CAS-39552-Y8B2

Ombudsman's Determination

Applicant	Mr H
Scheme	Reckitt Benckiser Pension Fund (**the Scheme**)
Respondents	Reckitt Benckiser Health Care UK Ltd (**the Employer**)
	Trustees of the Reckitt Benckiser Pension Fund (**the Trustees**)

Outcome

1. Mr H's complaint against the Trustees is not upheld.

Complaint summary

2. Mr H has complained that:-

   - He was misadvised as to his option of applying for the early release of his pension on the grounds of ill health and, as a result of this failure, his subsequent application was considered under less favourable Scheme Rules.
   - His application for the early release of his benefits on the grounds of ill health was mishandled and mismanaged.
   - He was provided with contradictory and conflicting information in pension forecasts, as a result, his pension is much less than he believed was the case.

3. He has also complained about the Employer's decision to close the Defined Benefit Section (**the DB Section**) to future accrual and switch it to a Defined Contribution basis (**the DC Section**).

Background information, including submissions from the parties

4. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were many other exchanges of information between all the parties.

5. The Scheme was originally established on a Defined Benefit basis. It was governed by a Definitive Trust Deed and Rules (**the Definitive Deed**) dated 16 September 2008. On 6 April 2007, the DB Section had been closed to new entrants and a new DC section was introduced.

6. A Deed of Amendment was made on 15 December 2017 (**the Deed of Amendment**). The Deed of Amendment changed the basis of accrual from a DB basis to accrual on a DC basis for all members with effect from 1 January 2018.

7. The power to amend the provisions of the Definitive Deed are contained in Clause 41. Sub-clause 41.1 (i) states:

> "The Trustees may at any time, with the consent of the Principal Company, by deed executed by the Trustees and the Principal Company amend all or any of the provisions of this Deed…"

8. Reckitt Benckiser Group plc (**RBG**) is the principal employer in relation to the Scheme. The Employer is a member of the RBG Group. For ease of understanding I have referred to both as the Employer.

9. Mr H was born in 1973. He was employed by the Employer as a Packaging Technologist from 24 October 1995 to 11 June 2018, when he was made redundant. He became a member of the Scheme on 15 August 1997. His Normal Retirement Age (**NRA**) is 65.

10. Mr H is disabled. In 2013, he was diagnosed as suffering from Cataplexy, defined as "a chronic neurological disorder that leads to loss of muscle control leading to collapse if the individual experiences a sudden change of emotion" and Narcolepsy.

11. On 11 July 2016, Mr H visited Occupational Health (**OH**). A report produced by OH said that Mr H was fit to undertake his normal duties. It said his condition was long-term and consideration might be given to an annual OH review assessment. It did not appear at the current time that he needed any workplace modifications or adjustments. It might, however, be sensible for a management led stress risk assessment to be undertaken.

12. There is no evidence that the Employer took steps to follow through with this.

13. On 9 August 2017, the Employer wrote to Mr H and other members of the Scheme to announce that it was consulting with affected employees on the potential closure of the DB Section and moving to a DC basis. The information was posted to Mr H's home address.

14. The Employer enclosed an Information Pack and urged Mr H to attend a pension clinic to discuss how the changes would affect him. Included in the Information Pack was a section entitled "Frequently Asked Questions" (**FAQ**).

15. The Information Pack included a Benefit Illustration (**the Illustration**) showing what Mr H's pension might be at retirement with and without the proposed changes. The Illustration was based on a number of assumptions, including salary growth and investment return on the DC fund.

16. The Illustration showed that if the changes did not go ahead, the notional value of Mr H's DB pension to the assumed date of closure was £14,017 p.a. and the estimated value of his pension at NRA if he remained in service was £39,448 p.a. He was also entitled to benefits from Additional Voluntary Contributions (**AVCs**) that he had paid. The value of these was £110,974 at 5 April 2017.

17. If the changes did go ahead the Illustration showed that the DB pension to the assumed date of closure would increase with revaluation to £29,140 p.a. at NRA. In addition the estimated DC pension was £3,217 p.a. Again, Mr H was also entitled to benefits from the AVCs that he had paid.

18. The Illustration included the following 'Important Notes':

> "These examples are for illustrative purposes only – you should not expect that these assumptions will be borne out in practice, and you should not under any circumstances rely on either the illustrations or assumptions for retirement planning purposes or otherwise.
>
> - This illustration is NOT a promise or a guarantee and it does not confer any rights to benefits.
> - At all times your benefits will be determined in accordance with the Rules of the Reckitt Benckiser Pension Fund, as amended from time to time, and any restrictions which may be imposed by HMRC or by over-riding legislation.
> - Your actual benefits will be different from the illustrations, for example if:
>   - the assumptions used are not borne out in practice;
>   - you contribute at a different rate to the one assumed
>   - you elect to take some of your pension at retirement as a tax-free cash lump sum (from either your DB benefits or your DC benefits); or
>   - you choose to leave THE EMPLOYER employment or retire at a different date. If you choose to leave THE EMPLOYER employment at an earlier date than illustrated, then the impact of the proposed change to DC would be smaller."

19. In September 2017, Mr H went on long term sick leave.

20. The DB Section was closed on 31 December 2017 and all employees, including Mr H, who had been active members became deferred members. At the time the DB Section closed Mr H was still on sick leave.

21. As part of the agreement reached, when the DB Section was closed employees moving from it to the DC Section were awarded a year's salary paid over three years (assuming continued employment). A Group Income Protection policy (**GIPP**) was also put in place by way of permanent health insurance, as there were less generous provisions on ill-health under the DC Section.

22. The GIPP covered those employees who were former active members of the DB Section (subject to policy terms and conditions). In broad terms, this provided for those covered to receive 60% of their basic salary up to their State Pension Age, following six months continued absence through ill-health, subject to certain requirements.

23. One of the requirements under the terms of the GIPP was that the employee had to be "actively at work" on 1 January 2018. As Mr H was on sick leave on 1 January 2018, when the GIPP first took effect, he was not immediately eligible to receive any benefit from the GIPP.

24. Mr H has said that as he had been absent from the end of September, he received no further information about the scheme closure after this date. His solicitor only received a copy of the GIPP after Mr H's employment had been terminated.

25. Mr H has said he was informed about the potential of redundancy in January 2018, and, following a consultation, on 16 April 2018, while he was still absent from work, he was advised that his role was being made redundant.

26. An OH report, dated 2 May 2018, said that Mr H was fit to return to work if a suitable role could be found.

27. On 30 May 2018, Mr H enquired about taking his pension early at age 57 and 60. On 14 June 2018, he asked for information about how to apply to take his pension early on the grounds of ill health.

28. Mr H's role was made redundant on 11 June 2018. He appealed against the redundancy decision in July 2018 but his appeal was rejected.

29. On 3 July 2018, the Trustees provided Mr H with a summary of the ill health test under the Rules and explained the information he would need to provide to start his application. They also provided an estimated quotation of Mr H's Ill Health Retirement Pension (**IHRP**) if his claim was approved.

30. On 1 May 2019, Mr H emailed the Employer to say that he wished to apply for an IHRP. He set out the background to his claim, much of which he believed the Employer was already aware of. He said that he had been diagnosed with two chronic disabilities, Cataplexy and Narcolepsy, and that he had been advised by his consultant that these would not improve.

31. Mr H's request was acknowledged by email from the UK Pensions and Benefits Manager on 2 May 2019. She said that she would confirm the next steps before the request could be sent to the Trustees as soon as she could and that this was likely to be in the next couple of weeks.

32. On 18 June 2019, Mr H asked for his IHRP application to be suspended. On 21 June 2019, he asked for it to be recommenced and on the same day the Trustees sent Mr H a number of forms to complete, which he returned on 2 July 2019. The Trustees emailed these to the OH provider on the same day.

33. An Occupational Health Consultation Report (**the Report**) completed by PAM OH Solutions on 22 August 2019 concluded that Mr H was "not fit for work, now or in the foreseeable future." The author also opined "I do not think that [Mr H] will ever be well enough to return to work physically or mentally. He has engaged with his GP and his specialist and tried all treatment to date with no avail."

34. On 28 August 2019, Mr H was provided with an estimate of his early retirement benefits if he were to retire on grounds of ill health. This showed an estimated pension from the Scheme of £11,418 p.a. plus an additional pension that could be paid from his AVCs of £2,265 p.a. Under the heading of 'Important Notes' the Illustration said:

    "The early retirement reduction has been calculated using the factors used by the Fund with effect from 01/07/2017";

    and

    "These figures are estimates for illustration purposes only and are subject to change".

    The covering email said that the figures were subject to the Trustees giving their consent to making immediate payment on the grounds of ill health under the Rules of the Scheme.

35. Mr H has said that as this figure was significantly lower than he had expected he emailed the Employer to seek clarification on this value. He did not understand at the time why he had been offered the value, when only a few months before it was so much higher. He needed a proper explanation and the Employer refused to do this.

36. On 29 August 2019, the Trustees confirmed that they had exercised their discretion and agreed that early retirement benefits could be paid to Mr H on the grounds of ill health, on the basis set out the previous day.

37. On 30 August 2019, Mr H requested that his pension be backdated to 1 May 2019, the date he made his application. The Trustees responded, on 6 September 2019, saying that the ill health criteria under the Rules had to be met before an IHRP could be granted. As Mr H had not satisfied the criteria on that date his pension could not be backdated.

38. Also on 30 August 2019, Mr H formally complained to the Employer about the damage he said had been done to his pension. He asked that his complaint was also forwarded to the Trustees.

39. He said that, in December 2017, his pension forecast had been an estimated value of £39,500 while in August 2019 it was worth £12,000. The decisions made by the Employer were supported on the understanding that there would be adequate protection and compensation to address the situation he now found himself in. The Employer had set up a health insurance scheme which was hidden from him. He was also told that if he did not return to work, he would receive no further pay. Therefore he was led to believe the only available option open to him was redundancy. He believed the Employer had failed to provide him with the security that it had provided to all other employees, knowing that at the time he was suffering from a chronic illness.

40. The Trustees responded by email on 6 September 2019 explaining that the ill health criteria under the Rules must be met before an IHRP could be granted. As Mr H had not satisfied the ill health criteria under the Rules on 1 May 2019, his pension could not be backdated to that date. The Trustees also explained in this email that early retirement from deferred status (as was the case for Mr H) was covered under Rule 18.1 of Schedule 2 of the Rules, and that this pension was reduced from age 60 for early payment.

41. On 10 September 2019, the Trustees responded to Mr H's complaint of 30 August 2019 reconfirming that his IHRP had been calculated in accordance with the Rules and confirming that his complaints regarding other matters, including PHI cover, were matters for the Employer.

42. Through October and November 2019, Mr H sought to reach an agreement with the Employer to honour what he considered was his full DB pension given that the DB Section was closed only four months before he was made redundant.

43. In January 2020, Mr H brought a claim for unfair dismissal to an Employment Tribunal (the **Tribunal**) claiming:

    - Unfair dismissal – claiming the dismissal was not a genuine redundancy or, if it was, that there was not a proper process and he was not properly considered for alternative work; and

    - Disability discrimination – the practice of requiring a certain standard of performance that put him at a substantial disadvantage due to his disability; failure to make reasonable adjustments for example to fire alarm evacuations and related disciplinary measures; harassment, unfair selection for redundancy based on reaching a certain standard of performance.

44. After the Tribunal hearing, all claims of discrimination were dismissed. Mr H was successful in his unfair dismissal claim regarding the redundancy procedure. However, the Tribunal found that it was certain that Mr H would have been made

redundant even if a proper process had been followed. He received no award from the Tribunal as he had received a redundancy payment which exceeded the statutory requirements.

45. The Tribunal did not address his pension complaints directly, but it did consider whether his ill health absence had contributed to his redundancy. Its conclusion was that there was no evidence of a link between his medical condition, and the treatments he was receiving, and his work performance. It pointed out that even when he went to OH, knowing that serious questions were being asked about his performance, he did not raise with the OH advisers that adjustments were required which would help him to meet the standards set by the Employer or result in consideration being given to amending those standards or how they were assessed.

46. The provision for the early payment of a Deferred Member's pension is contained in Rule 18 of the Trust Deed and Rules. The relevant section of Rule 18 states as follows:

> "18.1 Early Retirement
>
> (A) Rule 18 applies to a Deferred Member who:
>
> …
>
> (iii) at any age is, in the opinion of the Trustees, suffering from incapacity and satisfies the ill-health condition (within the meaning of paragraph 1 (ill-health condition) of Schedule 28 to the [Finance Act] 2004"
>
> (B) Subject to sub-rule (D) the Deferred Member may, with the consent of the Trustees, elect to retire under the DB Section before his Normal Retirement Date. If so, the Trustees must:
>
> (A) in respect of any period of Pre-2018 Pensionable Service, pay the Deferred Member a pension for life starting on the day next following that upon which he retires, of the amount calculated in accordance with sub-rule (C); and
>
> (B) in respect of any period of Post-2017 Pensionable Service use the Employed Member's 2018 Fund upon the Deferred Member's retirement under the DB Section to provide benefits …
>
> (C) The pension payable in respect of Pre 2018 Pensionable Service will be equal to the deferred pension to which the Employed Member became entitled on leaving service in accordance with Rule 15.2 (Deferred pension) increased in accordance with Rule 21.1 (Increases to deferred pensions) and then reduced by such amount as the Trustees determine and the Actuarial Adviser certifies as reasonable…

47. On 8 January 2020, Mr H asked if he could request an updated IHRP estimate as at 1 January 2020. The Trustees responded on 9 January 2020 to confirm that Mr H could request a further quotation as at 1 January 2020, and asked him to confirm if he would like the pensions team to prepare this. The Trustees confirmed that, given the relatively short period since the consent to his ill health early retirement application granted on 29 August 2019, they would honour their previous decision and would not request updated medical evidence.

48. On 4 February 2020, the Trustees wrote to Mr H to address a number of queries that had been raised via the external lawyers acting for the Employer in respect of Mr H's employment tribunal hearing. This included confirmation that the Trustees needed to take legal advice to confirm the correct commencement date of Mr H's IHRP, arising from his application in May 2019 (which was approved in August 2019 but Mr H had not yet requested that it be put into payment).

49. On 13 February 2020, the Trustees wrote to Mr H. They said:

> "Having given the matter due consideration and following the receipt of legal advice (including regarding the position under the Trust Deed and Rules of the Fund), the Trustees have agreed to allow a commencement date of your choice from between 1 May 2019 and 1 April 2020 without the requirement for further medical evidence. This provides you with the greatest possible flexibility regarding the start date of your pension, within the scope of the Trustees' powers. This is subject to the completion of all the paperwork to enable the pension to be put into payment, which must be received by the Trustees within two months of the date of this letter (13 April 2020).
>
> If you do not complete all of the necessary paperwork before 13 April 2020, the Trustees will consider that you have withdrawn your current application for ill health early retirement. This means that you will not be able to take your pension commencing from a date in the period specified in this letter.
>
> You will of course then be able to apply again in future for the payment of an ill health pension. However, in accordance with their duties and the Trust Deed and Rules, the Trustees would need to consider any future application afresh at the relevant time. This means that the Trustees would need to be satisfied that you still meet the Incapacity definition at that point, based on further relevant medical evidence at the date of your new application. On the basis you meet this criteria, the earliest possible commencement date of your pension would be from the date of the new application (and could not be backdated to a prior date).
>
> If you now wish to put your pension into payment, please let me know as soon as possible what commencement date within the above period you would like your pension calculating from, so we can arrange to provide these figures to you.
>
> To assist you in your deliberations of an appropriate commencement date… the pension is subject to an early retirement factor, therefore the earlier the

commencement date, the lower the pension will be due to the higher applicable early retirement reduction."

50. On 21 February 2020, the Chair of Trustees (**the Chair**) wrote to Mr H in response to a number of queries he had raised. The Chair confirmed that the Trustees were not able, within the constraints of the Rules, to consent to Mr H extending the commencement date of a pension under his current application (i.e. his May 2019 application) until August 2020 as he had requested. This was because the medical evidence would not be sufficiently recent for the Trustees to conclude that the ill health test at Rule 18.1 was met as at August 2020.

51. The Chair confirmed that Mr H could submit a new request at any time, and it would be considered as a new application. The Chair also reconfirmed that the pension would be reduced for early payment (as set out in Rule 18.1) and that the reduction meant that the early retirement pension was actuarially equivalent to the pension he would have received at age 60.

52. On 17 March 2021, the Trustees responded to Mr H's complaint under the Scheme's Internal Dispute Resolution Procedure. They said that the matters they were able to consider were limited to those which concerned the management of the Scheme and the provision of Scheme benefits. All other matters had to be directed to the Employer.

53. In summary, the Trustees said that:-

- The IHRP quoted to him was that to which he was eligible as a Deferred member and that, if awarded, the Rules stated that this had to be reduced for early payment.
- The Trustees understood that Mr H believed he should be provided with an enhanced pension, being the IHRP that could have been paid before 1 January 2018 to an active member who left employment on grounds of ill-health, who had applied for an ill-health pension and who met the relevant incapacity criteria.
- Enhanced IHRP had not been payable to any member of the Scheme since 1 January 2018 when the DB Section was closed to future accrual.
- Only active members who had left employment on grounds of ill-health, and where a medical practitioner could confirm the member was permanently prevented from carrying on their occupation before 1 January 2018 would be entitled to be considered for this benefit.
- For these reasons Mr H was not eligible for payment of an enhanced IHRP.
- The Trustees could not backdate his application for ill-health early retirement or grant an IHRP based on historic medical evidence. At the point any IHRP is granted, the Trustees must base this on current medical evidence based on the member's state of health at the date of application.

- He could submit a new application for an IHRP from Deferred member status in the future.

54. On 8 April 2020, Mr H emailed the Chair noting that his previous ill health application had expired and that he must make a new application “in the near future”. He requested that the new application be backdated to 7 April 2020 “whilst noting that he would not be in a position to formally apply until after the court hearing”.

55. Following a further enquiry from Mr H on 18 April 2020, the Chair wrote to him on 1 May 2020. The Chair explained that the Trustees had previously agreed on an exceptional basis to allow Mr H to backdate his previous ill health application to 1 May 2019 in light of the delays in obtaining the necessary medical evidence from the OH provider and the previous lack of clarity in confirming the timescales for accepting the offer. He said the Trustees were unable to repeat the flexible period for acceptance in respect of any future application and in particular could not allow Mr H to backdate any future ill health application prior to the date of any formal application.

56. On 9 February 2021, Mr H submitted a complaint under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).

57. The Trustees issued their response to Mr H's complaint under stage 2 of the IDRP on 17 March 2021. They did not uphold Mr H's complaint.

58. Also on 17 March 2021, Mr H requested that his IHRP application was recommenced.

The Employer’s and Trustees’ position

59. Before 1 January 2018, and for some time after, there was a shared expectation between the Employer and Mr H that he would return to work. There was therefore no reason to believe that the IHRP would be relevant to him.

60. In any event, Mr H was at all times kept fully informed as to the nature of the ill-health pension payable from the DB Section of the Scheme and the effect of the closure of the DB Section on that benefit.

61. Mr H did not meet the incapacity threshold under the Rules until well after the DB Section closure on 31 December 2017. This meant that Mr H would not have qualified for an IHRP while the DB Section was open to future accrual.

62. In any event, the Employer did not breach any duty to notify Mr H about the consequences of the DB Section closure for his IHRP. Furthermore, even if such a duty applied in this case, the Employer did, in fact, notify Mr H that the enhanced IHRP would cease to apply on the DB Section closure, via a Q&A document issued to all active members of the DB Section in August 2017.

63. The Employer asserts that the Pensions Ombudsman (**the PO**) does not have jurisdiction to consider any element of Mr H’s complaint which concerns the GIPP. Regardless, the Employer notes that Mr H did not meet certain eligibility requirements under the GIPP for the following reasons:

(i) Mr H was not "actively at work" on 1 January 2018; and

(ii) even if that particular exclusion did not apply, Mr H would not have qualified for GIPP benefits because either (a) he would not have met the incapacity threshold under the terms of the GIPP; and/or (b) he could not have met the six month deferral period under the GIPP because he was made redundant within six months after 1 January 2018.

64. It is clear from the history of Mr H's case that he was not considered, by himself or anyone else, permanently unable to carry on his occupation before 1 January 2018.

65. Mr H has complained that his application for an IHRP was mishandled but he has not specified in what way. The Trustees provided him with complete and accurate information about his entitlement to an IHRP under the Rules, and how to apply for this benefit. It progressed his application in a timely manner, though it acknowledges that the service provided by the OH provider was slower than it would otherwise expect.

66. The Employer points out that the retirement illustration provided as part of the consultation materials contained a number of warnings to show that they were estimates which were not guaranteed and were for illustrative purposes only. For their part, the Trustees do not believe that they have provided Mr H with contradictory and conflicting information in terms of his benefits from the Scheme.

Mr H's position

67. Mr H considers the Tribunal and pension investigation need to be considered as a single entity as each has a direct impact on the other.

68. While he acknowledges that the pension figures quoted to him were 'forecasts' he would expect these to have a reasonable degree of accuracy.

69. The Employer should have discussed the GIPP with him as at that time he was not formally redundant, was still within the consultation process and was still employed. The Employer should have provided him with the full options open to him. He says there was little to no information published by the Employer or made available to employees about the ill health early retirement system or how it worked.

70. To argue that he would not have been eligible for the GIPP illustrates that there was a fundamental problem with the procedure that the Employer had implemented. If he had remained in employment but still been absent through ill health, then this exclusion would have left him without cover and protection. The new DC Section would also protect employees moving over from the DB Section onto the new DC basis. Having a pre-diagnosed condition however discriminated against him.

71. As the 2021 medical reports confirm, his condition does not allow him to continue to work in his own occupation. He meets the criteria now and therefore would have met the same criteria previously.

72. Mr H says that at the time of the DB closure consultation he had asked how it would affect employees on long term sick leave but had received no answer. Nor was he told about the impact it would have on his AVCs.

73. For more than ten years he had been told that if he were unable to work through ill health he would be entitled to an early pension. It is not right that benefits such as this can simply disappear overnight.

Adjudicator's Opinion

74. Mr H's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Employer but that the Trustees should arrange for backdated instalments of Mr H's IHRP, from 2 May 2019 to 29 August 2019, to be paid to him together with interest. The Adjudicator's findings are summarised in paragraphs 75 to 128 below.

75. There was no dispute as to the basic facts of the case. On 9 August 2017, the Employer wrote to Mr H to announce that it was consulting with affected employees on the potential closure of the DB Section effective from 31 December 2017. In September 2017, Mr H went on long term sick leave and, while he was absent, the DB Section was closed to future accrual and a new DC arrangement established in its place. Subsequently, Mr H's role was made redundant and he later applied for an IHRP.

76. The relevant aspects of Mr H's complaint could be summarised as follows:-

- He believed that he was "misadvised" in relation to his IHRP options. He implied that the Employer should have informed/advised him of the financial consequences of the DB Section closure for his potential IHRP. He believed that this "misinformation" led him to make decisions which were not in his best financial interests overall.

- The Employer put the GIPP in place with effect from 1 January 2018. However, Mr H was not eligible to receive benefits under the GIPP because (amongst other reasons) he was not "actively at work" on 1 January 2018, when the GIPP first took effect. Mr H asserted that the Employer had "wrongfully prevented" him from accessing the GIPP benefits by failing to notify him of the GIPP eligibility conditions.

- Mr H also complained that his IHRP application was mishandled; and that he was misled by pension forecasts and "misinformation" provided by the Employer and the Trustees. A major part of this aspect of Mr H's complaint was that the DB Section closure meant that he would not receive a defined benefit pension based on service up to his normal retirement date.

77. Mr H had also complained about the Employer's decision to close the DB Section and switch it to DC. Mr H's complaint was largely about the way in which the switch from

the DB Section to DC had impacted on the benefits he receives and how the Employer and the Trustees went about that switch. So it was primarily about the duty of care owed to him.

78. With regards to Mr H's complaint about the decision to close the DB Section and to switch it to DC, the Adjudicator said that Clause 41.1 of the Definitive Deed gives the Trustees, with the consent of the Employer, the power to amend all or any of the provisions of the Definitive Deed by a deed executed by the Trustees and the Employer. This included the basis on which benefits were provided.

79. The Deed of Amendment, made by the Trustees and the Employer on 15 December 2017, changed the method of accrual from a DB basis to accrual on a DC basis with effect from 1 January 2018. In the Adjudicator's view, this was permitted under the terms of the Definitive Deed.

80. The Adjudicator believed that Mr H's complaint was conflated with other concerns that he had about his redundancy in 2018 and the way in which he felt he had been treated by the Employer. The Adjudicator acknowledged that Mr H believed that these matters were inseparable but did not agree. He said that the PO's jurisdiction did not extend to employment matters and so it would be wrong to consider those in reaching an opinion on Mr H's complaint.

81. Mr H's complaints about his redundancy were the subject of proceedings before the Tribunal in 2020. However, the Tribunal did not consider issues in relation to his IHRP. It found in Mr H's favour in relation to the consultation procedure for his redundancy but did not uphold his claim in relation to the substantive issues of disability discrimination, harassment and victimisation. It concluded that Mr H would have been fairly dismissed in any event, had a fair procedure been followed.

82. Mr H had also made a number of comments about the way the Employer had managed its business which, again, could not be considered by The Pensions Ombudsman (**TPO**).

83. The Adjudicator therefore only considered the issues in relation to the IHRP.

84. Mr H was currently in receipt of an IHRP from the Scheme. During his long-term sickness absence, but before he applied for an IHRP from the Scheme, the DB Section was closed to future accrual. Had Mr H applied and been granted an IHRP from active status before the DB Section's closure, it was likely that the IHRP payable to him from the Scheme would have been significantly higher than those he currently received. This was because the IHRP for a deferred member is reduced to reflect early payment. The IHRP for those members retiring from active status was potentially enhanced, that is no actuarial reduction was applied and/or the pension was based on prospective pensionable service. This depended on whether the member was incapable of carrying out his own occupation or any occupation.

85. The GIPP was put in place by the Employer on the closure of the DB Section, for those employees who were active members of the DB Section at the time of its

closure. Apparently, this was as a replacement for the enhanced IHRP. However, Mr H was not eligible to receive any benefit from the GIPP because he was not "actively at work" on 1 January 2018, when the GIPP first took effect.

86. The Adjudicator considered the extent to which the Employer and/or the Trustees had an obligation to warn Mr H about the adverse impact of the DB Section closure on his potential IHRP, given that the Employer was aware that he was on long-term sickness absence; and also on the extent to which Mr H should have been advised in relation to his eligibility to receive benefits under the GIPP.

87. In relation to the potential liability of the Employer, the leading case of *Scally v Southern Health and Social Services Board* [1991] 4 All ER 563 (**Scally**) had established that an employer has an implied legal obligation to draw the attention of their employees to a valuable contractual right, such as eligibility for (or the potential loss of entitlement to) an IHRP, if certain criteria were satisfied.

88. In *Scally*, the employer had failed to inform employees of their right to purchase added years of pensionable service at advantageous rates before the expiration of a deadline. The House of Lords held that the employer had breached an implied obligation to draw the attention of its employees to that contractual right. *Scally* established that this implied duty applied provided that: (i) the right was negotiated collectively or was incorporated from a separate document from the employee's contract of employment; (ii) the contractual right at issue was valuable and contingent on some action by the employee; and (iii) the employee could not reasonably be expected to know about the right unless his/her attention was drawn to it.

89. *Scally* has generally been subject to a narrow interpretation by the courts. This approach had necessarily been followed by the PO, for example in the cases of Mr E/25374 (November 2021), Mr K/25963 (March 2020) and Mrs S (deceased)/19018 (December 2018).

90. In particular, the courts have shown marked reluctance to extend the principle in *Scally* to create a wider duty on the part of an employer to consider, or advise, employees in relation to their financial and economic well-being. Instead, under *Scally*, an employer's duty could only extend to provision of factually correct information about the contractual right at issue; it did not include informing the member about the merits of any particular option.

91. This approach could be seen in *University of Nottingham v Eyett* [1999] All ER 437 (**Eyett**), in which the High Court had held that the Employer was not under a "positive" duty to inform an employee that it would be to his significant financial advantage if he delayed his early retirement by one month. The High Court had noted that the employee was in possession of all relevant pension scheme documents that would have enabled him to ascertain the position for himself.

92. Similarly, in the case of *Corsham v Police and Crime Commissioner for Essex* [2019] EWHC 1776 (Ch) (**Corsham**), the High Court had rejected arguments that an employer owed a 'Scally' duty to inform employees of the adverse tax consequences

in relation to certain pension scheme benefits. This approach was consistent with the narrow interpretation of *Scally* adopted in earlier cases, including *Outram v Academy Plastics* [2000] EWCA Civ 141 and *Crossley v Faithful & Gould Holding Ltd* [2004] EWCA Civ 293 (**Crossley**).

93. In *Crossley*, the Court of Appeal had held that the employer's duty did not extend to advising on the best strategy for an employee to adopt when making a claim for long-term disability. This was a matter for the employee.

94. With regards to how the principles in *Scally* applied to the circumstances of Mr H's case, the Adjudicator noted that the Employer argued that there was no relevant right available to Mr H, as the medical evidence suggested that he was unlikely to have qualified for the IHRP. Therefore, the *Scally* duty did not apply.

95. While the Adjudicator agreed that the medical evidence and other factors strongly suggested that Mr H would not have qualified for an IHRP from the DB Section, he did not necessarily believe that this precluded the existence of a relevant contractual right under *Scally* – although the position was arguable.

96. *Scally* set out three conditions which had to be met before an employer had a duty to inform an employee of the existence of a contractual right. Taking each of the three *Scally* criteria in turn:-

- The right must be negotiated collectively or incorporated from a separate document from the employee's contract of employment. The right at issue was the right of Mr H to receive an IHRP if he met the eligibility requirements under the Rules of the DB Section (or, possibly, the right to apply for the IHRP). This was incorporated into the employment relationship via a separate document; namely, the Rules of the Scheme. Therefore, this condition was met.

- The contractual right at issue must be valuable and contingent on some action by the employee. As the IHRP was: (i) valuable; and (ii) only available to members if they applied for it and submitted relevant medical evidence, this condition was also met.

- The employee could not reasonably be expected to know about the right unless his/her attention was drawn to it. In the Adjudicator's view, this condition was also met, as the right to receive an enhanced IHRP from the DB Section (and, specifically, the fact that this right would end from 1 January 2018) was not set out in the employment contract. The fact that the right to this enhanced benefit would be lost on the DB Section closure would not be discernible from existing scheme booklets or other material previously issued to employees.

97. However, the Adjudicator's opinion was that the Employer did draw Mr H's attention to both: (i) the existence of the right to an enhanced IHRP from the DB Section in certain circumstances; and (ii) the loss of that right on the DB Section closure, through the FAQ document issued on 9 August 2017.

98. The Employer had said that this FAQ document was sent to the home addresses of all active members, including Mr H. The issue of long-term ill-health benefits was addressed at section 15, as follows:

> "**How would my benefit change if I became permanently and seriously ill?**
>
> *Under our proposal, your benefit would change if you became permanently ill.*
>
> *As an active DB Member, you can retire at any age with the consent of the Trustees and the Company if the Trustees are satisfied that you are suffering from incapacity. The DB pension payable to you is calculated at the discretion of the Trustees, and the current practice is as follows:*
>
> *If you are permanently unable to do your job, a DB pension is payable based on the service you have completed and your pensionable salary at date of retirement, with no reduction applied for early payment.*
>
> *If you are permanently unable to do any job, a DB pension is payable based on your pensionable salary at date of retirement, but calculated as though you had remained in service until your normal retirement date. No reduction is applied for early payment.*
>
> *If the proposed changes go ahead, you would receive 60% of your basic salary up to age 65 following 6 months continued absence, subject to the Employers consent and the insurer's requirements. Subject to obtaining Trustee [and Company] consent, you may also draw your DB benefits once you have reached the minimum age, currently 55 (although they may be reduced for early payment)."*

99. In terms of content, the Adjudicator believed that section 15 of the FAQ document satisfied the *Scally* requirements. It set out accurate, factual information in relation to the current IHRP entitlement under the DB Section, and notified the employee that this would change following the DB Section closure. It stated that any post 1 January 2018 incapacity benefits from the DB Section might be reduced for early payment. Following the case law, there was no requirement for the Employer to advise employees on a particular course of action by, for example, prompting those on long-term sick leave to consider applying for an IHRP before 1 January 2018. In the Adjudicator's view, the information which would have enabled Mr H to take decisions in relation to his potential IHRP under the DB Section was set out in the FAQ document.

100. In considering whether the method of informing employees of the cessation of the enhanced IHRP under the DB Section, by using an FAQ mailshot, met legal requirements; the Adjudicator referred to the case of *Andrew v Kings College NHS Foundation Trust*[1] (**Andrew**).

[1] UKEAT/0304/13/RN

101. In *Andrew*, the Employment Appeal Tribunal (**EAT**) had held that the employer's implied duty under *Scally* was not to ensure that the information was successfully received by the employee; rather, the duty was limited to ensuring that the employer took reasonable steps to bring the relevant information to the employee's attention. The employer had sent information relating to the pension scheme by attaching it to each employee's payslip. The EAT had concluded that, even though a small number of employees had not in fact received the leaflet, the method adopted by the employer was reasonable and complied with the duty in *Scally*.

102. In Mr H's case, the relevant information had been included within the FAQ document which was sent to the home addresses of all affected employees on 9 August 2017. Applying *Andrew*, the Adjudicator believed that this was appropriate and reasonable in all of the circumstances and complied with the duty under *Scally*.

103. The Adjudicator also noted that Mr H was an elected employee representative for the purposes of the consultation exercise in relation to the DB Section closure. Therefore, it seemed highly likely that he both received and read/engaged with the FAQ document.

104. Mr H's statements that he expected to receive the enhanced IHRP based on previous pensions discussions and forecasts were superseded by the information contained in the FAQ. The FAQ was clear that the position would change on the DB Section closure. There would be a potential exception to this if Mr H could show that he was given contradictory information as to the post 1 January 2018 level of his IHRP, after receiving the FAQ document. However, the Adjudicator could not see any evidence to suggest that this had happened.

105. The Adjudicator noted Mr H's comment that the Employer had failed to respond to a request for information about the effect of the DB Section closure on employees with long term health issues. However, he noted that even if this request had pre-dated the closure by enough time to enable the Employer to have responded, Mr H did not suggest that he had been given incorrect information; rather, that the Employer had failed to address his question. The Adjudicator concluded that there was nothing to contradict the FAQ document. It had also appeared that Mr H did not follow-up or chase the query.

106. In summary, in the Adjudicator's opinion the Employer had discharged its duty under *Scally* by issuing the FAQ document.

107. In relation to negligent misstatement arguments, the Adjudicator noted that section 15 of the FAQ stated:

> "If the proposed changes go ahead, you would receive 60% of your basic salary up to age 65 following 6 months continued absence, subject to the Employer's consent and the insurer's requirements."

The Adjudicator considered it was possible, therefore, that Mr H might believe that the Employer was liable for "negligent misstatement" in relation to the GIPP coverage

(given that he was not, in fact, covered by the GIPP). However, in the Adjudicator's opinion, the PO's jurisdiction did not extend to any aspect of Mr H's complaint which concerned the GIPP as it was not connected to any occupational or personal pension arrangement. The Adjudicator did acknowledge that it might be open to Mr H to argue that, had he appreciated that he might not be eligible for the GIPP, he would have sought to bring his IHRP into payment under the DB Section of the Scheme.

108. For the reasons set out below, the Adjudicator did not believe that any claim by Mr H founded in negligent misstatement would be likely to succeed. Mr H would need to demonstrate that he had acted to his financial detriment, in reliance on an inaccurate, misleading or careless statement, or omission, made by the Employer.

109. The Adjudicator noted that the statement that employees would, after 1 January 2018, receive 60% of their salary, was caveated by a statement that it would be "subject to the Employers consent and the insurer's requirements". Therefore, the Adjudicator's view was that the statement itself was accurate, albeit lacking in detail. Even if a court held that the Employer had made a negligent misstatement, the Adjudicator did not believe that Mr H could show that he had acted in reliance on the misstatement or that he had suffered any loss. This was because the evidence strongly suggested that Mr H did not meet the incapacity threshold under the Rules until after the DB Section closure.

110. Before the DB Section closure, Rule 8.2 provided that an active member would be eligible to receive an IHRP if: (i) the Employer and the Trustees agreed; and (ii) the member met the ill-health condition set out in paragraph 1 of Schedule 28 to the Finance Act 2004 (**the Ill-Health Condition**). The extent of the enhancement to the IHRP was determined by the Trustees; the policy in place since 1997 was to set different levels of enhancement depending on the extent of the member's incapacity.

111. The Ill-Health Condition provided that the Trustees must have received evidence from a registered medical practitioner that, at the time of the application: (i) the member was (and would continue to be) incapable of carrying on his/her occupation because of physical/mental impairment; and (ii) that the member had in fact ceased to carry on his/her occupation.

112. The key issue relevant to whether Mr H had suffered loss or detriment in relation to the alleged misstatement was whether Mr H met the incapacity threshold under the Rules, namely whether he met the Ill-Health Condition at any time between receiving the FAQ document, on or shortly after 9 August 2017, and the closure of the DB Section. From 1 January 2018 onwards the enhanced IHRP had no longer been available irrespective of the condition of Mr H's health.

113. Mr H had asserted that he would have met the criteria prior to the DB Section closure on 31 December 2017. This was based on the fact that he subsequently met the criteria and was in receipt of an IHRP.

114. The Adjudicator had reviewed the file documents; in particular, an OH report of 18 October 2017. This had anticipated that Mr H might return to work, in certain

circumstances. It was also clear evidence that Mr H had not, at that time, met the permanence criterion prescribed in the Ill-Health Condition, specifically, the requirement that the member would continue to be incapable of carrying on his occupation. The relevant extract is set out below:

> "[Mr H] is currently unfit for work and I do not envisage his return until his perceptions of how he is being treated by management are addressed… Once these have been addressed his condition may settle and if not then his consultant may be able to provide [Mr H] with further guidance. On [Mr H's] return his previous adjustments would still be advised. His conditions may impact on his performance depending on the stability of his symptoms but he should not require any further adjustments at this time."

115. Mr H had argued that this report was inaccurate and had been written in order to help him to retain his position. In the Adjudicator's view this was speculative. In any event, the fact that Mr H had wanted to retain his position and had fought to do so up until mid-2018, suggested that he viewed himself as having been fit to work in his then occupation.

116. The Adjudicator had also considered the OH report dated 2 May 2018. Although this post-dated the DB Section closure, it was evidence of how Mr H's condition might have developed between October 2017, January 2018, and up to May 2018. This again showed that the medical practitioner had anticipated that Mr H could return to work – if a suitable role could be found. The relevant extracts are set out below:

> "[Mr H] tells me that since his last consultation he felt that the frequency and the duration of his attacks had diminished and that he was ready to return to work.
>
> [Mr H] would be fit to return to work but this would be dependent on role availability, should a suitable role be available he could return to work as soon as required… I would therefore advise that a meeting takes place to discuss any potential roles, and should one be available [Mr H] would benefit from a phased return over a 3 week period to allow him to regain working stamina."

117. The evidence suggested that both Mr H and the Employer, as recently as May 2018, had anticipated that he might return to work, if a role could be found for him. This strongly suggested that Mr H did not meet the permanence requirement of the Ill-Health Condition test, and would not, therefore, have met the incapacity threshold under the DB Section rules at 31 December 2017.

118. The Adjudicator noted that Mr H had appealed his redundancy under the Employer's internal procedures, before taking his case to the Tribunal. The appeal meeting had taken place on 4 July 2018. At that meeting, Mr H had argued that he was unfairly selected for redundancy. Similarly, Mr H had challenged the redundancy process in the Tribunal.

119. Mr H had also stated that although he had been off work with ill-health, this "should not have prevented [the Employer] from finding me an alternative role". The

Adjudicator considered that this, and the fact that Mr H had applied for other similar jobs in advance of his Tribunal hearing, again indicated that Mr H viewed himself as having been fit to work in his occupation.

120. The Adjudicator also noted the substantial period of time between the DB Section closure and Mr H's IHRP application on 1 May 2019.

121. In conclusion, the Adjudicator's view was that any claim by Mr H in relation to negligent misstatement would not succeed. In particular, he did not believe that the evidence suggested that Mr H had suffered any loss as a result of the arguably incomplete statement in the FAQ. The evidence strongly suggested that Mr H had not met the incapacity threshold under the Rules at any point between first taking sick leave in September 2017 and the DB Section closure with effect from 1 January 2018.

122. In relation to Mr H's complaint that he had been wrongfully prevented from accessing the GIPP benefits, the Adjudicator also considered whether this fell within the PO's jurisdiction.

123. Matters that the PO can investigate are set out in statute. Section 146(1) of the Pension Schemes Act 1993 provides that the PO may investigate or determine a complaint or dispute made by or on behalf of an actual or potential beneficiary of an "occupational or personal pension scheme".

124. The Adjudicator concluded that the GIPP was an insurance product which was neither itself an occupational/personal pension scheme, nor was it part of or connected to an occupational or personal pension scheme. Therefore, the PO did not have jurisdiction to investigate or determine any part of Mr H's complaint which related to the GIPP, including the extent to which the Employer had a legal duty to inform him of the GIPP eligibility terms and benefit conditions.

125. In relation to the effective date of payment of Mr H's IHRP, the Adjudicator noted that Mr H had applied for an IHRP from deferred status on 1 May 2019. However, it was not until 29 August 2019, that the Trustees confirmed that they had exercised their discretion and agreed that early retirement benefits could be paid. The Adjudicator acknowledged that a small part of the delay was caused by Mr H but considered that the majority of the four months wait for the Trustees' agreement was outside Mr H's control.

126. On 30 August 2019, Mr H had requested that his pension be backdated to 1 May 2019, the date on which he had made his application. The Trustees refused his request saying that the ill health criteria under the Rules had to be met before an IHRP could be granted.

127. Rule 18.1 states that a Deferred Member may, with the consent of the Trustees, elect to retire under the DB Section before his Normal Retirement Date. One of the grounds for early retirement is through ill health. If the Trustees give their consent,

then they must pay the member a pension starting on the day next following that upon which he retires.

128. In the Adjudicator's view, the effective date on which Mr H retired was the date on which he made his application for an IHRP. The fact that it took the Trustees four months to provide their consent had not been through any fault of Mr H's and, having given their consent, the Trustees were obliged to pay his pension from the day after he retired, that is 2 May 2019.

129. The Employer accepted the Adjudicator's Opinion, whereas the Trustees and Mr H did not and the complaint was passed to me to consider. The Trustees and Mr H provided their further comments which I have considered in paragraphs 163 to 216 below.

130. Mr H's comments were extensive and is one of the key reasons for the length of this Determination. Given the size of his response, I set out only the key grounds below. I have however considered all the issues raised in Mr H's original complaint and his submission following the Adjudicator's Opinion.

Mr H's additional points

131. He strongly disputes that employment matters are out of the PO's jurisdiction. He considers it is a consequence of the termination of his employment that has caused the situation with his pension and therefore this must be considered.

132. He had raised a grievance about the way he was treated at work. Part of the grievance related to his pension. The Employer, without informing the employees, had introduced a scheme that froze an individual's salary, without the employee being made aware in advance. Not only did this supress his salary but it also had a significant impact on his pension as without any annual pay rise the predictions of his pension would be substantially lower at retirement.

133. His role had allowed him to maintain his position because the Employer had created a specific role that could accommodate his health condition. He subsequently found out that it was unlikely that he would find a similar role in any other organisation because of the restrictions brought about due to his health.

134. He argues that if the DB Section had remained open he would not have suffered penalty deductions on health grounds. Even though the Scheme had closed, because he has had to retire due to ill health he believes that rule should still apply. If he had been able to join the GIPP he would not be taking his pension early and therefore he would not have had penalties applied.

135. The rules of the DC Section and the new GIPP should have been explained to him. To say the GIPP did not apply to him is incorrect; he was an employee and he had been transferred to the DC Section.

136. The GIPP terms stated that an employee needed to be actively in work for six months to be covered. It then said that for those absent before the six-month period

temporary protection could be granted. He was not told about this; that should have been in place and offered to him. Instead, he was told that he would get no further pay, and that he should take redundancy.

137. The Employer sent another copy of the exclusions, dated 18 March 2018, which included a new exclusion stating that the temporary cover was not available to anyone already absent at the time of the transfer. Therefore, this was only implemented after employees had been moved over to the DC Section and after the redundancy consultation period had started. He could understand if this information had mistakenly been overlooked for somebody in good health, but for someone in his situation this was critical information.

138. He believes that the Employer should have advised him of other options regarding his AVCs. If he had not taken the full tax-free cash allowance then he should have been entitled to withdraw the AVCs and invest them in other ways, thereby allowing him to access his money rather than have it tied up.

139. He had paid £190,000 in AVCs, so the £70,000 excess above his tax-free lump sum is being used to pay him an increased pension, but this would only be about £800 p.a. The Employer said this was calculated from a formula used for the DB Section. If he were to die after five years then the remainder of his fund would be lost. If he had known this he would not have chosen to invest this amount into AVCs.

140. The retirement illustration dated 1 September 2021 was the first time he had been given the option to transfer out of the Scheme. This illustration quoted a total cash equivalent transfer value (**CETV**) of £1,015,412.12. The Employer had previously told him his pension was only worth £12,000 p.a. If the CETV had been offered to him at the time it would have confirmed his understanding that his pension was worth significantly more than he was being told.

141. The option to transfer out and the CETV should have been provided long before the final financial figures were presented to him. Instead he was continually told that his only option was to take his pension. Had he known about the CETV, he could have avoided the Tribunal, taken the £200,000 settlement he had been offered, followed by the 25% tax free lump sum even if it meant waiting for this until he was aged 55.

142. The Employer paid for an independent financial adviser whose recommendation was to take the pension as this was a secure income, albeit at a low value, although by now it had increased in value to £16,850 p.a. However, he says that when he showed the illustration to his own financial advisor he was told the transfer out was the better option.

143. During his membership of the DB Section he received an annual pension statement. He is aware that these are a forecast, however these forecasts must have been based on reliable information and therefore he would assume that although there are no guarantees it was reasonable to expect the value would be there or there about.

144. The benefit statements he was given did not say they were an illustration; this was a caveat that only started to be added in the last couple of months before the DB Section was closed. The DB figures were fixed, based on salary and years of service. He did not expect them to diminish in value like they did.

145. When the DB Section closure pack was sent out he was on holiday for two weeks and then away on business before taking sick leave. HR had told him to put anything work related aside and to focus on getting better. Therefore, he was not in a position to address any concern over the DB Section closure. Employees had been informed in Aug 2017 that consultation for potential closure of the Scheme may occur. It was open to consultation and the document suggested that this change may not happen.

146. By mid-September he went on sick leave and did not return to work. No more information was shared with him and he had no access to the pension literature. A series of workshops was offered to employees but as he was absent he was unable to attend and was not provided with any information from these.

147. While the Employer told him the rules would change for the DB Section, it advised there would be suitable provisions as an alternative for employees requiring ill health cover. He was led to believe the new provisions would be open to him; the Q&A document did not mention any exclusions.

148. As he was absent through ill health during this period, he was not in a position to make informed decisions. The Employer had a duty to inform him of the exclusions to the new pension scheme, particularly if the new rules did not apply to him at the time of the consultation.

149. In the lead up to the Tribunal there had been numerous attempts to agree a financial settlement eventually increasing to £200,000. His solicitor's advice was he should accept the offer. He considered his pension losses were separate to the Tribunal and therefore he should still have been able to continue to have TPO conduct an investigation into his circumstances. If he had accepted the offer, the Employer stipulated that he must sign a non-disclosure agreement (NDA) which stated that he must withdraw all complaints with TPO. He asked for this condition to be removed from the document, but the Employer refused.

150. He does not understand why the Employer refers to the pension that he has taken early as an IHRP, as he considers there is no advantage in taking it on the grounds of ill health. The literature provided indicates that with acceptance of the IHRP there are no financial penalties for taking the pension early. However, his pension has incurred penalties.

151. When he was first diagnosed with his illness, the Pensions Manager explained that if he became so ill that he could not work he would be entitled to a pension based on his years of completed pensionable service and any years remaining would be added. So the calculation would be based on full working pensionable service.

152. Based on what was known about his condition his situation would have been equally as severe at the start of his absence as at the time of assessment. This would suggest that he did fulfil the criteria for the IHRP before the closure of the DB Section. The OH report said that his condition rendered him unfit for any occupation and therefore his entitlement should have been for an enhanced pension.

153. He initially made an application for IHRP on 1 May 2019 but the Employer said it would only pay from the date of OH approval at the end of August 2019. The Adjudicator had said that his pension should be backdated to the date when he first applied for his IHRP, and arrears paid from 2 May 2019 to 2 August 2019. However, he did not start to draw his pension until 17 March 2021 and he therefore believes the arrears needs to be increased.

The Trustees' additional points

154. The Adjudicator's suggested direction regarding redress pre-supposes that Mr H's IHRP was put into payment with effect from 30 August 2019, with the period between 2 May 2019 and 29 August 2019 being a period in which the Adjudicator considered a pension should have been payable and was not. The Trustees argue that no such pension is properly payable in respect of this period, as Mr H did not proceed to take an IHRP as a result of the initial request he made on 1 May 2019. Indeed, he did not retire from the Scheme on grounds of ill-health until 17 March 2021, pursuant to an entirely separate application that he had subsequently made.

155. The Trustees had previously offered Mr H an IHRP commencing from 2 May 2019, which Mr H had refused, choosing instead to defer his retirement to a later date.

156. It is correct that further to Mr H's initial application for an IHRP on 1 May 2019, there was a period of time before the Trustees were able to establish that the conditions for Mr H for being entitled to such a pension were met. The two key conditions were:

    (i) receiving the necessary medical evidence to establish the ill-health tests were met; and

    (ii) the Trustees determining to award a pension.

    These conditions were not met until 29 August 2019 which is why the Trustees' initial position was that Mr H's IHRP should not commence from a date earlier than 30 August 2019.

157. The Trustees sent a communication to Mr H on 13 February 2020, to confirm the outcome of their decision regarding the commencement of his pension, based on his May 2019 ill health application. The Trustees confirmed that, taking account of previous delays in the process, Mr H could request a commencement date for his IHRP of any time between 1 May 2019 and 1 April 2020. In order to proceed with that application (and it was unclear whether Mr H did wish to proceed with drawing a pension at that time), Mr H was told that he would need to complete the necessary

paperwork to effect the commencement of his pension (and identify his chosen start date) by 13 April 2020 or his application would be treated as withdrawn.

158. Mr H chose not to submit any paperwork to proceed with an IHRP application at that time, and his 2019 application was, therefore, treated as withdrawn.

159. The Adjudicator's proposed direction is not a remedy Mr H has asked for, nor has he complained about the start date of his pension. Such an order would give rise to an unauthorised payment because it is a requirement of the Finance Act 2004 that a scheme pension be payable for life. It would not therefore be possible, as an authorised payment, for the Trustees to make a payment representing instalments for a period between 2 May 2019 and 29 August 2019, when Mr H's scheme pension did not otherwise commence until 17 March 2021.

160. There is a direct correlation between the amount of IHRP payable to a member and the start date for that pension. The IHRP payable from deferred status is actuarially reduced for early payment. In broad terms, this means that the earlier the start date, the lower the initial rate of pension payable and, therefore, the lower the tax-free cash sum that is available to the member.

161. Regardless of the start date, the actuarial "value" of the total benefits is intended to be the same. An earlier start date does not therefore result in a more valuable benefit for the member. Consequently, a member may have reasons to prefer drawing a pension at a later point, in order that the reduction for early payment is smaller, and to have the ability to take a higher tax-free cash sum.

162. The Trustees do not understand Mr H to be asking for the pension payable pursuant to his 2021 Application to be replaced with the pension that would have been payable had he chosen to take a pension pursuant to his 2019 Application. This would require unwinding a set of payment streams made to Mr H (the benefit payments made pursuant to the 2021 Application), including asking Mr H to re-pay what would have been an overstated tax-free lump sum.

Ombudsman's decision

163. I sympathise with Mr H and the position he now finds himself in. However, it appears that much of his frustration is as a result of the way in which he feels he has been treated by the Employer, and actually has little to do with his pension complaint.

164. I agree with the Adjudicator that my powers extend only to the consideration of pension complaints. This is explained in Part X of the 1993 Act (the Pensions Ombudsman) (**the 1993 Act**). Section 146 (1) of the 1993 Act states:

> "The Pensions Ombudsman may investigate and determine the following matters—
>
> (a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational or personal pension scheme who alleges that he has

> sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme…

165. Regardless, section 146(6) of the 1993 Act states:

> "The Pensions Ombudsman shall not investigate or determine a complaint or dispute—
>
> (a) if, before the making of the complaint or the reference of the dispute—
>
> (i) proceedings in respect of the matters which would be the subject of the investigation have been begun in any court or employment tribunal…

166. Much of what Mr H has written in his application form to TPO relates either to his redundancy or to the GIPP. In his further submissions he continues to complain about some of the matters which were previously considered by the Tribunal and which I cannot now consider.

167. I acknowledge that Mr H contends that his treatment by the Employer is a direct cause of the situation with his pension. However, I can only investigate and determine disputes with employers if they relate to the occupational pension scheme.

168. In the case of *Engineering Training Authority v the Pensions Ombudsman (1996) PLR 409,* Carnwath J stated that the PO's jurisdiction is directed to:

> "…the employer's functions under or "in relation to" the pension scheme in question. It does not give the Ombudsman jurisdiction to investigate complaints about the ordinary contractual relations between the employer and the employee. These are matters for the Industrial Tribunal, or an action in the Court for breach of contract."

169. Consequently, I cannot consider Mr H's complaints regarding his dismissal or about disability discrimination in the workplace. In any event, the Tribunal considered whether Mr H was unfairly dismissed and whether there was disability discrimination against him by the Employer. After a contested hearing the Tribunal found that there had been procedural irregularities in relation to Mr H's redundancy dismissal, but that it was certain that he would nonetheless have been made redundant. Applying *Polkey v AE Dayton Services Ltd [1987]*, there was no loss to Mr H. As he had received a redundancy payment greater than the statutory requirement, no award was made. All other claims were dismissed. It is not for me to comment on that and it is not a factor for me to consider in this Determination.

170. The GIPP is also outside my jurisdiction, and therefore whether its terms are fair or unfair is not a matter on which I can comment.

171. Paragraph 2 above, sets out those elements of Mr H's complaint which I can consider. I find that much of Mr H's complaint has been dealt with by the Adjudicator and I do not propose repeating his conclusions here. I have instead focused my

attention on whether the Employer and the Trustees acted correctly and appropriately towards Mr H, in particular focusing on the duty of care owed to him.

172. Dealing firstly with the decision to close the DB Section, Clause 41. Sub-clause 41.1 of the Definitive Deed (see paragraph 7 above) gives the Trustees, with the consent of the Principal Company, the power to amend the provisions of the Definitive Deed. I therefore find that closing the DB Section through the Deed of Amendment, was in accordance with the terms governing the Scheme.

173. I have not considered this aspect of Mr H's complaint further, but I have looked at how the change to the benefit basis was implemented and communicated.

174. In broad terms, case law confirms that employers are not obliged to advise members about their pension rights, or to highlight potentially detrimental decisions or inform members of how best to exercise their pension rights. The Adjudicator discussed this in his Opinion and I agree with his analysis. I will recap some of the points for ease of reference.

175. As the Adjudicator explained, *Scally*, concerned a group of doctors who were entitled to buy enhanced pension rights (added years of service) under provisions in a collective agreement. They were not informed of this right, and so failed to take advantage of it. Also, there was a specific time limit in which these new doctors had to elect to buy added years – one year from the beginning of their employment.

176. The House of Lords decided that, in the specific case, it was appropriate to imply a term into the doctors' employment contracts that the employer would take reasonable steps to inform the doctors about their rights. This implied term would only arise if specific conditions were met – broadly that the overall contractual terms had not been negotiated individually or was in a separate document from the employee's contract; that the right was valuable and that it required some action on the part of the employee to access it; and that the employee could not reasonably be expected to be aware of the particular term unless drawn to the employee's attention.

177. In Mr H's case, the right would be the provision for ill-health retirement under the DB Scheme. I consider that Mr H would have been aware of this provision from the documentation sent to him by the Trustees in discharge of their disclosure duties. So, Mr H would be aware of the right – and the focus would be on the time scale under which it was accessible.

178. The Employer argues that no duty under *Scally* arises because Mr H would not have been able to avail himself of the right. The distinction that the Employer is trying to make is that in Scally the doctors had to take action to access the right and that it was in their power to do so; whereas in Mr H's situation he had to meet the incapacity criteria, which was a matter of fact. The doctors' right was 'actual' and Mr H's merely prospective – it could only become an actual right when he met the criteria.

179. In *Crossley*, the Court of Appeal held there is no implied duty on an employer to take reasonable care of an employee's economic well-being. The court ruled that the

employer was not in breach of contract for failing to advise an employee that his resignation would have a detrimental effect on his entitlement under a permanent health insurance policy.

180. In *Eyett*, the employer failed to advise the employee that his chosen retirement date was financially disadvantageous to him, and that, if he chose to retire the following month, his pension would be calculated at a higher rate. The High Court found there was no obligation to tell the employee he was making a mistake, and no breach of the implied term of trust and confidence. It distinguished the situation from that in Scally thus:

> "So far as the Scally principle is concerned, the facts of the present case are quite different from those which obtained in Scally. There, the relevant plaintiffs were wholly ignorant of the existence of the valuable right in question and had no means of knowing of its existence unless told of it by their employers. Moreover, I am unable to share the Ombudsman's conclusion that a careful reader of the explanatory booklet which was available to the Complainant would not have been able to deduce from it the consequences, in terms of final pensionable salary, of choosing a date one side or the other of 1 August on which to take early retirement."

181. In reaching its decision, the court also explained that the member did not ask the university for any advice about his chosen retirement date, and there was no evidence that the university was aware that he was making his decision on the grounds of a mistaken belief. It could therefore not be brought within the remit of the *Scally* decision. The judge declined to find that the University was in breach of contract – and resisted "the proposition that the implied term of mutual trust and confidence includes within it a positive, obligation to give advice of the kind which is now asserted".

182. The Employer refers to the *Eyett* decision in its formal response to TPO (and I think that it is indeed relevant in this situation). As in *Eyett*, Mr H had been provided with information about the DB Scheme benefits and the future changes. He did not ask the Employer whether he would be better off applying for ill-health before the closure of the DB Scheme. Similarly, there is no evidence that the Employer was aware that Mr H was making any decisions on a mistaken belief about ill-health benefits. In my view, in light of the information provided to Mr H, the situations are analogous.

183. Given that Mr H would likely not have met the criteria from ill-health retirement (according to the available medical evidence and his own intentions to return to work throughout the redundancy process the next year and through his Tribunal case), I consider it would be very unlikely that a court would say that the implied duty of trust and confidence included a duty to advise Mr H that he would be better off applying for ill-health retirement before the DB Scheme closed to future accrual.

184. A *Scally* duty might have arisen, but in my view was discharged because of the information provided. In the end, the practical outcome is the same. In reading the

judgment in *Eyett*, I do not consider that the judge addresses the question of whether there would have been a *Scally* type duty if the information had not been provided.

185. Another way of expressing this would be that in light of the information that had been provided to Mr H and the circumstances that he appears not to have met the criteria for ill-health retirement, applying *Eyett*, the Employer's implied duty of trust and confidence did not include a positive duty to advise Mr H that he would be better off applying for ill-health retirement before the DB Scheme closed – not least as it was not clear that Mr H would have met the ill health test and, in any event, was looking to continue working.

186. I have next considered whether due to his circumstances, Mr H could be considered 'vulnerable' and thus required special consideration.

187. The medical evidence shows that Mr H suffers with narcolepsy and cataplexy. Attacks can be triggered by stress. In the occupational health report of 18 October 2017, it appears that he was at that time unfit and that the OH Adviser did not envisage his return until his perceptions of how he was treated by management were addressed. However, she indicated that Mr H was fit to attend meetings to discuss these issues.

188. There is nothing in the report that suggests to me that Mr H's ability to read and understand documents is impaired. It also appears from the formal response that Mr H was an elected staff representative in the consultation process. Again, this indicates to me that there was no evidence of a particular vulnerability or lack of understanding. As I do not see evidence to hold that he was vulnerable, I will not dwell on whether this could have changed the duty to Mr H.

189. Moreover, I find that to some extent whether there was a duty to Mr H or a duty to act more carefully because he was on long-term sick leave is moot. The facts are that he was made redundant and, at that time, was continuing to say that he would be fit to return to work. He was not seeking IHER. Furthermore, all available evidence shows that he would not have qualified for ill-health retirement before the DB Section closed. Therefore, he could not have availed himself of ill-health retirement, regardless of what information he might have been provided with and consequently, he has not incurred a loss.

190. With regard to the accuracy of the information provided, if an employer gives information to employees (whether or not it is under a duty to do so), case law indicates the employer must take reasonable care in giving the information - *Hagen and others v ICI Chemicals & Polymers Ltd and others [2002] IRLR 31*.

191. In *Corsham*, the High Court held that the police authority was liable for negligent misstatement where it had informed police officers who were members of the Police Pension Scheme that they would receive a tax-free lump sum, despite knowing about offers to re-employ them straight after retirement. The court held that the police authority, as administrator of the scheme, should have known about the provisions in the Finance Act 2004 regarding the taxation of pensions and the adverse tax

consequences arising where police officers were re-employed into civilian roles within one month of retirement.

192. However, it does not seem to me that Mr H is actually making the case that there was an error in the documents that he received and that he acted in reliance on that misstatement in not applying for ill-health retirement before the DB Scheme closed.

193. Rather, Mr H appears to be more concerned about what he was told about the GIPP. Although the GIPP itself is outside of my jurisdiction, it is possible that an incorrect statement about it may have influenced Mr H's decisions about ill-health retirement within the Scheme (which would be within my jurisdiction).

194. The statement that a person would receive 60% of basic salary up to age 65 following 6 months continued absence, subject to employer's consent and insurer's requirements appears to me to be factually correct. The statement could have gone on to explain what the insurer's requirements were, including that a member be actively at work for a period before the full cover was applicable, but I do not think that anything in the statement was incorrect. It made clear that the benefit was conditional – employer consent and insurer's requirements were necessary. I believe that there was sufficient information such that if Mr H were concerned about the change in ill-health provision he could have asked about the insurer's requirements. He did not do so. Given the discussion on *Scally* above, there was no implied duty on the Employer to do more.

195. Further, I find there was no material factual misstatement. Even if there was a *Scally* type duty and it had been breached or a negligent misstatement (and I do not accept either to be the case), any such breach or misstatement would not have caused any loss to Mr H.

196. Mr H considers that his annual benefits statements were incorrect as the pension eventually paid to him was significantly less than he was led to believe.

197. Mr H's 2017 benefits statement shows that the benefits quoted are based on his service to Normal Retirement Date (at age 65) and that they are "Estimated Retirement Benefits at Age 65".

198. Moreover, under the heading 'Further Information', it says:

> "THIS STATEMENT is designed to give an INDICATION of your prospective benefits from the Fund…"

199. Rule 18.1 (B) states that "the Deferred Member may, with the consent of the Trustees, elect to retire under the DB Section before his Normal Retirement Date." Further, Rule 18.1 (A) states that retirement can be before age 55 if, in the opinion of the Trustees, the member satisfies the ill-health condition.

200. Rule 18.1 (C) states that "The pension payable in respect of Pre-2018 Pensionable Service will be equal to the deferred pension to which the Employed Member became entitled on leaving service…reduced by such amount as the Trustees determine and

the Actuarial Adviser certifies as reasonable having regard to the period (if any) between the start of the pension and the Deferred Member's 60th birthday…"

201. By the time Mr H claimed his IHRP he was a Deferred Member, having left the Scheme when he was made redundant. His pension was based only on his service accrued to the date he left the Scheme and was reduced by an early retirement factor.

202. At the time he took early retirement, Mr H was aged 47. The benefit he is receiving is therefore potentially payable for 18 years until he reaches NRA, with annual increases and attaching benefits for his dependants.

203. Mr H is also unhappy with what he sees as a poor return on the amount he invested in AVCs. He says that he would not have paid as much as he did, had he known the outcome.

204. Again, the benefit he is receiving is significantly reduced by the fact he is taking it 18 years before his NRA. As for the amount he invested, that was his choice. He has presented no evidence to show that the Employer or the Trustees cajoled or persuaded him in any way to make the contributions he did. It is unfortunate that his circumstances turned out the way they did so that his pension benefits are being paid from a much earlier age than he had anticipated, but that is not the fault of the Employer or the Trustees.

205. In further support of his case, Mr H has compared the benefits he is receiving with the CETV he was quoted. He is unhappy that the CETV was not quoted to him sooner, but there was no requirement on the Trustees to automatically provide details of the CETV. This was only obligatory on request by Mr H.

206. He also believes that the CETV is a far more attractive proposition than the benefits he is receiving. But it appears Mr H may be confusing the 'value' of the various quotations he has received. The CETV is an equivalent value of the annual pension figures and contingent benefits. It is a large number and may well seem attractive, but ultimately the 'value' is broadly the same as the benefits he is receiving.

207. I accept that Mr H could have taken the CETV and transferred his fund to another provider. It is possible, though by no means certain, that he could then have taken advantage of 'pension freedoms' to in due course select a tax-free cash sum and possibly income drawdown. But whether that would represent a better option for him is debatable. As he says, the two financial advisers he consulted had totally different views on this. This reflects the tension between a secure pension guaranteed to be payable for life and a more speculative income that is wholly dependent on future investment returns.

208. Ultimately it was for Mr H to decide, and he took the secure pension option. It is not for me to consider whether that was the correct decision, and only time will tell. But there is no evidence to suggest that Mr H was coerced in any way to making the decision he did by either the Employer or the Trustees.

209. Finally, I have considered whether the Employer discharged its implied duty of good faith in its dealings with Mr H.

210. I believe that there is no argument that Mr H received the Information Pack and enclosures. In summary, my view is:-

- Mr H was provided with adequate information about the ill-health provisions of the DB Section and the changes under the incoming DC Section.
- Applying *Eyett*, in these circumstances the employer's implied duty of trust and confidence did not extend to a positive duty to advise Mr H.
- The evidence does not suggest Mr H's ill-health made him unable to read or understand the information provided and I do not consider it supports a view that he was in this sense vulnerable or that there was any increased duty on the employer.
- I do not find there was any material factual misstatement and therefore there can be no negligent misstatement.
- And even if a *Scally* type duty had been breached or there had been a negligent misstatement, there was no loss as the available evidence indicates that Mr H would not have qualified for ill-health retirement even if he had applied before 1 January 2018.

211. When the DB Scheme closed to future accrual, Mr H became a deferred member and continued to build up benefits in the DC Scheme. At this point, Mr H was on sick leave but the available evidence from the Occupational Health report in October 2017 suggests that he would not have met the ill-health criteria (it appears the block to returning to work was resolving issues with management and that he was fit to have meetings about this). It appears that Mr H intended to return to work both at the time of closure of the DB Scheme, and throughout the redundancy process and contested tribunal case. His case was that he should have been considered for other positions and therefore believed he was fit to work. The OH report in May 2018 also says that he was fit to return if an appropriate position could be found. This is after the event, but it still supports the view that he was not likely to meet the ill-health criteria in December of 2017.

212. So, even if the Employer had a duty to provide Mr H with more detail about the changes to the scheme or about the GIPP (which I do not agree with), it could have made no difference. Mr H would have had to apply for ill-health retirement before the DB Section closed to future accrual. The evidence indicates that he would not have qualified. On the contrary until his redundancy and through his Tribunal claim, he was arguing that he was fit to work.

213. Therefore, even if there was a *Scally* duty and it was breached and/or there was a negligent misstatement about the GIPP on which Mr H reasonably relied, there is no loss and no injustice.

214. In light of that I do not need to address questions of whether there was breach of any duty in negligence, whether Mr H relied on the statement, or whether any such reliance was reasonable in the circumstances.

215. Mr H has clearly gone through a difficult time and had some decisions to make which he perhaps now reflects on and wishes he had done something different. But that is not the responsibility of the Employer or the Trustees. I consider that both respondents gave Mr H every opportunity to evaluate his options before making his decisions. In some instances, he changed his mind and missed deadlines as a result, but again I find that is not through any fault of the Employer or the Trustees.

216. I have considered the Adjudicator's view that Mr H should be offered a pension backdated to 2 May 2019. I agree with the Trustees' submission that Mr H ultimately retired in May 2021 as a result of a separate, later application for IHER. Therefore, it would be inappropriate to backdate the pension to May 2019 (which relates to an application that Mr H decided not to pursue). In any event, I accept that the pension and lump sum payable from the earlier date would be of a lesser amount. While backdating would result in Mr H receiving an immediate payment of arrears of pension, he would have to repay part of the tax free cash sum he received. Even if Mr H were benefited by this approach in the short-term, I find that it would have financial consequences for him in the longer term, so that overall it would more likely than not cause him a loss. Consequently, for these reasons, I am not prepared to make such a direction.

217. I do not uphold Mr H's complaint.

Dominic Harris

Pensions Ombudsman
6 January 2025