Determination.

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Pensions Ombudsman Focus for the period December 2008 to February 2009

Welcome to the 20th edition of the Pensions Ombudsman Focus for the period December 2008 to February 2009.

The Pensions Ombudsman's office under Tony King has been effective in reducing the significant backlog of cases. In addition, in a welcome move, the previous proposal to merge the Pensions Ombudsman with the Financial Ombudsman Service has been abandoned.

Our aim is to provide you with a quarterly review of important determinations of the Pensions Ombudsman and to draw to your attention Ombudsman-related issues of practical relevance. If you wish to discuss these issues and how they might affect you, please contact Mark Blyth, Partner of our specialist Pensions Litigation Group, on (+44) 20 7456 4246.

Injury benefits: injury caused by being accused of bullying can be an injury "attributable to the duties of that employment"

Mrs M D Hewitt v NHS Business Services Authority, Pensions Division (72140/1)

Mrs Hewitt, ("**H**") worked as a Biomedical Scientist for Birkenhead and Wallasey NHS Pensions Trust (the "**Trust**") from 1986. In 1996, H had a period of sickness absence. The occupational health physician reported that the causes of her symptoms of anxiety and depression were not related to her employment. This view was shared by the consultant psychiatrist to whom H was referred.

In October 2000, whilst training a junior colleague, H was accused of bullying. The Head of Clinical Services and Chief Biomedical Scientist interviewed H in order to investigate the grievance. The records of the interview have since been destroyed. H stated that she "felt shocked, demoralised and suffered acute anxiety symptoms as a result of the interview". As a result of the accusations H was unable to eat, suffered sleeplessness and stomach pain as well as a loss of concentration.

The bullying allegations against H were not substantiated (and were formally dismissed at an industrial tribunal in April 2002) and H continued in her role. In May 2001, she was prescribed Prozac and had one week's sick leave. In June 2001, she took sick leave due to anxiety/depression and did not return to work. Her application for ill-health early retirement was rejected in October 2002 because "permanent" incapacity had not been proven.

In November 2002, H received industrial injury disablement benefit due to "psychological injury and severe mental and emotional trauma". H's employment was terminated in April 2003 and, in November 2003, she applied for injury benefits. The Scheme's medical adviser considered H's application and concluded, in October 2004, that the anxiety and depression were mainly attributable to the bullying allegation and how H perceived she had been treated afterwards. H was informed that she was therefore entitled to injury benefit.

In 2006, the medical adviser was asked to review H's application in light of *R v Metropolitan Police Service, ex parte Stunt [2001]*, a case in which it was held that although the member in question had suffered injury as a result of being subject to disciplinary proceedings, the proceedings did not constitute "execution of his duty" and he was therefore not entitled to an ill-health early retirement pension. On the basis of this case, the medical adviser altered his opinion and H was notified that her application had been rejected.

H brought a claim before the Pensions Ombudsman on the grounds that her injury had been sustained in the course of her employment and she should therefore receive the injury benefit which she sought. The respondent's position was that it had originally incorrectly agreed to pay H the injury benefit but, following *Stunt* and because her incapacity was not as a result of the duties of her employment, they were entitled to review that application and reject it.

The Pensions Ombudsman distinguished H's case from *Stunt* on the grounds that the Police Pension Regulations 1987 refer to "an injury received in the execution of duty", whereas the regulations applicable to H (the National Health Service (Injury Benefits) Regulations 1995) use the phrase "attributable to the duties of that employment". The Ombudsman held that the wording in the NHS Regulations was broader than that of the Police Pension Regulations and as such covered the situation where as a result of supervising other members of staff a complaint is made and investigated, resulting in injury.

The Ombudsman found that the decision in *Stunt* did not provide justification for the withdrawal of H's injury benefit. He directed the NHS Business Services Authority to reinstate the benefit from the date it was withdrawn, to pay her all back payments and to include in the payment simple interest for late payment.

Disapplication of HMRC limitations on pension increases do not have retrospective effect and pensioner members have no right to know if benefits are secured by an annuity

Mr G R Hawkins v The Trustees of The Niarchos (London) Ltd 1967 Pension Scheme and Niarchos (London) Ltd (72839/1)

Mr Hawkins ("**H**") retired on 31 July 1993. The Scheme Rules provided that any pension and all subsequent increases were subject to HMRC limitations. H's pension increased after he left service by 6% per annum until it reached the HMRC maximum and from then on it increased at the higher of RPI or 3% per annum.

H's pension was secured by an annuity purchased with the Prudential in the name of the Trustees. Any surplus payments generated by the annuity were retained by the Trustees.

Certain changes to the Rules took place following the introduction of the Finance Act 2004, with effect from 6 April 2006. On 1 March 2007, H queried why full indexing of his pension had not been restored. The Trustees' reply explained that they had been advised that pension increases should be applied to the rate of pension being paid immediately prior to 6 April 2006.

H made an application to the Pensions Ombudsman, on the basis that the Scheme Rules on retirement stated that annual increases will be 6% per annum of the original amount of pension or annuity, subject to HMRC limits. He claimed that, since the HMRC limits had been removed by deed, indexation back to inception of the annuity must apply. H did not believe that the Fund had the right to receive surpluses that arose as a result of HMRC restrictions after 6 April 2006.

H further claimed that he had never been informed that the annuities would remain the property of the Scheme, and that the Scheme Trustees should not be permanently reducing his benefit.

The Trustees counter-argued that the correct reading of the Rules and legislation was that pension increases should go back up to 6% from the first anniversary of 6 April 2006 and that they had been diligent in applying the change and keeping members informed.

The Pensions Ombudsman held that the Trustees had correctly applied the relevant Rule and therefore the increase to pensions should be calculated based on the pension in payment each year. The calculation should include actual past increases and should not be based on the increases that would have been made had the restrictions not been in place.

The Ombudsman also held that the annuity had been purchased in the name of the Trustees with the aim of providing an income stream sufficient to pay H his benefit due. The Trustees were therefore entitled to take the full proceeds of the annuity and retain the excess. Although the Ombudsman appreciated that H found the amendments unfair, he held that because the Trustees had not acted incorrectly in the application of

the Rules, H's complaint against the Trustees would not be upheld.
In respect of H's complaint against the Trustees and Employer, the Ombudsman found that there is no obligation on trustees to inform individual pensioners of the method by which their pension will be secured. There had therefore been no injustice in not informing H that the annuities would remain the property of the Trustees and his complaint on this ground was therefore also refused.

Interest: Ombudsman declined to award interest on a late payment of benefits

Mrs Riddell v Department of Finance & Personnel, Civil Service Pensions (NI) (72726)

Mrs Riddell ("**R**") retired in 1997. During her working life she had been told that, as a part-time employee, she was ineligible to join the Principal Civil Service Pension Scheme (the "**Scheme**"). Some 10 years later, R was informed that the Department of Finance & Personnel ("**DFP**") had decided that she was in fact eligible to enter the Scheme and that if she withdrew her Tribunal claim, she would be admitted retrospectively to the Scheme.

The parties agreed that R was entitled to retrospective membership for the period 1 September 1984 until 23 May 1997. DFP informed R that she would be entitled to a pension and a lump sum and that she could purchase a widower's pension, but that this would require the payment by her of back contribution.

R later enquired through the Scheme's internal dispute resolution procedure whether she was entitled to interest on her benefits for the period between her retirement in 1997 and the date of payment of the benefits in 2008. R agreed to pay the contribution arrears in respect of the widower's pension as long as she was permitted to pursue her claim for interest on her benefit payment.

R's pension came into payment in June 2008 and no account for interest for late payment was made. She consequently brought a claim before the Pensions Ombudsman that she should have received interest for late payment on her pension and lump sum. In defence of the claim, the DFP maintained that the decision to pay interest came down to the relevant provisions in the Rules, which only permit interest to be paid in exceptional circumstances, which did not exist here.

The Ombudsman held that under the Pension Schemes (Northern Ireland) Act 1993 he was authorised to direct that interest payments be made. However, he stated that in the absence of maladministration and the fact that there was no provision in the Rules that allowed the payment of interest in this situation, he could not direct that an interest payment be made. He also took account of the fact that R had not been asked to pay interest on the contribution arrears in respect of the widower's contributions.

The Ombudsman further considered whether R had a legal entitlement to interest. Following the House of Lords case *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another [2007]*, the Ombudsman did not consider that R was legally entitled to interest.

The Ombudsman directed DFP to pay R £200 by way of compensation for the inconvenience suffered by R and the unreasonable delay between when her entitlement to benefits arose and when they actually came into payment.

Maladministration: incorrect information given to a pension credit member

S Kerbel v Southwark County Council (72577/1)

Mr Kerbel was a deferred member of the Local Government Pension Scheme (the "**LGPS**"). He had the option to receive his benefits from age 60 (June 2010). His ex-spouse, Ms Kerbel ("**K**"), became entitled to 60% of Mr Kerbel's cash equivalent transfer value, a sum of £81,142.19 (net of costs) under a pension sharing order which took effect from 8 December 2006. K subsequently became a pension credit member of the LGPS.

When they took advice prior to divorce, Mr Kerbel and K were told independently by Southwark County Council (**"Southwark CC**") that they would both be entitled to take benefits from age 60 under the pension sharing regulations. This information formed part of the basis upon which they achieved a clean break divorce settlement.

However, in a letter from Southwark CC to K in February 2007, K was informed that she would only be entitled to take her benefits from age 65 and that "the date that [her] pension credit benefits... are payable is totally independent of the date that [her] ex-spouse may draw his benefits...".

K complained through the Scheme's IDRP that she should receive her pension at age 60 rather than age 65. Southwark CC responded quoting Part IV of the Local Government Pension Scheme Regulations 1997 (the "**Regulations**") that "benefits are payable when the Pension Credit Member attains Normal Benefit Age which is defined in Schedule 1A as age 65".

K then brought a claim before the Pensions Ombudsman that Southwark CC had wrongly interpreted the Regulations, or that they had given her wrong information that her benefits were payable from age 60. K also argued that had she known that she would not be entitled to receive her benefits until age 65, it was likely that a different divorce settlement would have been reached and she was therefore entitled to compensation.

The Ombudsman found that although Mr Kerbel was entitled to receive his benefits from age 60, there was no provision under the Regulations that entitled K to receive hers at 60 as well. He held that K had effectively become a new member of the LGPS and was therefore entitled to her benefits at age 65 as she would be if she was an employee member.

The Ombudsman further held that Southwark CC had correctly interpreted the Regulations. The value of K's benefits was no less than if they had been payable at age 60 (because they would have been reduced to cover an extra five years of payment). However, he acknowledged the difficulty of K's situation. Nonetheless, he felt that he could not make an award on the basis that a different divorce settlement would have been reached had K known that she would not receive her benefits until age 65, as there was no certainty that this would have been the case or what form it might have taken.

The giving of incorrect information to Mr Kerbel and K by Southwark CC was found to be maladministration. The Ombudsman awarded K £800 to compensate her for her disappointment in not receiving her pension until five years later than she expected.

Limitation period: full application to actions by a beneficiary for a breach of trust

Mr Peter Lever v The Lancashire County Cricket Club (27178/2)

Mr Lever ("**L**") was employed by the Lancashire County Cricket Club (the "**LCCC**") from April 1960. In September 1974, the pension manager wrote to LCCC explaining that existing members who left before 6 April 1980 would have the option of taking a refund of their own contributions in lieu of other benefits. Members who left after 6 April 1980 would get a refund of their own contributions made before 6 April 1975 in lieu of benefits. L left service in April 1977.

L was re-employed by LCCC between 1983 and 1986. In June 1985, LCCC informed L that two annuity policies had been purchased in the trustees' name to secure L's benefits. The letter said that if L left service within five years after the arrangement was set up he could either take a refund of contributions or he could convert the policy to a fully paid up policy and take the full proceeds of it. L acknowledged receipt of this letter.

On leaving employment with LCCC for the second time in 1986, L's annuity provider issued L with a form which stated that the policies could only be transferred to an exempt approved scheme and that any surrender values would be payable to LCCC as grantees under the policies. L elected to surrender the policies, although he denied ever receiving the letter or cheque that LCCC claim was sent to him.

In 2004, L obtained details of the original policies and wrote to LCCC questioning their low value and also whether it was right that LCCC should be able to cash them in. LCCC claimed that the assets held for L's benefit had previously been paid out and that it was unable to find a record of the outstanding policies or benefits for L.

L made a complaint to the Pensions Ombudsman that he had not received his benefits and that LCCC owed him the full actuarial value of his accrued rights. L was aware that his claim was potentially time barred and he argued that the Limitation Act was subject to the proviso that there was no limitation period for actions to recover trust property. In support of this he cited the case of *Nelson v Rye (1996)* for the principle that a simple breach of fiduciary duty is not subject to the restrictions of the Limitation Act.

L submitted that his financial planning for retirement had been based on reliance on his pension benefit. He did not accept that LCCC's contribution rate was as low as it said it was, or that it was static throughout his membership of the scheme.

LCCC refused to accept that L had not known that his pension was not as he expected until 2004. LCCC denied that it had not paid all of the necessary contributions into the scheme and that it had failed to pay to L the proceeds of his policies or his return of contributions.

The Pensions Ombudsman dealt first with the issue of the limitation period. He held that in an action by a beneficiary for breach of trust, the time starts to run from the accrual of the right of action, and not from the date of knowledge. L's right of action arose when he turned 40 in 1980 and therefore on the face of it his claim was time barred. The

Ombudsman considered *Nelson v Rye*, but rejected it on the grounds that it had been subsequently overruled. The Ombudsman found that there was only no limitation period applicable in a claim by a beneficiary if LCCC had received L's benefits and converted them for its own use. He found no evidence to support this.

Because the period of delay between the right of action arising and L's claim was significant and because the time delay was not the fault of LCCC, it was likely that a court would consider it unjust and unreasonable to allow L to pursue a claim against LCCC. On these grounds the Ombudsman rejected the first element of L's claim.

Despite L's claim being time barred, the Ombudsman decided to consider it on the basis that relatively little time had passed since the end of the limitation period.

Because of the letter of 26 June 1985 from LCCC to L and the letter of 1 December 1986 from the broker to L, both of which highlighted L's right, if he left within five years, to claim the proceeds of the converted policies, the Ombudsman held that it appeared that a cheque for the amount of the proceeds of the policies had been sent to L. The Ombudsman did not express an opinion as to whether this cheque was ever received by L; he was satisfied that even if it was not, this was not as a result of maladministration by LCCC.

On this basis, and on the grounds that L did not query at the time why he had not received the cheque as requested, the Ombudsman dismissed L's complaint.

Transfer of preserved pension benefits: improper delay

Mrs J M Quest v Dorset County Council, Aon Consulting Limited and the Trustees of the Center Parcs Pension Scheme (S00483)

Mrs Quest ("**Q**") was a member of the Local Government Pension Scheme ("**LGPS**"). In July 2001, Q asked Dorset County Council (the "**Council**") to provide a quotation for the transfer of her preserved benefits in the Center Parcs Pension Scheme ("**CPPS**") into the LGPS. The Council wrote to Aon Consulting Limited ("**Aon**"), the administrator of the CPPS, requesting the quotation.

Aon calculated the transfer value to be £72,265. The Council sent three letters to Aon requesting GMP information in relation to Q. In May 2002, the Council telephoned Aon twice for a COD (Contracted-out Deduction) figure. Aon obtained this figure from HMRC and immediately faxed it to the Council on 15 May 2002. The following day the Council wrote to Q stating that the transfer value would purchase a service credit of 15 years 144 days. On this basis, Q completed the transfer instructions to the Council and requested payment from Aon on 21 May 2002.

On 24 January 2003, the Council received only £54,698 from Aon. This purchased a service credit of 11 years 8 days. The Council complained to Aon on Q's behalf about the decrease in transfer value. On 11 January 2005, Aon wrote to the Council stating that statutory regulations permitted six months to process a transfer after receipt of a member's application, and that between May and November 2002 the transfer values in the CPPS had rapidly decreased, which explained the difference.

Aon offered a further £3,056. This was the amount needed to purchase the difference between the service credit which could have been purchased with the transfer value calculated as at 22 November 2002 (six months after the date on which the application was received) and the total service credit already purchased (seven months after the application was received). The Council accepted this sum "in full and final settlement", without reverting back to Q.

Q complained to Aon and the Council. Aon replied that as far as they were concerned the matter was closed, and whilst the Council admitted to Q that it had caused some delays and that it would have been preferable to consult Q before accepting Aon's offer in settlement, it said that this was not maladministration, and that it was done simply to assist Q in speeding the process up so that she could transfer her LGPS benefits. The Council did, however, pay Q £500 compensation for the distress and inconvenience caused to her.

Q brought a complaint before the Pensions Ombudsman based on the time delays between her transfer request and the date the transfer was made and also the fact that the Council had accepted the sum from Aon without consulting her.

The Ombudsman held that by 5 September 2001, the Council had all the information that Aon was required to provide. It held that Q could have accepted a transfer quotation by 28 September 2001. In addition, the Council had confused GMP and COD

in their requests to Aon which led to unnecessary delays. Finally, in accepting Aon's offer in settlement without consulting Q, the Council was responsible for any liability on the part of Aon.

In relation to Aon and the trustees of the CPPS, the Ombudsman held that confusion and delay could have been avoided if Aon had explained its position in relation to the COD instead of ignoring the Council's letters.

Under the relevant law trustees must apply for permission from the Pensions Regulator to extend the six-month period permitted to process a transfer application. If the six-month period is extended without reasonable excuse, the transfer value must be recalculated as at the date of the member's application or, if greater, interest at a specified rate must be added to the original transfer value. The Ombudsman found that the fact that Aon did not request permission for the delay in payment following receipt of the transfer form suggested that they had no reasonable excuse.

The Ombudsman directed Aon to calculate, within 14 days, the transfer value in the CPPS as at 22 May 2002, i.e. the date of Q's application. He directed that the trustees of the CPPS must pay to the Teachers' Pension Scheme on Q's behalf the amount required to purchase the difference (if positive) between this service credit and the total service credit already purchased pursuant to the transfers from the CPPS.

The Ombudsman directed the Council to calculate the service credit that would have been purchased in the LGPS on 28 September 2001 by a transfer value of £72,265.57. The Council was directed to pay to the Teachers' Pension Scheme the amount required to purchase the difference (if positive) between this service credit and the total service credit already purchased by transfers from the CPPS.

Incorrect benefits statement: employer not under a duty to inform member of loss of right to unreduced pension

Mrs Wootton v NHS Business Services Authority (71204/1)

Mrs Wootton ("**W**") worked for the NHS Business Services Authority ("**NHSBSA**") and was a member of the NHS Pension Scheme (the "**Scheme**"). Before leaving employment in September 1986, she was a "special classes" member of the Scheme. This meant that she could retire at age 55 (which she would attain in September 2006) with an unreduced pension.

In November 1995, W re-entered employment with NHSBSA and rejoined the Scheme. Having been out of the Scheme for more than five years, she had lost her status as a special classes member along with the right to retire at 55 with an unreduced pension. W continued to believe that she could receive an unreduced pension at age 55. Her belief was reinforced by correspondence from NHSBSA received between 1999 and 2006, which provided her with benefit estimates based on her retirement age being 55. However, W also received correspondence which referred to her benefits being payable from age 60.

W agreed to purchase added years by deductions of salary from her 48th birthday (the birthday after entering into the purchase agreement) until her 55th birthday. At age 55, W requested information about the benefits she could draw. NHSBSA wrote to W informing her that there had been an error and that in fact her normal retirement age was 60 rather than 55.

W complained to the Pensions Ombudsman that she had been given misleading information about the age at which she could retire. She also complained that the £250 payment offered by NHSBSA to compensate her for distress and inconvenience and loss of expectation was insufficient.

NHSBSA admitted that they should have recognised W's loss of the right to retire at age 55 with an unreduced pension and that they should have corresponded with her on that basis. However, they submitted that the member had not suffered any financial loss as a result of the error as she had not retired, she was still a member of the Scheme and was therefore still accruing benefits.

The Ombudsman agreed with the respondent on this point, on the basis that W had not been able to show any financial loss. However, he did direct that W should be given the option to adjust the purchase of added years to the correct period, i.e. from her 48th to her 60th birthday, as it would be slightly cheaper for her.

NHSBSA also submitted that W should have been aware that her normal retirement age was 60 since when she re-joined the Scheme in 1995 she was given a Scheme Guide which explained the loss of the right to retire at 55 following a five-year gap in employment with the NHS. The Ombudsman disagreed on this point, holding that it was unrealistic to expect W to have realised that the break in her service between 1986 and 1995 meant that she lost her right to retire at age 55 with an unreduced pension. He also found that it was not unreasonable for her to have relied on the information that she

received indicating that she had this right. However, the Ombudsman felt that NHSBSA had not been under a duty to inform deferred members of the consequences of not re-joining NHSBSA and the Scheme before March 1995.

The Ombudsman directed NHSBSA to pay W £1,000 in compensation for the distress and disappointment she had suffered as a result of learning that she would not be able to draw pension for an additional five years without a significant reduction.

Payment under a compromise agreement does not automatically eliminate right to pension benefits under redundancy provisions

Mr D Rowlett v London Borough of Havering (71381/1)

Mr Rowlett ("**R**") was employed by the London Borough of Havering (the "**Council**") from 1991 as a sign writer. He was a member of the Local Government Pension Scheme ("**LGPS**"), which was administered by the Council. R's employment was transferred under TUPE on 1 March 2005 to May Gurney.

May Gurney did not manufacture signs and R's role was not to be required following the transfer. On 11 February 2005, R received a letter from May Gurney informing him that they did not anticipate having any sign-maker positions, but that he would be fully consulted on the situation and his options.

After the transfer took place R was told that he should stay at home. This he did and remained on full pay until 31 May 2005 when his employment ceased. On 20 June 2005, R entered into a compromise agreement with May Gurney, under which he received £34,900. The agreement also provided that R would waive any right to "any claim in respect of his accrued pension rights, save any claim in relation to… [the] Statement of Policy published in October 2003".

On signing the agreement, R applied to the Council for the immediate payment of his benefits. He subsequently received a benefit statement which showed his entitlement to a lump sum of £21,077 and a pension of £6,923 per annum. Two months later, however, he received a letter from the Council indicating that it wished to recover the lump sum that had already been paid and that he was no longer entitled to an early-retirement pension.

R complained through the LGPS's internal dispute resolution procedure ("**IDRP**"). The LGPS had a two-stage IDRP under which May Gurney made the first instance decision. May Gurney gave R formal notification on 18 May 2006 of its decision that R was not entitled to immediate retirement benefits because the termination of his employment had been by mutual agreement.

R appealed to the Pensions Ombudsman, claiming that the payment he received under the compromise agreement was for his loss of office and termination of employment and it was entirely separate from the payment that he was seeking from the LGPS in connection with his redundancy. R brought his complaint against the Council only. The Council argued that because it was not a party to the compromise agreement nor to any related discussions it could not comment upon the circumstances surrounding the termination of R's employment. The Council further added that although it was apparent that the compromise agreement had not been well drafted, it appears as if R signed away the right to any immediate pension benefits. The Council submitted that R's complaint should be against May Gurney instead.

The Ombudsman held that R had waived any claim or rights associated with the LGPS Regulations. Using a general principle that any ambiguity in a contract should be construed against the person who drafted it, he found that the compromise agreement

should be construed in favour of R. He did not agree that the intentions of the parties were clear, except to the extent of settling R's claim in relation to the LGPS Regulations.

The Ombudsman further held that he would only intervene where the decision made was one which no properly directed, reasonable decision-maker could have reached. The Council was not entitled to refuse to consider R's request; it had therefore failed to direct itself properly.

The Ombudsman found that the Council did not need to reach its own decision about whether R had been made redundant, but it should have looked at how May Gurney reached the decision that it made.

The Ombudsman awarded R £100 compensation for the disappointment suffered, although he directed that it was not appropriate to award compensation for the financial loss as R had not suffered any such loss. Finally, he instructed the Council to consider R's application under the LGPS Regulations.

Conflict of interest: having a personal interest in the payment of a lump sum death benefit did not prevent trustee from being able to take part in decision-making process

Mrs J E Warwick v Mrs S A Ranger and Union Pension Trustees Ltd (71590/1)

Mr and Mrs Ranger were the co-directors of R Ranger Ltd (the "**Company**") and were both trustees of its pension scheme. Mr and Mrs Ranger separated in October 1995. Mr Ranger and Mrs Warwick ("**W**") had been in a relationship together for several years, and following Mr Ranger's separation from his wife, they began cohabiting.

Mr Ranger died on 6 March 2004. The trustees of the scheme at this time were Mrs Ranger and an independent trustee. The Rules of the scheme provided that on death a lump sum would be payable and a dependant's/widow's pension would be purchased with the balance of the fund.

W was eligible to receive the lump sum following Mr Ranger's death on the basis that she was a beneficiary under his will. She was only entitled to the dependant's pension if she could show that she was financially dependent on Mr Ranger. The scheme administrator therefore wrote to W requesting certain financial information that was believed would enable them to make a decision on the level of her dependency on Mr Ranger.

On 3 March 2006, the administrators advised W that the trustees had decided to award her a lump sum of £70,235. They also advised her that a dependant's pension of £13,000 was available, but that it remained for her to prove that she had been financially dependent on Mr Ranger. In response to this, W said that she was not prepared to provide any further information.

In a letter to W from the administrator of 28 March 2006, W was informed that the trustees (especially Mrs Ranger) did not believe that W had proven financial dependency. Further, the letter put to W Mrs Ranger's belief that Mr Ranger's income was insufficient to cover his expenses and therefore in his later years he must have been supported by W, and was in fact probably dependent upon her.

In June 2006, the trustees suggested that, as a compromise, 50% of the residual fund should be used to purchase a pension for W. W rejected this, and so in July of that year the administrator once again requested W's bank statements for the two years previous to Mr Ranger's death. W refused to supply this information.

In the absence of progress, on 5 October 2006 the administrator wrote to W explaining that the trustees had decided to implement the compromise that they had suggested in June. In February 2007, the administrator wrote to W with details of the most favourable quotation and enclosed the necessary documents for her to complete. W refused to accept the quotation and asked for more details on how the fund had been calculated.

She was provided with this information and also details of the factors the trustees had taken into account when apportioning the lump sum. These details revealed that the independent trustee had decided that on the basis that W had been in a relationship

with Mr Ranger at the time of his death, she was the main beneficiary under his will, and that as she appeared to have limited resources she should receive the majority of the lump sum. However, the fact that Mrs Ranger was still married to Mr Ranger meant that she should receive a 20% share. The details also remained that Mrs Ranger disagreed with her entitlement and felt that the split should be 60/40 in favour of W and that discussions resulted in an apportionment of 70/30.

W complained to the Pensions Ombudsman that Mrs Ranger should not have participated in the decision because she had a conflict of interest and the reduction in her lump sum should not have been made on the basis of the objections of a trustee with a personal interest.

The Ombudsman held that in this situation there was clearly a potential for a conflict of interest. However these scheme Rules did not prevent a trustee from acting in these circumstances. He further held that the difference in opinion of the trustees was as to how the lump sum should be split and not as to whom it should be payable to. The trustees came to a compromise on this which the Ombudsman did not believe was invalidated by the possibility of bias on Mrs Ranger's part.

The Ombudsman did not believe that the trustees' request for further information from W was unreasonable and he found that W's refusal to provide this information gave further weight to the suspicion that she was not dependent on Mr Ranger. On this basis the Ombudsman rejected W's complaint.

Failure to properly inform of pension rights is injustice, regardless of whether this causes financial loss

Mr W E Hughes v CEMEX UK Materials Ltd (27698/1)

Mr Hughes ("**H**") became a member of the RMC Money Purchase Pension Scheme (the "**Scheme**") on 28 February 1995. On 1 December 1999, he was promoted, following which he received a new employment contract, which showed that he participated in the RMC "pension plus" Scheme. Records showed that he was also sent various pieces of "company information". H has no recollection of receiving these documents.

In November 2003, the Trustees issued a member announcement explaining that the Fund was to close to new members. H denies ever receiving this announcement. A letter to H dated 23 April 2004 stated that he was a member of the Scheme and offered him membership of the new DC section from 11 May 2004. H joined the DC section from 1 August 2004.

H later found out that some of his colleagues were members of the DB section of the Scheme. He enquired as to whether he was eligible to join this section. He was told that he had missed the opportunity to join when he had failed to respond to a final offer. H complained that he had never been made aware that he was entitled to join the DB section

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The response of H's employer ("**CEMEX**") was that they were sympathetic to his situation, but that there was no record that he had not been offered membership and he had had ample opportunity to raise this before the Scheme closed and it became too late.

In July 2006 H used the final appeal procedure to complain that he had not known about the DB Scheme and that if he had been aware of it he would have joined it. The final appeal hearing in October 2006 held that although there was no evidence that H had been informed of his right to join the DB section, CEMEX did not accept that he had no knowledge of it at all and he had had adequate opportunity (four years) to enquire as to his eligibility.

H complained to the Pensions Ombudsman. The Ombudsman held that it was not reasonable to have expected H to realise from the information that he was given that there was more than one scheme that he was eligible to join. The Ombudsman was therefore satisfied that H had not been properly informed of his pension rights. This was maladministration on the part of the Scheme's trustees.

The Ombudsman found that there was no evidence to support CEMEX's claim that H must have been aware of the DB section and the fact that it was closing to new entrants. Further, the Ombudsman did not accept that it was impossible for H's benefits to have been amended to fall in line with the benefits he would have received under the DB section. On this basis H's complaint was upheld.

However, the Ombudsman found that it was unlikely that the financial loss suffered by H was as great as H anticipated, largely because the DB section was contracted out, whereas the DC section was not.

The Ombudsman directed that H should receive benefits in respect of his contributions post-promotion equal to those that he would have received under the DB section, reduced by the amount of his State additional pension accrued during that time. Alternatively, given the complexity of the calculations and the fact that the DC benefits may turn out to be better than those under the DB section, the Ombudsman directed that H should have the right to choose instead to receive £5,000 compensation from CEMEX.

Regardless of H's decision, CEMEX was directed to pay him £100 compensation for the distress and inconvenience of having to make a complaint.

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