Determination.

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Pensions Ombudsman Focus for the period
June 2014 to August 2014
Welcome to the 42nd edition of the Pensions Ombudsman Focus for the period June 2014 to August 2014.

Our aim is to provide you with a quarterly review of important determinations of the Pensions Ombudsman and alert you to 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.

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Mr Roger Fokerd against Heineken UK Limited and Scottish & Newcastle Pension Plan Trustee Ltd

The Scottish & Newcastle Pension Plan (the “Plan”), of which Mr Fokerd was a member, provided in its Rules for RPI-linked annual increases of up to 5% on pensions in payment in excess of GMP for post-April 1997 pensionable service. Prior to its takeover by Heineken UK Limited (“Heineken”), Scottish & Newcastle Ltd (“S&N”) had also traditionally provided discretionary increases for pre-April 1997 service on the same calculation basis.

Mr Fokerd was made compulsorily redundant on 30 April 1999. During a meeting with the Plan administrators prior to redundancy, he was shown a statement of retirement benefits which explained that, if he retired early, the basis for his pension increases would be RPI-linked (up to a maximum of 5%). However, this basis for increases appeared to refer to Mr Fokerd’s entire pension and did not differentiate between pre- and post-April 1997 service.

Mr Fokerd accepted this early retirement offer and continued to receive annual pensions increases in accordance with RPI (up to 5%) until 2010, when the administrators communicated to him that the trustees had decided, at their discretion, not to increase pensions in excess of GMP earned prior to April 1997. Mr Fokerd subsequently complained that he was entitled to pre-April 1997 increases on the previous basis, pointing to the incorrect statement previously provided by the administrators. Mr Fokerd claimed that his pension entitlement formed part of his contract of employment and that he had negotiated improved terms to his contract by accepting these pension terms. He also asserted that the voluntary early retirement terms he had accepted were part of his redundancy terms and had led to him deciding against making an unfair dismissal claim. Mr Fokerd conceded that, in any case, he would not have changed his decision to opt for early retirement had the correct early retirement quotation been shown to him at the time. However, he explained that his subsequent decision to move from Edinburgh and reduce his work hours had been based in reliance on his anticipated pensions increases. Had he remained in Edinburgh, he claimed he would have benefited from a large rise in house prices in the following period.

In response, Heineken (as employer) pointed out that any entitlement to pension benefits arose from membership of the Plan. Although the contract of employment gave a right to join this Plan, it did not govern the terms of membership. The member literature made clear that pre-April 1997 pensions increases were discretionary only. Furthermore, the trustees could not have changed Mr Fokerd’s employment terms as they were not a party to his employment contract. Finally, Heineken stated that Mr Fokerd had offered no evidence that he would have acted differently had the statement provided been correct, and his alleged loss from selling his Edinburgh home was neither reasonably foreseeable nor a direct consequence of this.
The trustees, in their defence, noted that they had no intention to override the Rules and in any case had no power to unilaterally change them. They also stated that Mr Fokerd would have had no greater entitlement to pension increases had he not opted for early retirement, as even if he had become a deferred member, he would still have been entitled to pre-1997 increases on a discretionary basis only.

The Ombudsman agreed with Heineken that the terms of employment gave a right to be a Plan member but the conditions of Plan membership (and therefore of pensions entitlements) came from the Plan Rules. He also agreed that the trustees, who were not a party to the contract, could not alter Mr Fokerd’s terms of employment. The Ombudsman also pointed out that Mr Fokerd’s redundancy was compulsory and therefore was not an opportunity for him to negotiate his leaving terms. As such, no contractual entitlement to pre-1997 increases arose. The fact Mr Fokerd took a voluntary early pension (which he accepted he would have chosen in any case) in no sense prevented him from launching an unfair dismissal claim in respect of his redundancy. Given that Mr Fokerd’s alleged financial loss arose from a set of highly particular factors (a lifestyle change purportedly based on a set of detailed assumptions regarding discretionary increases), the Ombudsman stated that any loss would have to be shown to be reasonably foreseeable for the trustees to be liable, which the Ombudsman determined was not the case. As the statement of benefits had not caused the alleged loss, which was too remote in any event, the Ombudsman determined that Mr Fokerd was only entitled to £500 compensation for distress and disappointment caused by the trustees’ maladministration in providing an incorrect statement of benefits.
Where trustees establish a causal link between expenditure made due to a change of position and an overpaid pension, they are not entitled to decide that no causal link exists at a later date. Limitation periods may apply in overpayment cases if the trustees should have been reasonably aware of the mistake sooner. Also, recovery of overpaid amounts without member consent before the matter is settled may not be permitted.

Mr David Clift against the Trustees of the Industry-Wide Coal Staff Superannuation Scheme

In June 1999, the trustees of the Industry-Wide Coal Staff Superannuation Scheme (“IWCSSS”) discovered that they had overpaid £3,876 of a £8,748 pensions lump sum to Mr Clift. They had used the wrong date when calculating his overtime earnings. By this point, Mr Clift had already placed an order for a conservatory at a cost of £11,220. Mr Clift successfully appealed against the trustees’ attempt to recoup the overpayment on the basis that the trustees accepted he had bought the conservatory in reliance on the awarded lump sum.

However, in August 2011, the trustees notified Mr Clift that they had overpaid him further amounts totalling £2,795, this time due to a separate error when calculating his pension benefits.

Mr Clift contested the attempted recovery of funds on several grounds. Firstly, as the principles were no different to the first overpayment, he argued the change of position defence relating to the purchase of the conservatory should still apply to the second overpayment. He also argued that he had changed his position by having become accustomed to the “luxury” of a monthly take-away meal at an irreversible total outlay of £2,880 over the preceding 12 years. In addition, Mr Clift contested that the trustees had contravened s91 Pensions Act 1995 by recouping overpaid sums before the dispute had been settled. Finally, based on the Limitation Act 1980, he argued that, in any case, the trustees could only attempt to recover up to six years’ worth of overpayments as the limitation period had started from the time the trustees could have discovered the mistake with reasonable diligence.

In reply, the trustees stated that they had only realised the second overpayment problem in 2010 and could not have discovered this with “reasonable diligence” any earlier, so the limitation period had only started upon discovery in 2010. In the trustees’ opinion, the reason for the second overpayment was the establishment of a “mirror image” scheme to replicate an earlier scheme which had led to the adoption of mistaken calculation practices and this was separate from the reason for the first overpayment. In relation to the change of position defence, in spite of their previous finding that this had been a valid defence in the original overpayment case, the trustees decided that the money spent on the conservatory did not constitute a change of position. They also considered there was no evidence that Mr Clift had changed his position with his takeaway meals habit.

The Deputy Pensions Ombudsman failed to see how the trustees could change their view formed on the first overpayment that, but for the overpayment, Mr Clift would not have bought the conservatory in 1999. If they had been satisfied of a “causal link” between overpayment and purchase in the first instance, the trustees could not subsequently decide there was no causal link for the second overpayment. However, the Deputy Pensions Ombudsman dismissed the argument that the money spent on
takeaways was an unrecoverable change of position as Mr Clift had other sources of pension income to fund this and, in any case, had not kept any receipts to evidence this expenditure.

Turning to the relevant provisions of the Limitation Act 1980, the Deputy Pensions Ombudsman confirmed that the limitation period of six years in respect of the second overpayment began from the date a trustee discovers, or with “reasonable diligence” could have discovered, the error. She dismissed the trustees’ argument that the mistake could not have been discovered any sooner, stating that a reasonably diligent trustee should have a strong knowledge of the scheme rules and understand how they are applied to begin with. The trustees had not ensured the scheme administrators were replicating the provisions under the earlier scheme, should have carried out checks or audits on a regular basis, and should not have had to act only after “odd results” had appeared. As the Deputy Pensions Ombudsman felt the mistake should have been discovered when first made in June 1999, she stated that the limitation period ran out in 2005 (ie. six years before the trustees made Mr Clift aware of the second overpayment in August 2011).

Finally, in relation to s91 Pensions Act 1995, the Deputy Pensions Ombudsman said that it was maladministration to recover overpaid sums without Mr Clift’s consent while the disagreement was ongoing. However, in reaching this view, it is unclear whether the Deputy Pensions Ombudsman considered conflicting case law and determinations which provide that recouped overpayments are not caught by s91.

The Deputy Pensions Ombudsman therefore ordered that the trustees refrain from reclaiming the second overpayment lump sum, recalculate the overpaid pension benefits with regard to the Limitation Act 1980 as well as any payments already deducted and pay Mr Clift £350 for distress and inconvenience.
Mr Jardine against British Telecommunications plc

BT terminated the employment contract of Mr Jardine (who suffered from depression) on the grounds of incapacity. Mr Jardine applied for an ill-health pension under the BT Pension Scheme. However, despite two psychiatrists’ reports that indicated he was unfit to return to work, BT refused his application on the grounds that improvement was the ‘norm’ with his condition. The Ombudsman’s office found this decision had been unreasonable and directed that BT make the decision again on the basis of a new medical report produced by a previously uninvolved medical adviser. BT appointed Dr Sheard to carry out a new review and provided him with all of Mr Jardine’s medical records (including those produced after Mr Jardine’s dismissal). BT asked Dr Sheard to decide whether Mr Jardine was likely to have been permanently incapacitated as at the date of his dismissal. Dr Sheard decided that, based on the information available to him, Mr Jardine was not permanently unable to return to work at the time of his dismissal and suggested that he would have responded to further treatment options.

Mr Jardine argued that the scheme rules contained no requirement to consider appropriate treatments when deciding whether any incapacity was permanent. He further argued that Dr Sheard had unreasonably disregarded two previous medical reports that said he had been unable to return to work despite having received treatment. Mr Jardine asked the Ombudsman to reverse BT’s decision rather than remit it back to BT yet again for another review.

BT countered that they had complied with the Ombudsman’s previous direction to commission a fresh and independent medical report and that to revisit the decision again would be inappropriate. They argued that it would have gone beyond the terms of the Ombudsman’s order to seek fresh additional information from the doctors who had previously seen Mr Jardine, instead of merely providing all evidence that had already been produced. They also said that as the test for permanent incapacity was to be decided as at the date Mr Jardine had left employment, any subsequently created medical information was irrelevant to the conclusions of the report.

The Deputy Pensions Ombudsman said that regardless of whether BT had complied with the original order to produce a new medical review, the decision could still be referred back to the Ombudsman’s office if there had been a flaw in the fresh decision-making process. Whilst recognising that the scheme rules were silent on the question of untried treatments, the Deputy Pensions Ombudsman said that this was nevertheless an important consideration when deciding whether incapacity was permanent and that Dr Sheard had been reasonable to consider this. However, the Deputy Pensions Ombudsman said that Dr Sheard had drawn the wrong conclusions from the evidence available to him. Dr Sheard gave inadequate reasons for disagreeing with a November 2004 report which dismissed Mr Jardine’s prospects of recovery and for asserting that Mr Jardine was permanently incapacitated. For example, Dr Sheard did not specifically mention any alternative medication or therapy that might benefit Mr Jardine and whether it was reasonable for Mr Jardine to do undergo such treatment. Dr Sheard also contradicted himself by conceding that he might now be persuaded that Mr Jardine...
was permanently unable to return to work, despite having concluded that Mr Jardine wasn’t able to do so at the time of his dismissal, and despite the fact that nothing had apparently changed in his condition in the six years between these dates. Given that Dr Sheard had identified a lack of detail or reasoning for the November 2004 report’s conclusion, the Deputy Pensions Ombudsman said that Dr Sheard needed further information himself to make a proper decision and that his decision appeared to have been reached based on a ‘default’ view that Mr Jardine was not permanently incapacitated. As such, Dr Sheard should have requested extra information and BT should have ensured that he considered all the relevant information when making a decision.

The Deputy Pensions Ombudsman said she was unable to reverse the decision herself given the insufficient medical information available. She instead remitted the decision back to BT. She decided that BT was guilty of maladministration for making a decision based on an “incomplete and insufficient report by Dr Sheard” and directed BT to ask Dr Sheard to undertake another new review based on complete information and this time provide full reasons why he disagreed with the November 2004 report, the likely effect of any treatments taken by Mr Jardine prior to his dismissal and the availability of alternative treatments. The Deputy Pensions Ombudsman also ordered BT to pay Mr Jardine £250 for distress and inconvenience.
NHS Business Services Authority v Wheeler [2014] EWHC 2155 (Ch)

The NHS Business Service Authority (the “Authority”), administered the NHS Pension Scheme. They appealed to the High Court against a determination by the Deputy Pensions Ombudsman regarding an overpayment to the estate of Dr Wheeler. Dr Wheeler had been due to start work at a surgery on the day he had died. The Authority then paid a lump sum death benefit of £150,053 to his estate, but later realised that Dr Wheeler had not arrived at work on the morning of his death and so had not begun pensionable employment. Because of this, the Authority had wrongly implemented the scheme’s regulations and attempted to recover the overpaid £131,451 from the estate. By this point, however, the executors had already used this money to discharge numerous estate liabilities and argued that they could not repay the money as the estate would otherwise be insolvent and that they had changed position by administering the estate in the way they had.

The Deputy Pensions Ombudsman found that the overpayment resulted from maladministration, that the executors had changed their position due to the overpayment and, because the executors had not acted negligently, should not be liable for any shortfall to repay the overpayment. She directed that the Authority could only recover up to the remaining value of assets in the estate (£51,832) less the executors’ legal costs of £8,796 and ordered that the Authority pay both executors £1,000 each for distress and inconvenience.

The Authority appealed against the decision, challenging the Deputy Pensions Ombudsman’s jurisdiction to hear the claim for repayment and her grounds for limiting the Authority’s entitlement to repayment. They also argued that the Deputy Pensions Ombudsman had made a perverse decision not based on established legal principles.

The judge said that the Ombudsman’s office did have jurisdiction on the question of repayment as the dispute was within the scope of the Pension Schemes Act 1993 (both as a beneficiary complaint relating to maladministration or as a dispute of fact or law between a scheme manager and an actual or potential beneficiary). The judge also said that the Ombudsman has a very wide power to direct remedies but that decisions had to be based on established legal principles and the Ombudsman could not provide for remedies a court of law could not give. However, in cases of maladministration, the Ombudsman could grant relief that courts cannot.

Regarding the Deputy Pensions Ombudsman’s repayment decision, the judge disagreed that there had been a valid change of position defence as the payments discharging the insolvent estate’s debts had involved no detriment to the estate. In any case, these payments could be challenged under insolvency law by the creditors of the estate. The judge also found the Deputy Pension Ombudsman had erred in law by discussing the question of the executors’ liability and negligence rather than the liability of the estate, as this had the effect of granting the creditors of the estate a priority over the Authority’s claim to the debts, for which there was no established legal principle.
The judge then turned to the appellants’ arguments regarding legal expenses. The appellants said that, technically, the respondents had not won the original case (as they had merely limited the repayment claim to a lower amount) and so the decision to award legal costs in favour of the respondents had been perverse. They also argued that the legal costs had been unreasonably incurred and that the Deputy Pensions Ombudsman had not considered whether the legal costs were caused by the maladministration or as a result of the complainants’ purportedly “unsuccessful” original challenge. The judge pointed out that any appeal against an Ombudsman decision must be on a point of law. As the Deputy Pensions Ombudsman had decided the legal costs had been reasonably incurred, and because she had only decided against working out the exact cause of the legal costs in order to avoid further cost being incurred in an already complex case, the judge decided the Deputy Pensions Ombudsman had not made an error of law.

For the above reasons, the judge set aside the Deputy Pensions Ombudsman’s original decision on repayment, allowing the Authority to seek to reclaim the whole £131,451 overpayment amount from the estate. However, he ordered that the original decision to award reimbursed legal fees and distress and inconvenience payments should stand at the same amounts.
Mr McClean against Skipton Building Society and the Trustees of the Sequence (UK) Ltd (South)

Scottish Widows, the administrators of the Sequence (UK) Ltd (South) Staff Pension Scheme (the “Scheme”), informed Mr McClean in September 2010 that he would shortly reach age 62 which was the normal retirement age (“NRA”) for the Scheme. Mr McClean queried this with Scottish Widows and said he was unaware his NRA had been reduced from 65. Mr McClean retired at age 62 in November 2010 and chose a pension of £5,558 and a lump sum of £37,058. In November 2011, the Trustee told Mr McClean that his NRA was in fact age 65 and that due to this his pension had been miscalculated. As a result, the Trustee reduced the pension from December 2011 to £4,726.

Mr McClean argued that he would not have taken his pension at 62 had he known his actual NRA was 65 as he had intended to (and had) continued working till 65 in any case and, while the additional money from retiring from the Scheme at age 62 had been useful, it had not been essential to him at the time. He also had to pay tax on his pension because he had continued to work. He asked to be put in the position he would have been in had his pension started at age 65, which would have been £7,938 without taking a lump sum.

The Trustee said it could not reverse Mr McClean’s retirement as Mr McClean would need to be able to repay both his pension and tax free lump sum (he could repay the lump sum but not the pension element). The Trustee also argued that under the Finance Act, the rate of a scheme pension could not be reversed or reduced when compared against the rate payable in the previous 12 months, as to do so would make the pension paid to date an unauthorised payment and would lead to adverse tax consequences for both the Scheme and Mr McClean. The Trustee argued that these tax consequences were very serious and complicated and would require the Scheme and Mr McClean to take professional advice.

The Deputy Pensions Ombudsman found that Mr McClean had a valid defence of estoppel by representation as there had been a clear representation to Mr McClean that his NRA was age 62, it was reasonably foreseeable that he would rely on this and he had acted in reliance on the representation and to his detriment by forgoing a £7,938 pension that he would have received. The Deputy Pensions Ombudsman said it would be unconscionable to go back on the representation made. The Deputy Pensions Ombudsman also looked at the alternative argument of negligent misrepresentation and potentially putting Mr McClean in the position he would have been in but for the misrepresentation. However, due to the complications involved with this approach, including the need to take tax and actuarial advice, Mr McClean’s lack of funds to repay the pension and the six year timeframe that any offsetting arrangement might take, the Deputy Pensions Ombudsman decided against this approach on the grounds that it would be disproportionate and inappropriate.
Based on the above conclusions, the Deputy Pensions Ombudsman decided that Mr McClean should instead benefit from the estoppel defence and ordered the Trustee to pay Mr McClean his pension as if his NRA had been age 62, to reimburse him for any shortfall for reductions made from December 2011 onwards with interest and to pay him £150 for inconvenience.
A decision-maker was at fault for failing to ask the correct questions by seeking clarification from a member who had given conflicting and unclear instructions on a survivor nomination form.

Mr Jonathan Harrison against Aegon

Mr J B Harrison, who was a member of the Aegon Personal Pension Plan (the “Plan”), completed a survivor nomination form in November 1999 directing that his common law wife, Mrs G Harrison, should receive 100% of his benefits under the Plan upon his death. However, Mr J B Harrison subsequently sent another form (dated 17 July 2000) to the administrators of the Plan, Aegon, which showed Mrs G Harrison as the nominated survivor but with her name crossed out on the form. Shortly after this, a death benefit nomination form was sent to Aegon on 5 September 2000 which nominated Jonathan Harrison (the son of Mr J B Harrison) and his two sisters to each receive one third of any lump sum payable under the Plan. Mr J B Harrison died on 22 October 2011, but on 24 October 2011, his independent financial adviser (“IFA”) sent a death benefit nomination form to Aegon dated 21 October 2011 which nominated Jonathan Harrison to receive 100% of any lump sum under the Plan.

Following Mr J B Harrison’s death, Aegon said that the survivor nomination form (directing that Mrs G Harrison should receive 100% of any lump sum available) took priority over the death benefit nomination form (in favour of the son). Mr J B Harrison’s IFA argued that, as Mrs G Harrison’s name had a line struck through it on the survivor nomination form, the form had been rescinded and therefore Jonathan Harrison should receive the lump sum. The IFA further said that there had not been a financial relationship between Mrs G Harrison and Mr J B Harrison for 10 years. However, Mrs G Harrison’s solicitors subsequently provided a court order from 2001 which showed that Mr J B Harrison was making monthly payments to Mrs G Harrison for the benefit of their daughter. Mrs G Harrison’s solicitors argued that this showed that she qualified as a Dependant and as a nominated survivor under the Plan rules. Aegon accepted this argument and recognised the fact that a valid survivor nomination form would override any discretionary lump sum decision to be made under the rules. Aegon said it did not question the crossed out name in the survivor nomination form as neither Mr J B Harrison nor his IFA had told Aegon at the time that he wished to rescind Mrs G Harrison’s nomination. Aegon admitted Mrs G Harrison’s claim and gave her the option of taking the full lump sum or using it to buy an annuity. Jonathan Harrison complained to the Ombudsman regarding Aegon’s refusal to pay him the lump sum.

The Deputy Pensions Ombudsman examined whether Aegon had followed the correct process when handling the decision. The Deputy Pensions Ombudsman recited the duties of decision-makers to (i) take into account all relevant matters and ignore irrelevant ones, (ii) ask themselves the correct questions, (iii) direct themselves correctly in law and interpretation of the rules and (iv) not arrive at a perverse decision. The Deputy Pensions Ombudsman found that Aegon’s interpretation of the rules had been correct. She agreed that Aegon could not take the October 2011 death benefit nomination form into account as Aegon had received it after Mr J B Harrison’s death and concurred that the rules allowed a member to nominate a survivor to receive their benefits on death. However, the Deputy Pensions Ombudsman disagreed with
Aegon’s decision not to query the crossed out name on the July 2000 nomination form, especially as Aegon were sent a form only two months later nominating Mr J B Harrison’s children to receive any lump sum. Accordingly, Aegon had failed to ask itself the correct questions and was guilty of maladministration. The Deputy Pensions Ombudsman ordered Aegon to reconsider its decision taking account of all the nominations and to pay Jonathan Harrison £150 for “non-financial injustice” he had suffered.
Employers should ensure they have appropriate procedures in place to relay scheme information to members in order to evidence fulfilment of their obligations.

Mrs Chapman against Middlesbrough Council, Redcar and Cleveland Borough Council and Teachers’ Pensions

Mrs Chapman reached age 75 on 12 December 2009. At this point, she was still in part-time employment with both Middlesbrough Council (“Middlesbrough”) and Redcar and Cleveland Borough Council (“Redcar”). The regulations governing her pensions scheme membership with both employers provided that the upper limit on pensionable employment was age 75. However, both employers continued to deduct pensions contributions after she had turned 75. Mrs Chapman retired in May 2010 and applied for her pension (including a lump sum) shortly afterwards. Teachers’ Pensions, who administered the scheme, initially told Mrs Chapman that she was entitled to a total lump sum of £5,981. However, Mrs Chapman was later told that she was in fact not entitled to any lump sum, as no retirement lump sum could be paid to a person after age 75 under the regulations applicable to the scheme.

Following a complaint in relation to the above through the scheme’s internal dispute resolution procedure, Mrs Chapman was told that her revised £3,349 lump sum pension would instead be paid to her as a pension at a rate of £313 a year. Both Mrs Chapman’s employers repaid the contributions they had incorrectly deducted from her after she had reached age 75.

Mrs Chapman complained to the Ombudsman. She argued that she had never received any information from either employer relating to the age 75 upper limit on contributions or the age 75 lump sum restriction. She claimed that, had she known of the lump sum restriction, she would have retired before her 75th birthday.

Middlesbrough said that their role was merely that of a “sign posting service” and that responsibility for the provision of benefit entitlement information lay with Teachers’ Pensions. Middlesbrough also said that scheme information would normally be given to a head-teacher at each school who would then pass this on to the other employees. Redcar took a similar position to Middlesbrough and said that they would initially provide pension starter packs to individuals and that designated managers would then notify pensions changes to staff.

Teachers’ Pensions said that it had sent a letter in 2007 to all scheme employers which gave notice of the upper age 75 limit on lump sums and pensionable employment. However, neither Middlesbrough nor Redcar could find any record of this. In addition to this letter, Teachers’ Pensions said that various guides and leaflets were available on its website which should have made employers aware of the restriction to retirement lump sum benefits. Given that Teachers’ Pensions did not employ teachers, it said that it was the employers’ responsibility to keep a record of their employees’ circumstances (including their age) and pointed to the relevant scheme regulations which provide that employers are responsible for deducting member contributions from salary and for recording the period an employee is in pensionable employment.
The Deputy Pensions Ombudsman agreed that, under the applicable regulations, employers had a duty to monitor employee contributions and the period of pensionable employment and said that neither Middlesbrough nor Redcar appeared to have sufficient systems in place to do this. On the matter of Mrs Chapman’s inability to take her lump sum, the Deputy Pensions Ombudsman said that there was an implied general duty in the contractual relationship between employer and employee to bring the existence of valuable rights to the attention of employees (even though no explicit legal duty to do this existed in 2007). While neither employer could confirm they had received the letter from Teachers’ Pensions which contained the crucial “age 75” information, a 2007 phone note discussing the letter appeared to show that Teachers’ Pensions had discussed these age-related changes with one of the employers, which satisfied the Deputy Pensions Ombudsman that Teachers’ Pensions had notified the employers.

The Deputy Pensions Ombudsman then examined whether the employers had forwarded this information to Mrs Chapman. The Deputy Pensions Ombudsman felt that the employers’ practice of “cascading” pension information down to members via certain people who acted as “co-ordinators” was reasonable, even though the employers had no evidence that they had given the relevant information to the coordinators where Mrs Chapman worked. On the other hand, apart from Mrs Chapman’s personal testimony which was based on memory, Mrs Chapman could not conclusively prove that she had attended all potentially relevant co-ordinator meetings at which the information may have been shared. Mrs Chapman’s submissions were also unreliable as she appeared to be unaware that she was entitled to a lump sum prior to 75 to begin with despite having received several benefit statements notifying her of this right.

In the face of insufficient evidence and on the balance of probabilities, the Deputy Pensions Ombudsman decided that the employers probably had informed Mrs Chapman of the lump sum restriction after age 75 as there had been no complaints from other members about any of the other scheme changes (including a reduction to employees’ salaries) that had occurred in 2007. Furthermore, the Deputy Pensions Ombudsman was unable to say that Mrs Chapman had suffered a loss in being unable to take a lump sum as the pension was of equivalent actuarial value to a lump sum, and the small amount of the pension meant that she would not have to pay tax as it fell within her yearly personal allowance. There was also no evidence that Mrs Chapman would die earlier than the mortality rate used in actuarial calculations and suffer any detriment.

Based on the above, the Deputy Pensions Ombudsman gave no award in respect of Mrs Chapman’s inability to take a lump sum but directed that both employers each pay £75 to Mrs Chapman for maladministration in giving her an incorrect benefit statement on retirement, for the interest lost on her overpaid pension contributions and for the inconvenience caused.
The trustees and administrators of a SIPP had no duty to remind a SIPP member of the maximum annual drawdown amounts available to him. As a SIPP member who had actively decided to set up a personal plan, he should have been aware of all the relevant information provided.

Mr C F Dawson against Alliance Trust Pensions Limited (now Tower Pensions Trust Limited)

Mr Dawson set up a self invested personal pension (“SIPP”) plan in 2001. Wolanski & Co Trustees Limited, which later became Alliance Trust Pensions Limited (“Alliance”), were the trustees and administrators of the SIPP. The rules of the SIPP provided that annual income withdrawals were limited to amounts calculated by reference to Government Actuary tables. Alliance documentation which appeared to relate to the establishment of the SIPP showed that Alliance would provide “administrative services” and provide annual statements with details of investments held.

Mr Dawson began drawing from his SIPP in 2007 by taking his maximum cash free lump sum but did not take any income withdrawals. In March and April 2008, he drew a gross total of £31,250 in income payments for the 2007/2008 pension year but did not take the maximum income available to him for the pension year (of up to £75,040).

On 23 July 2008, Mr Dawson took SIPP income of £43,750. However, in December 2008, Alliance sent a review for the year commencing 5 July 2008 with an accompanying Unsecured Pension Options Form (which was clearly stated to relate to the pension year 5 July 2008 to 4 July 2009). This clarified that Mr Dawson had already taken £43,750 income for the year and could take a further £31,290 for the rest of the year. In a February 2009 phone call, Alliance explained to Mr Dawson that he had not taken his maximum income for the 2007/2008 year as he had only taken £31,250 for that period, and that any income payment could not be backdated. Mr Dawson said that he and his financial adviser were unaware that the pension year ran from 5 July to 4 July and that the 2008 yearly review pack should have been sent out earlier. He said he hadn’t taken his maximum available income for the year as he had been withdrawing his pension on a fiscal year (6 April to 5 April) basis. He queried why Alliance had not told him that there was a pension year or that there was a 4 July 2008 deadline for income withdrawals. Alliance apologised that the review document hadn’t been issued in July but said that it was Mr Dawson’s financial adviser’s responsibility to advise him on any decisions. Mr Dawson later drew his remaining available income of £31,290 for the 2008/2009 pension year.

For the 2009/2010 to 2011/2012 pension years, Alliance sent annual reviews which showed the remaining value of Mr Dawson’s SIPP plan. Each form set out the maximum gross annual income of £75,040 that Mr Dawson could take but gave no indication of amounts already taken out or still to be taken for each pension year. Mr Dawson took his maximum income of £75,040 for the 2009/2010 year and withdrew £75,000 income for the other two years.

Mr Dawson complained to the Ombudsman. He argued that as trustees, Alliance were duty-bound to make him aware of his benefit options as a beneficiary. He argued that this included a “duty of care” to remind him before the end of each pension year of the maximum remaining amount of income available for withdrawal, and argued that the SIPP documentation set out this duty. He said that Alliance had been negligent
by not doing this, and had also breached a contractual duty to provide these figures. He said that he needed the maximum income of £75,040 each year to live off and that he had needed to supplement the £43,790 income that he had not withdrawn in 2008. Although this money remained in his pension plan, he maintained he had suffered a loss as the invested capital had since fallen in value.

Alliance contended that its obligation was only to provide information about the SIPP and that it was Mr Dawson’s duty to understand the information. It denied that it had a duty to inform him of yearly income amounts available from the SIPP and said it was not bound to advise him on investment decisions.

The Ombudsman said that Alliance had clearly defined the term “pension year” in both its April 2007 and subsequent June 2007 correspondence with Mr Dawson. The fact that Mr Dawson claimed not to be aware of this suggested he had either not read or taken proper account of the correspondence. The Ombudsman noted that only the 2008/2009 Options Form mentioned the remaining untaken income and that this had shown the amount for the then current pension year, not for the previous year. The Ombudsman said that this form did not reflect the standard for the correspondence provided to Mr Dawson in other years. The Ombudsman could see no duty under trust law, statute or the contractual documentation between Mr Dawson and Alliance obliging Alliance to provide updates on remaining income amounts. The Ombudsman placed weight on the fact that Mr Dawson had actively chosen to set up the SIPP and was not a beneficiary by “force of circumstance”, so should have been aware of the maximum amount, how much he had taken in each year, and when the pension year ran from. Finally, the Ombudsman said that Mr Dawson did not appear to need the income from his SIPP to supplement his other income, as shown by the comparatively low amounts he subsequently withdrew in late 2008. In addition, the Ombudsman found that no direct loss had occurred as the money had remained as capital within the SIPP. The fact the money in the SIPP had fallen in value did not prove loss, as the other money Mr Dawson had allegedly withdrawn to supplement his income was presumably also subject to the same investment risk, and furthermore, Mr Dawson was primarily responsible for his own SIPP investment decisions. The Ombudsman therefore rejected the complaint.
When considering discretionary increases, employers are entitled to take into account their own interests (amongst other factors). Further, a statement of intent regarding benefits is insufficient to give rise to contractual entitlement.

Mr Thomson against GEH Holdings/International General Electric U.S.A. & GE Pension Trustees Ltd

Mr Thomson is a member of both the GE Pension Plan (the “Plan”) and the GE Supplementary Pension Scheme (the “Scheme”). Although increases in respect of pre-1997 service are discretionary under both the Plan and the Scheme, Mr Thomson continually received inflation-linked increases from 1988 until 2009. However, these inflationary increases stopped from 2010 onwards.

Mr Thomson complained in relation to the cessation of his pre-1997 pension increases and the conduct of both GEH Holdings/International General Electric U.S.A. (the “Company”) and GE Pension Trustees Ltd (the “Trustee”). He said that members had been assured in 2002 that discretionary increases would continue. He also said that, while an Employer could take its own interests into account, the Members' interests and expectations were also relevant to the decision, especially as there was an expectation the increases would continue. Mr Thomson said that the strong employer covenant, the existence of available funds from a previous special contribution and the relatively small size of the increases in relation to the overall deficit meant that it was perverse the increases hadn't been granted and showed that relevant factors had been ignored. He also alleged that there was an implied contractual duty to give increases based on previous practice.

In relation to his allegations of Trustee “misgovernance”, Mr Thomson said that the Trustee and the Company had taken a “blanket” approach to refusing future increases. He alleged that the Company had breached its implied contractual duty of good faith and pointed to various failures in the decision-making process. He said that the Company, as Principal Employer, breached the Plan Rules by deciding not to grant a discretionary increase before the Trustee had made its decision and had then acted “capriciously” by emailing this decision to the Trustee during a Trustee meeting at which the decision was being discussed. Finally, Mr Thomson alleged that there had been flaws in the Chairman and member-nominated trustee appointment processes.

The Company said that the decision to stop discretionary increases was due to a near seven-fold increase in the Scheme and Plan deficits in the 2009 triennial valuation and that its priority was to ensure the funding of guaranteed non-discretionary benefits. However, it said that decisions as to discretionary increases remained under review and that it had not taken a blanket decision. The Company also said that Mr Thomson had provided no evidence of assurances given in 2002 relating to discretionary increases. The Trustee said that the increases were discretionary and so Mr Thomson did not have an automatic right to increases.

The Deputy Pensions Ombudsman first looked at the Scheme and Plan Rules. She disagreed with Mr Thomson’s explanation of the Rules and said that it was insignificant whether the Company decided on discretionary increases before the Trustee had made its own decision. Given the Scheme and Plan had the same Company and Trustee and had similar Rules, it made administrative sense for the Company and Trustee to operate a single joint decision-making process. The Deputy Pensions Ombudsman also
felt that the fact the Company had informed the Trustee of its decision not to award discretionary increases during the Trustee meeting was immaterial to the Trustee’s decision. Regarding the obligation to consider Members’ interests, the Deputy Pensions Ombudsman said that the decision-making power here was not fiduciary and so the Company was entitled to consider its own interests. There were valid financial reasons (including the size of the deficit) why the Company decided against the increases and the fact the increases were small in comparison to the deficit was no justification to grant them. The Trustees, had also shown from the 2009 to 2012 meeting minutes that they had considered the question of increases annually and so had not made a pre-determined decision based on the 2009 triennial valuation. The Deputy Pensions Ombudsman agreed with the Company that Mr Thomson had not shown evidence of any binding assurance given in 2002 as to future increases (a mere statement of intent would not give rise to any entitlement), and, in any case, such an assurance could not be expected to apply indefinitely. Further, the Deputy Pensions Ombudsman said that past practice could not give rise to future expectation. Finally, the Deputy Pensions Ombudsman dismissed Mr Thomson’s allegations of Trustee board impropriety, pointing out the fact that Mr Thomson had been a Trustee of the Scheme and Plan in the past yet had never complained of practices of which he would have been aware until his discretionary increases had become an issue. He had also failed to provide any evidence in support of his allegations.

Based on the reasons above, the Deputy Pensions Ombudsman did not uphold the complaint.
Mr Pearce against the trustees of the Arriva London North and Arriva London South Pension Scheme

Mr Pearce (the member) was dismissed from Arriva on medical grounds in December 2012. He applied for an ill health early retirement pension in January 2013 and submitted a medical assessment carried out by the Arriva company doctor in November 2012 (the “Arriva Assessment”). The Arriva Assessment only considered Mr Pearce’s fitness to work for Arriva (the employer). The independent medical practitioner for the Scheme then carried out a medical report in February 2013 (the “IMP Assessment”) and concluded that Mr Pearce did not meet the Scheme’s ill health criteria. The Scheme administrator rejected Mr Pearce’s ill health early retirement application.

Mr Pearce complained under the Scheme’s internal dispute resolution procedure in relation to the decision to reject his ill health early retirement pension. He questioned why a medical assessment carried out by his own GP (the “GP Assessment”) had not been requested by the trustees in reaching their decision. The trustees agreed to provide a new medical assessment of Mr Pearce’s condition taking the GP Assessment into account. Mr Pearce refused to undergo a second assessment as he did not see why it was necessary and complained to the Ombudsman. He said that the trustees had only relied on the IMP Assessment when making their decision and had failed to consider the Arriva and GP Assessments. He said that the trustees did not have the power under the Scheme Rules to require that his ill health early retirement application be considered on the basis of the IMP Assessment, which he said was incomplete and unreliable.

The trustees responded that the IMP Assessment complied with the Scheme Rules and that neither the Arriva or GP Assessments met the standard required under the Rules so could not be considered.

The Ombudsman said that Mr Pearce needed to meet the definition of “Incapacity” under the Scheme Rules and that any medical assessment must be carried out by a “registered medical practitioner” (as stipulated in the Finance Act 2004). The Incapacity definition in the Scheme Rules required a member to be unable to work in “any capacity”, which is a harder criterion to meet than that set out in the Finance Act 2004. The Scheme’s IMP Assessment had also complied with the law by using a registered medical practitioner.

The Scheme Rules allowed the trustees (with principal employer consent) to act on the advice of any individual they considered qualified to advise them. Therefore, the Ombudsman found that the trustees were entitled to rely on their own independent medical assessors’ advice, despite this marking a shift from the previous practice of using assessments by members’ GPs.

While both the Arriva and GP Assessments had been performed by registered medical practitioners, the Ombudsman agreed with the trustees that neither the Arriva or GP Assessments could be considered by the trustees, as neither assessment had considered Mr Pearce’s medical condition against the definition of Incapacity under the Rules. The IMP Assessment, on the other hand, had done this. Accordingly, the
Ombudsman decided that the trustees had directed themselves correctly both in law and on construction of the Rules (albeit adopting more onerous Incapacity requirements than those in the Finance Act 2004), had correctly ignored the Arriva and GP Assessments when making their decision, and had not reached a perverse decision. The Ombudsman rejected the complaint.