Acceptance whereby he entered into a full and final settlement agreement in relation to "any claims of whatsoever nature in connection with and/or arising out of or concerning" his employment with the company. They contended that this was binding on the complainant and requested that I take no further action in relation to the complaint. I responded by stating that the complaint was not a claim but rather a complaint of maladministration of a pension scheme and the right to make such a complaint is conferred by Section 131 of the Pensions Act, 1990. I further pointed out that any agreement between the complainant and the employer is between these parties and does not affect my statutory duty to investigate and make determination on a complaint of maladministration or relieve the trustees of their duty to administer the scheme properly.

Following these interventions, the company agreed to purchase a buy-out bond on behalf of the complainant equal to the transfer value of what would have been payable under the pension scheme had he been entitled to preserved benefits under that scheme on termination of service. This offer was conditional on the complainant withdrawing his complaint to my Office and on my agreement to withdraw from the investigation of the complaint. I agreed to this, on the condition that, should the agreement now reached not be honoured, the investigation would be revived.

Enhanced pension package on redundancy – tax treatment of lump sum contribution to pension fund – mediation of benefits

The complainant worked for a bank for 21 years until his resignation in 1999. At the time of his resignation, he became aware of the possibility of a redundancy package being introduced at the bank and he sought and received written assurance from the Personnel Manager that *"in the event that any voluntary parting package scheme is introduced in the Bank (better than the package already offered to you) between now and the end of this financial year (which you would ordinarily have been entitled to) then you will automatically be given full elements of same".*

A package was later agreed in the bank but was just after the end of the financial year referred to in the letter of comfort received by the complainant and he did not therefore benefit from it. This package included enhanced pension benefits which involved full preservation rights on all pensionable service. The complainant attempted to have the bank review his pension entitlement and eventually the case ended up in the Labour Court under a Section 20 Referral. This led to the Labour Court recommending a lump sum payment to the complainant for pension purposes of €20,000.

The bank then issued a cheque to the complainant for €11,200 stating that, following consultation with the Revenue Commissioners, they had deducted tax and PRSI contributions. The complainant was unhappy with this and did not cash the cheque as he stated that the bank had informed the Chairman of the Labour Court that any lump sum payment would be treated in the most efficient way for tax purposes.

The complainant then brought his complaint to me. I informed him that there was little opportunity to avoid paying tax on the payment in some fashion or other. However, as the Chairman of the Labour Court indicated that the payment was for pension purposes, I suggested to the employer that perhaps the payment should have been made directly to the complainant's pension fund. This would involve the recovery of the tax and PRSI already deducted. The bank considered this suggestion and agreed to lodge the full payment into a separate "pension pot" which would be valued as notional units of the bank's Exempt Managed Pension Fund and would sit alongside the complainant's preserved pension. They also agreed to allow the complainant a one-off opportunity, at any time between the ages of 55 and the date on which his preserved benefit becomes payable, to have his notional Exempt Managed Pension Fund units valued and transferred to notional cash fund units.

This resolved the matter to everyone's satisfaction.

Late payment of benefits – failure to explain and apologise

This complaint related to late payment of benefits following retirement. The complainant retired on 6 January 2004 and had notified the Department of Education & Science of his retirement on 6 October 2003 – i.e., he gave three months' prior notice. The complainant's lump sum was paid to him on 18 January 2004 but did not take account of a benchmarking award due from 1 January 2004. Pension benefits were not put into payment until 26 March 2004 (including arrears of pension due from 6 January).

The complainant complained to me of the inordinate delay in paying his pension, the lack of any reasonable explanation by the Department for the delay, the financial loss as a result of having to take out an overdraft and the stress involved in having to fight for his pension rights after 35$^1/_2$ years' service.

I contacted the Department and sought an explanation. I was informed that a decision was taken by the Department to hold all new pension calculations coming into effect after 1 January 2004 until sanction for the next round of benchmarking was made, due from 1 January. This decision was taken in good faith in order to avoid having to re-calculate all pension benefits after benchmarking was sanctioned. However, due to industrial relations issues, the sanction for the benchmarking award was delayed and this "caught out" the Pensions Administration Unit. The Department accepted that the complainant had not received a proper explanation as to the delays and agreed to contact him with a full explanation and apology. Unfortunately, there was again a delay in making this contact with the complainant, and I had to intervene again in order to get this addressed.

Pension scheme trustees, or those charged with the administration of pension schemes, must avoid undue delay – particularly in cases where practical difficulties may arise for the individual member as a result or where uncertainty may be created. Where delay is unavoidable, a detailed explanation of the circumstances should be communicated to the individual member. This complaint stemmed from poor communication and could have been easily resolved by the provision of a proper explanation and apology in a timely manner.

Non-compliance with client instruction – compensation payment for stress – jurisdiction of the Pensions Ombudsman

The complainant had recently moved to Australia and had given email instruction to the Life Company to transfer his pension retirement bond on <u>10 July 2003</u> and expressly instructed that the transfer should not happen sooner than this. The bond was transferred by the Life Company on <u>26 June 2003</u> and the complainant alleged that he suffered financial loss of approximately Aus$8,000 as a result. The Life Company then offered a payment of €3,212 (Aus$5,500) which the complainant accepted. However, the complainant then sought compensation from the Life Company for stress and inconvenience. The Life Company offered €1,000 as compensation for any stress experienced as a result of their administrative errors but the complainant rejected this.

Both parties contacted me and asked me to act as independent adjudicator on the matter. However, as I am confined to making determinations relating to the alleged maladministration of pension schemes and any financial redress I can order is limited to financial loss under the scheme, I felt I could not involve myself in any deliberation relating to issues such as stress compensation awards. I therefore suggested that my colleague, the Insurance Ombudsman, might be a more appropriate person to consider this question.

The Life Company issued the €1,000 compensation to the complainant and informed him of his right to go to the Insurance Ombudsman if he so wished. I was happy to note that he accepted the payment.

Transfer Value – missing cheque – accepting earlier date as date of receipt

This case involved a loss in value following a transfer cheque being mislaid between one fund and another. The complainant had paid-up benefits under an old pension scheme and decided to transfer these benefits to his new pension plan. A cheque for the transfer amount was issued by Insurance Company A on 13 August 2004 but apparently never received by Insurance Company B which was dealing with the new pension scheme. Following checks to ensure that the cheque had actually issued and had not been cashed, a replacement cheque issued and was received and invested by Insurance Company B on 23 September 2004. In the intervening period, equity markets changed and this led to a loss of approximately €1,700 to the complainant in the value of his investment.

Following my intervention, Insurance Company B agreed to accept his transfer value as if it had been received on 14 August i.e. he would not suffer as a result of the missing cheque situation.

Early retirement option – discretion of the Trustees – review of discretionary decision

The complainant left the company in May 2003 at age 50 and applied for immediate payment of his early retirement pension under the rules of the scheme. However, payment of early retirement pension was a discretionary power available to the trustees and they decided in February 2004 that, due to the current funding position of the company pension scheme, they were not in a position to consent to any early retirements at that time. As a result, the complainant's application was refused and he was informed that his benefits would be preserved for him until normal retirement age.

A complaint was then made to me. I contacted the trustees and administrators on behalf of the complainant and following this intervention, the trustee noted that his application for early retirement pension was in fact made before their decision that early retirement pensions could not be accommodated. While the trustees were entitled in the interests of all members to make their initial decision, they decided in the very exceptional circumstances that the complainant should be paid his early retirement pension with immediate effect.

Death Benefit – deceased not member of scheme – employer voluntarily agrees to pay death benefit

This complaint related to a death benefit claim under the Construction Federation Operatives Scheme. However, as the deceased was not registered as a member of the scheme by the employer the trustee had no liability to pay death benefit. The employer, from the outset of the claim, agreed to pay the equivalent amount of the death benefit under the scheme to the deceased's next-of-kin. Solicitors for the employer and for the next-of-kin then engaged in exchange of letters in order to facilitate the issuing of the cheque for the amount agreed. The solicitors for the next-of-kin also sought, as a gesture of goodwill, that the employer should pay their client's expenses in this matter. Sixteen months after the original notification to the employer of the death of their employee, the agreed death benefit had still not been paid.

The solicitors for the next-of-kin then contacted my Office, stating that they were instructed to specifically ask me to look into the matter to see if it could be resolved without the trouble and expense of Court proceedings which "would only further aggravate the loss and distress they have already experienced".

I intervened on behalf of the next-of-kin and quickly identified that the outstanding information required to facilitate the issue of the cheque related to clarification as to who the next-of-kin actually was and whether or not the trustees of the Construction Federation Operatives Scheme could act as facilitators in the issuing of the cheque. It was confirmed that the deceased had no spouse or children and that his next-of-kin were his parents and that the trustees of the scheme would facilitate the exchange of the cheque if this was required.

However, as the trustees had no direct responsibility in the case I requested the solicitors for the employer to issue a cheque in equal amounts to each parent, amounting in total to the death benefit agreed. I also informed the solicitors for the next-of-kin that I could take no action in relation to the request that their legal costs be paid by the employer as such action would be outside my terms of reference under the Pensions Act.

I was again struck by the unnecessary delay involved in getting this matter sorted out. It took nearly 18 months to get the final benefit paid to the next-of-kin of a deceased member of staff. This delay was all the more worrying, given that the employer had agreed within the first four months of the dispute to pay the death benefit.

Maladministration – failure to properly inform staff of options – failure to deal with queries in a timely manner – missed deadline for choosing option

The complainant joined the company in September 2001 and was automatically put into the company pension scheme. In August 2002, the company issued a circular to all pension scheme members outlining a number of changes to the scheme, including an opportunity for staff under 23 years of age to opt out of paying contributions until they reached that age. Her senior manager at the time urged staff to think carefully about opting out and promised an information session to discuss the issues. This information session never materialised. The complainant then went through numerous efforts to get advice from management in the company and from the Secretary of the company pension scheme – all to no avail. Eventually she was informed in January 2004 that she had missed the deadline for opting out and must therefore remain in the scheme. She felt aggrieved by this and argued that it was through no fault of her own that she missed this deadline. She was assured that the Secretary to the pension scheme would consider her situation and get back to her. The Secretary failed to respond to her and, in August 2004 she initiated a formal complaint procedure under the pension scheme. Finally, in September 2004, the complainant received confirmation that she could opt out of the pension scheme until her 23rd birthday and that a refund of the contributions paid since January 2004 would be made. However, she was not satisfied with this, as she had been trying to get enough information to consider opting out since the original circular issued in August 2002 and therefore complained to me.

I intervened on her behalf and the company accepted that they had been at fault and agreed to rectify the situation by allowing the complainant take a refund of the contributions paid since August 2002 if she so wished.