

Ombudsman's Determination

Applicant	Mr D
Scheme	Sun Microsystems Limited Retirement and Death Benefits Scheme (the Scheme)
Respondent	Oracle Corporation UK Limited (Oracle)

Complaint Summary

1. Mr D has complained that Oracle (incorporating Sun Microsystems Limited (**Sun**)), his former employer, significantly underpaid his pension contributions into the Scheme:
 - whilst he was receiving benefits from the company's Permanent Health Insurance Scheme (**PHI Scheme**) from December 2001 until 23 May 2013, his Normal Retirement Date (**NRD**) in the Scheme; and
 - for the period from his NRD until 9 July 2014, whilst he remained its employee, which included a three month notice period commencing 9 April 2014, the date his employment with Oracle was terminated in accordance with the Settlement Agreement.
2. Benefits arising from the PHI Scheme which do not relate to the Scheme are outside of my jurisdiction, therefore, I can only consider the contributions payable to the Scheme and not any other benefits from the PHI Scheme.

Summary of the Ombudsman's Determination and reasons

3. Mr D's complaint should be upheld and further action is required from Oracle to put matters right.
4. My reasons for reaching this decision are explained in more detail below.

Detailed Determination

Material facts

5. Mr D joined Oracle in January 2000. He went on long term sick leave in June 2001, at the age of 48, and did not return to work again. When, after 26 weeks, contractual sick pay was exhausted, Mr D received benefits from the PHI Scheme, in accordance with its terms and conditions, until he attained age 60 in May 2013.
6. Mr D's salary, as at the date of his PHI claim, was £90,000 p.a.
7. The relevant sections taken from the PHI Guidelines and the rules of the Scheme are set out in Appendices I and II below.
8. The PHI Scheme is designed to replace a percentage of an employee's loss of earnings and, in some cases, the pension scheme and National Insurance (NI) contributions whilst the employee is unable to work due to illness. These benefits are paid to the employer who then pays the employee.
9. On 13 February 2002, Canada Life, the provider of the PHI Scheme, wrote to SBJ Benefit Consultants (**SBJ**), Oracle's advisers in relation to Mr D's PHI benefit, saying:

Basic benefit (Using basic salary of £85,000 plus car allowance of £9,609.60)

$(£94,609.60 \times 75\%) - £3,627.00 = £67,330.20$

Pension contributions

$£85,000 \times 12.00\% = £10,200.00$

NI Contributions

$(£67,330.20 - £4,524.00) \times 11.9\% = £ 7,473.94$

Total benefit = £85,004.14 p.a.

However, this benefit is subject to the free cover level limit of £80,000 which applied at the date of this claimant's date of disability. The monthly benefit is therefore restricted to £6,666.67."

10. On 18 February 2002, SBJ wrote to Sun quoting the information given by Canada Life concerning Mr D's benefits and stating that his salary at the date of the PHI claim was £90,000 and not £85,000. SBJ added:

"If you wish, Sun may choose to pay the additional benefit in respect of this member. If you do not pay the additional benefit, you will need to decide how to split the benefit which you will be receiving from Canada Life in respect of basic benefit payable to the member, pension contributions and employer NI contributions (obviously this would depend on the split between basic benefit and pension contributions)."

11. The Scheme was closed on 31 March 2011. After this date, all Sun employees paid contributions into the Oracle Pension Scheme. From 1 April 2011, the employer contributions were limited to a maximum of 6% of basic salary provided the employees paid 6% of salary. Its letter of 30 March 2011 to Mr N states, under the heading "Pension", that:

- his participation in the Scheme would cease as at 31 March 2011; and
- from 1 April 2011, he would be entitled to join its Group Flexible Retirement Plan (**GFRP**), administered by Standard Life;
- a contribution of 12% would be paid directly into the scheme by them; and
- if he wished to join, he should notify them in writing.

12. Mr D signed a letter in April 2011 confirming that he understood the above changes made to the pension arrangements. He annotated on this letter:

"Just to confirm our conversation that I wish to be enrolled in GFRP."

13. Oracle made Mr D redundant and sent him a Settlement Agreement for completion and return. In particular, the Settlement Agreement showed that:

- his employment with Oracle terminated on 9 April 2014;
- he would be paid any entitlement to salary and benefits (if applicable) up to and including 9 April 2014 and also £23,858 in lieu of salary and benefits for the period equivalent to his notice period; and
- he would be paid for accrued holiday entitlement, calculated from 1 January 2014 to 9 April 2014 not yet taken, and also for the period equivalent to his entitlement to notice.

14. Under the heading "Pension", the Settlement Agreement said that:

"All employee pension contributions in respect of the Employee's pension arrangements will cease on the Termination Date. However, a pension payment, based on the Company's current contribution level, will be calculated for the period equivalent to the Employee's notice and paid as a lump sum into the Employee's pension."

15. Prior to being made redundant, Mr D had been in regular contact with Oracle for about a year attempting to settle a dispute over possible shortfalls in his PHI benefit payments, including pension contributions. In particular, Mr D sent Oracle, on 3 April 2014, details of his accountant's calculations showing a shortfall in the region of around £82,000 in pension contributions.

16. On 29 April 2014, Mr D asked Oracle for additional time to sign the Settlement Agreement because he wanted the issue of the possible payment shortfalls resolved first.

17. In its letter dated 30 April 2014, Oracle replied that it had paid Mr D the statutory components of his redundancy payment and would pay a “discretionary enhanced severance” only if he returned the signed Settlement Agreement within 14 days. It also responded to Mr D’s concerns that there had been a shortfall in his PHI benefit payments and pension contributions as follows:
 - a) PHI benefit was not 100% of his basic salary but 75% of the total of his basic salary and his annual car allowance prior to incapacity less a single person’s state incapacity benefit;
 - b) any London weighting and car parking allowances are excluded from the calculation;
 - c) he received a 5% increase each year to his PHI benefit until December 2009 in accordance with the terms and conditions of the PHI policy;
 - d) having calculated incorrectly his monthly PHI benefit in February 2010, it continued to overpay this benefit to him by mistake until May 2013;
 - e) it did not therefore increase his PHI benefit by 5% in 2010, 2011 or 2012 because he was receiving around £2,500 each month more than his correct entitlement;
 - f) it should have informed him what had happened and asked him to make appropriate repayments as soon as the error was identified – and if it done so, the PHI benefit would have been increased by 5% in 2010, 2011 and 2012;
 - g) as a consequence of the overpayment of his PHI benefit, employer pension contributions have also been overpaid into the Scheme ;
 - h) it mistakenly continued to pay his car allowance when his PHI benefits commenced; and
 - i) it would not ask him to repay the overpaid PHI benefit, car allowance or employer contributions, in order to try settling his complaint amicably.
18. On 2 May 2014, Mr D asked Oracle to send him details of its calculations of his PHI benefit and pension contributions. Oracle refused and said that its final position was as detailed in its letter of 30 April 2014.
19. On 5 May 2014, Mr D informed his solicitor that although he disagreed with what Oracle said in its letter, he would accept its enhanced severance payment offer and make a separate claim for the underpaid pension contributions later.
20. Mr D signed the Settlement Agreement after inserting a handwritten clause 13.6, with his solicitor’s assistance, which stated:

“The company waives any claim it may have against the employee for any overpayment of PHI benefits, salary, car allowance or employer contributions or London weighting and car parking...”

21. The Settlement Agreement also included a clause which said that Mr D was not precluded from making a claim in respect of his accrued pension rights under the Scheme by accepting the terms set out in it.
22. On 13 May 2014, Oracle notified Mr D that it accepted the amendment made to the Settlement Agreement and would pay the discretionary enhanced severance to him.
23. According to personal benefit statements and Oracle's records for Mr D, the following contributions were paid into the Scheme:

Statement of Benefits

<u>Contribution Period</u>	<u>Annual Employee Contributions</u>	<u>Annual Employer Contributions</u>
01/01/02 to 31/12/02	£3,433.30	£6,866.70
01/01/03 to 31/12/03	no statement available	
01/01/04 to 31/12/04	£7,200	£3,600
01/01/05 to 31/12/05	£5,400	£2,700
01/01/06 to 31/12/06	£10,800 (default contribution)	
01/01/07 to 31/12/07*	£10,800 (default contribution)	
01/01/08 to 31/12/08*	£13,190.80 (default contribution)	
01/01/09 to 31/12/09*	£14,393.55 (default contribution)	
01/01/10 to 31/12/10*	£14,352.36 (default contribution)	

*Mr D says that he did not receive the 2007, 2008, 2009 and 2010 annual benefit statements.

Oracle's Records

<u>Contribution Period</u>	<u>Total Contributions</u>
01/04/06 to 31/03/07	£ nil
01/04/07 to 31/03/08	£3,178.16
01/04/08 to 31/03/09	£15,007.03
01/04/09 to 31/03/10	£14,352.36
01/04/10 to 31/03/11	£14,352.36
01/04/11 to 31/03/12	£9,900
01/04/12 to 31/03/13	£10,800

24. Oracle accepts that the actual contribution figures shown on Mr D's statement of benefits are correct and considers that they are consistent with those shown on its records. When comparing them, it says that account has to be taken that Aon's figures are quoted on a calendar year basis whilst Oracle's are quoted on a tax year basis. Furthermore, as Mr D's contribution figures, provided prior to Oracle taking on the payroll, are not corroborated by firm evidence, Aon's statements provide the best information available for these.
25. According to the PHI Guidelines for the period that Mr D received his PHI benefits whilst an Oracle employee:
- a) he could continue to pay contributions into the Scheme based on his lower PHI salary;
 - b) Oracle's contributions to the Scheme would be paid on the higher salary together with a contribution to cover the difference between Mr D's own contributions at the lower PHI salary and what his contribution would have been on the higher salary; and
 - c) full pension contributions are maintained for as long as Mr D's employment contract remained.
26. According to the Scheme Trust Deed and Rules, the following contribution rates became effective from 1 October 1998:

Member's Age	Member's Contribution	Employer's Contribution	Total Contribution
Under 40	3% of Scheme Salary	7% of Scheme Salary	10% of Scheme Salary
40 to 49	4% of Scheme Salary	8% of Scheme Salary	12% of Scheme Salary
50 or over	5% of Scheme Salary	9% of Scheme Salary	14% of Scheme Salary

27. According to Canada Life's records, the following PHI benefit payments were paid to Oracle for Mr D:

Payment Period	Monthly Payment Amount
10/12/01 to 9/12/02	£6,666.67
10/12/02 to 9/12/03	£7,000.00
10/12/03 to 9/12/04	£7,350.00

10/12/04 to 9/12/05	£7,717.50
10/12/05 to 9/12/06	£8,103.38
10/12/06 to 9/12/07	£8,508.55
10/12/07 to 9/12/08	£8,933.08
10/12/08 to 9/12/09	£9,380.68
10/12/09 to 9/10/10	£9,849.71
10/12/10 to 9/12/11	£10,342.20
09/12/11 to termination date	£10,859.31

28. Oracle says that Mr D has not disputed that it had overpaid his PHI benefits by around £138,000 and it was Oracle's understanding that if it did not recover the overpayment from him, Mr D would not make a further claim for underpaid pension contributions.
29. Mr D was unable to resolve the issue of possible underpaid pension contributions with Oracle and referred the matter to us.

Summary of Mr D's position

30. Following the decision in *Ralph v Arjo Wiggins Ltd* (the Pensions Ombudsman intervening) [2009] All ER (D) 65 (Dec), "in the case of maladministration (i.e. where no legal rights have been infringed) there is no applicable limitation period". He asserts that his complaint is wholly about maladministration which resulted in the underpayment of pension contributions and on this basis Oracle has no case for the Limitation Act to apply.
31. Alternatively, he submits that there was negligence as well as a breach of contract on Oracle's part. In such a claim for negligence, a three year limitation period applies after the claimant becomes aware of the negligence. In his case he only became aware of the mistake when he received Oracle's letter of 14 October 2014. This was a response to an e-mail which he sent on 27 February 2014 in which he said: "I am in a bit of a muddle here as I am not sure where I stand or what happens going forward and I am trying to sort out various pension payments". He had previously assumed that the correct payments were being made and he had no particular reason to check.
32. The £10,200 contribution paid into his pension in 2002 was 12% of his salary of £85,000 p.a. He cannot accept Oracle's position that it was not its intention to pay full contributions. His view is reinforced by Oracle's letter of 1 April 2011 which states that a contribution of 12% would be paid directly into the pension scheme on his behalf by it.

33. He agreed to join the GFRP, but Oracle are “cherry picking” the terms, from its letter of 30 March 2011, which suits Oracle. It has disregarded the fact that on page one of that letter, under the heading “Group Income Protection Claim - Canada Life”, it states: “The benefit from the above policy will continue, subject to regular assessment and approval by the insurer.”
34. His contributions were taken directly from source. He has made no changes to how his contributions should be collected. In its letter dated 1 April 2011, Oracle state that it will contribute at 12% of his salary on his behalf. If it failed to collect these contributions at source, he cannot be held responsible for Oracle’s shortcomings.
35. There is no evidence that a payment of £11,402.28 was made on 9 December 2012. If such a payment was made, he requires Oracle to supply corroborating evidence.
36. The contribution figures shown on the 2006, 2007, 2008, 2009 and 2010 statements from Aon, the current administrator of the Scheme, are not corroborated by Oracle’s payroll records “which relate to actual cash paid” and cannot therefore be relied upon.
37. In particular, Oracle’s payroll records clearly show that no pension contributions were paid for him between 1 April 2006 and 31 March 2007. Aon has not provided any concrete evidence to prove that it received total pension contributions of £10,800 during this period.
38. Payroll records demonstrate what was actually paid to an employee and are acceptable in a Court of Law as evidence. Benefit statements including the following proviso, however, are inadmissible:

“This statement is provided for illustration purposes only and it is not a statement of entitlement. Whilst every effort has been made to ensure the accuracy of the statement, it is not binding on the trustees if an error or omission is subsequently discovered.”

This proviso covers all the information shown on the benefit statements including the contributions paid into the Scheme and not just the fund values.

39. The annual performance of his personal pension plan (net of fees) into which the benefits available to him from the Scheme have been transferred are, from 2014 onwards:

2014: 6.56%, 2015: 3.54%, 2016: 12.95% and 2017: 7.59% (year to date)

The annualised rate of return is 8.96%.

40. He remained an employee of Oracle from April 2013 until July 2014 and should have received salary, expenses and pension contributions during this period. Oracle only paid his expenses. According to the terms of the Settlement Agreement, he is also entitled to pension contributions for this period and Oracle has not explained why it did not pay these. It was Oracle who prevented him from working during this period

by insisting that he had to be “assessed by Occupational Health before returning to work.”

Summary of Oracle’s position

41. The statements more recently received from Aon show that Mr D did receive contributions into his policy every year and explains why Mr D did not complain about not receiving any contributions. This does not support its understanding that no contributions were paid in 2007, as previously argued. Consequently it no longer raises this aspect of its response to the Opinion.
42. The Limitation Act applies in respect of Mr D’s complaint and the relevant limitation period for Mr D to bring a claim is six years from the date of the alleged underpayments or three years from the date that Mr D knew, or ought to have known, of the fact of the underpayments.
43. Oracle does not consider that Mr D has a valid argument to claim that he was unaware of the alleged underpayments at any time after 2007. No payments were made to Mr D in respect of his pension in 2007 (according to its records) and it is clear that he ought to have known at that date that his pension contributions were not being paid in the manner that he now claims they ought to have been. As such, the secondary limitation period does not assist Mr D and he is only entitled to recover overpayments which date back no more than six years from the date of his claim.
44. It accepts (broadly in line with the position for overpayments following the decision in *Webber v Department for Education* [2016] EWHC 2519 (Ch)) that the relevant recovery period ought to be six years from the date Mr D submitted his complaint to the Ombudsman, being 20 October 2014, and therefore Mr D can only claim for underpayments after 20 October 2008.
45. Mr D has no legal right to any benefits above those set out in the PHI Guidelines which state that the benefits are subject “to any conditions, exclusions or limitations which the insurer may impose”. The payments were restricted by Canada Life to £80,000. Any payments above these amounts were discretionary and there is no evidence that it wrote to Mr D to give him a right to any additional benefits.
46. Mr D did not pay pension contributions based on his PHI salary as set out in the PHI Guidelines, so he should not receive credit for these contributions. Its contributions should be limited to the amount quoted in the PHI Guidelines i.e. employer contributions on the higher salary and employee contributions based on the difference between Mr D’s salary and lower PHI salary. This is supported by clause 16.3 of the Scheme Rules which states that if a member is receiving PHI benefits then he may not suspend his contributions. There was consequently a clear intention that it would not pay these contributions and it would be contrary to the Scheme Rules if it did pay them on behalf of Mr D now. If he agrees to pay his contributions these could be added to his pension fund.

47. In its view, the letter dated 18 February 2002 does not show that it had intended to follow PHI Guidelines by paying full employee and employer contributions for Mr D into the Scheme from the PHI benefits. The letter states: "If you wish, Sun may choose to pay the additional benefit". This shows that no decision has been made. The letter also confirms that to pay restricted benefits it would need to agree the split. It therefore strongly suggests that this option had not been rejected. The calculation on the second page merely shows the benefits payable if it decided to pay the full benefits.
48. The fact that the payments over the years were so varied suggests that it did not have a clear policy on the amount that should be paid. Therefore, if the amounts payable are recalculated, this should be done in accordance with the PHI Guidelines which allows it to restrict the payments.
49. There was a further increase in the monthly payment on 9 December 2012 to £11,402.48.
50. When Mr D's PHI benefits ceased on his 60th birthday, it asked him whether or not he was fit to return to work. As Mr D did not return to work for medical reasons, there was no obligation on it to continue paying his salary and pension contributions during his continued absence.
51. In order to perform the redress calculation for Mr D, it proposes to use the relevant investment returns from (a) the Scheme up to 2010 as shown on Mr D's annual benefit statements (b) Standard Life's default fund for the GFRP in 2011, 2012 and 2013 and (c) from 2014 onwards the returns available from his investments in his personal pension plan into which his benefits in the Scheme were transferred.
52. The benefit statements clearly show that contributions totalling £10,800 were paid into the Scheme for Mr D during both 2006 and 2007. The fact that these payments have not been recorded by its payroll team does not mean that they were not paid. It had to rely on records which it inherited from Sun. Furthermore as Mr D's PHI benefits were not a simple percentage of salary, it was not surprising that some payments have not been recorded properly in its records.
53. It therefore considers that the benefit statements provide a more reliable record of the actual contributions paid and the figures shown on them should be used in its redress calculation.

Conclusions

54. The Limitation Act 1980 (Limitation Act) issue.

Mr D has said his complaint is one of maladministration and so there should be no limitation period. However, Mr D's complaint in substance is one of a breach of contract. That breach being that Oracle did not pay the contributions it was obliged to by virtue of Mr D's employment. Those breaches occurred from 2002 – 2013 and in the event that the Limitation Act is applicable the relevant time limit for seeking

recovery of the underpayment is six years from the date of the incorrect payments, that being the date when the cause of action accrues (applying section 5 of the Limitation Act). There is, however, provision for the six year period to be extended where the underpayment is the consequence of a mistake. Under section 32(1) (c) of the Limitation Act, the time would not start to run until the mistake was discovered or could "with reasonable diligence" have been discovered. Therefore, in Mr D's case time did not start to run until he could, with reasonable diligence, have discovered that Oracle had been making underpayments in respect of his pension contributions.

55. Mr D has submitted that he was not aware of the underpayments until October 2014 when he received a letter from Oracle, which followed correspondence he had sent to Oracle in which he said, "I am in a bit of a muddle as I am not sure where I stand or what happens going forward and I am trying to sort out various pension payments". It would appear that prior to this letter (from around 2013 to 2014), Mr D and Oracle had been in negotiations concerning Mr D being made redundant and entering into a settlement agreement to terminate his employment. The evidence points to it being these events which led Mr D and Oracle to review his entitlements. Mr D sought advice and by 3 April 2014 had sent Oracle his accountant's calculations showing a shortfall in pension's contributions amounting to £82,000 which he queried with Oracle. Despite a settlement agreement being entered into, the unpaid contributions were specifically excluded from this and discussions surrounding these were ongoing.
56. Reasonable diligence does not require exceptional or excessive measures to be taken, and on the evidence provided, I do not consider that Mr D could have easily identified that Oracle was not paying the correct level of pension contributions for him prior to 2014. In my opinion it was rational for Mr D to hold a reasonable belief that Oracle was making the relevant contributions on his behalf, as indeed it was contractually obliged to do, especially given that Mr D was absent from work on sick leave and in receipt of PHI.
57. Since raising the issue of the Limitation Act Oracle was asked to provide further submissions as to why it believes that Mr D should have been aware of the underpayments in 2007, as it contends. Oracle has said that as no pension contribution was paid at all for Mr D between 1 April 2006 and 31 March 2007 (based on its records), it would have been reasonable for Mr D to have made a complaint if he did not receive any payment. However, this was not being paid directly to Mr D, and for the reasons already set out in paragraphs 55 and 56 above, I do not take the view that with reasonable diligence Mr D could have discovered the underpayments before 2014.
58. It follows that for the purposes of the Limitation Act, time did not start running from the date that the underpayments first occurred in 2002 or when each underpayment occurred after that, but instead from 2014, when Mr D could, with reasonable diligence, have discovered the underpayments, and in fact did (applying section 32 of the Limitation Act). Therefore, Mr D has six years from 2014 in which to make his claim for recovery of all of the underpayments of pension contributions.

59. Having considered Oracle's submissions in relation to the Limitation Act I am not satisfied that Mr D's complaint is statute barred because, regardless of the applicable cut-off date, which Oracle has argued should be the date of Mr D's complaint to the Pensions Ombudsman, Mr D has until 2020 to recover the underpayments so is well within the relevant limitation period.
60. In the event that Mr D also has a claim in negligence, broadly the time limits in that respect are six years from the negligent act or (if later) within three years of the date of knowledge (section 14A of the Limitation Act). For the same reasons that I have already set out above, in relation to reasonable diligence, it is my view that Mr D could not have obtained relevant knowledge of the underpayments until 2014. So in the event he also has a claim in negligence, this too is not barred by virtue of the Limitation Act. It is also worth noting that should Mr D have a claim in both contract and negligence and one is statute barred, it does not mean that a claim founded in the other cannot still succeed.
61. The available evidence shows that Oracle had intended to follow the PHI Guidelines by paying full employee and employer pension contributions into the Scheme from the PHI benefits received from Canada Life.
62. I note Mr D's view that in accordance with the Settlement Agreement his pension contributions should have ceased on 9 July 2014 to include the three months' notice period. But the Settlement Agreement also stipulates that Oracle would only pay salary and benefits up to and including the termination date if Mr D was entitled to them. I accept Oracle's view that since Mr D did not return to work when his PHI benefits ceased on his 60th birthday, in May 2013, it was under no obligation to continue paying his salary. Since Mr D's pension contributions are expressed as a percentage of his salary, it is my view that no such contributions are payable during the period from 23 May 2013 until 9 July 2014.
63. Mr D has calculated that Oracle underpaid his pension contributions up to 23 May 2013 by around £78,000 and the calculation for this is shown in Appendix IV.
64. Failure by Oracle to pay the correct pension contributions into the Scheme is clearly maladministration on its part.
65. Although I have some sympathy with Oracle's stance on this matter, by countersigning Mr D's Compromise Agreement which included a handwritten clause 13.6, which, in addition to a provision accepting that Mr D was not precluded from bringing a claim in respect of his accrued pension rights, Oracle waived its right to any claim it might have had to offset the underpaid pension contributions against the amount of overpaid PHI benefits.
66. Oracle say that the Scheme was closed on 31 March 2011, and Mr D was offered membership of the GFRP from 1 April 2011, which he accepted. The employer's contribution rate under the GFRP was limited to a maximum of 6% of basic salary provided the employee pays 6%. I would agree that as the Scheme was closed on 31

March 2011, the contributions to the Scheme could not continue. As Mr D had agreed to join the GFRP, the contribution rate for him from 1 April 2011 onwards should be 12% and not 14%.

67. On the basis that the contribution rate of 12 % commenced on 1 April 2011, the shortfall in contributions up to his 60th birthday, based on Mr D's calculations in Appendix IV, is around £72,500.
68. In my view, the fact that Mr D did not pay pension contributions on his PHI salary is irrelevant. Oracle was paid the PHI benefits for Mr D by Canada Life, and therefore it had a duty to pay both employer and employee pension contributions to the Scheme, and subsequently the GFRP, at the correct level unless there was a reason it was unable to do so. If Oracle was unable to do this, because of the restriction in Mr D's PHI benefits, it should have explained this to Mr D.
69. I would agree with Oracle that Mr D's benefits are subject to the £80,000 restriction imposed by Canada Life and therefore any payments made above that limit is at its discretion. As SBJ states in its letter of 18 February 2002, it was up to Oracle to decide how to split Mr D's PHI benefit between the basic benefit and the pension contributions. If he was paid the full basic benefit (i.e. 75% of salary less the state benefit) then there would an insufficient amount left to meet Mr D's full pension contributions and vice versa. However, if Oracle did not intend to pay Mr D's full pension contributions it should have explained this to him at that time, but it did not.
70. As it was clear that the PHI benefits would not be sufficient to cover both Mr D's full basic benefit and pension contributions, Oracle had to decide whether it was prepared to make up the shortfall, that is the difference between the full benefits due to Mr D and the restricted benefit. Oracle says that it did not have a clear policy on the amount to be paid. I find that the absence of a clear policy is unhelpful and given its failure to advise Mr D of any such restriction or intention to exercise its discretion in this way, it is liable for the full pension contributions.
71. Mr D disagrees with Oracle's view that the figures shown on his annual benefit statements for his total pension contributions paid into the Scheme and GFRP, are more reliable than those shown in its own payroll records for use in the redress calculation. Given the significant discrepancies between some of the figures shown on its own records and those displayed on the benefit statements for Mr D's pension contributions into the Scheme over the years, I would recommend that Oracle carry out a thorough reconciliation of the contributions paid with the assistance of Aon and Standard Life, before performing the redress calculation.
72. Oracle's failure to pay the full pension contributions for Mr D into the Scheme and the GFRP, is a breach of its contract with Mr D. He has suffered an injustice as his pension fund is lower than it would have been had the full contributions been paid at the appropriate time.
73. Therefore, I uphold Mr D's complaint against Oracle.

Directions

74. I direct that within 90 days of the date of this Determination Oracle shall:

- a) calculate the full employee and employer contribution payments for the Scheme and also the GFRP, during the period Mr D was in receipt of PHI benefits up to his 60th birthday;
- b) compare these contribution payments which what was actually paid into the Scheme and GFRP;
- c) using the investment returns from (a) the Scheme up to 2010 as shown on Mr D's annual benefit statements (b) Standard Life's default fund for the GFRP in 2011, 2012 and 2013 and (c) his selected investments in his personal pension plan into which the benefits available to him from the Scheme and GFRP were transferred from 2014 onwards, calculate the investment return available on the underpaid pension contributions assuming that they had been invested at the appropriate time;
- d) pay the underpaid contributions with investment return as calculated above into Mr D's personal pension plan; and
- e) pay Mr D £500 for the significant non-financial injustice he has suffered.

Anthony Arter

Pensions Ombudsman
23 October 2017

APPENDIX I

Set out below are relevant paragraphs from the PHI Guidelines as shown on the Sun HR Web:

“The PHI Scheme is provided to ensure that a good level of income continues to be available to Sun employees who develop long term health problems in excess of 26 weeks absence. The scheme may be amended by the Company from time to time and your eligibility is dependent on acceptance and continuation of cover for you by the appropriate insurer at rates acceptable by the Company and to any conditions, exclusions or limitations which such insurer may propose. A summary of the current rules of the scheme is as follows:

Payments are made provided that, in the opinion of the insurance company you are unable, due to illness or injury, to perform your normal occupation...Payment of PHI will start only after the medical insurers have accepted the claim, this may be backdated if appropriate.

PHI payments are made after 26 weeks of absence and at the rate of 75% of your scheme salary (scheme salary is annual basic salary...as at the date of commencement of your period of incapacity, less the Single Persons State Incapacity Benefit for which you are eligible). The benefit will increase annually at the rate of 5% pa throughout the period of incapacity. Payments are made subject to normal tax and NI deductions.

PHI payments under the scheme normally continue until recovery, age 60 or death. The insurance company may require evidence from time to time of your continued incapacity and you are required to co-operate with them in respect of requests for medical examinations etc.

Full pension contributions are maintained for as long as the employment contract remains.

Continued Employment Benefit Under PHI

For the period that you receive your PHI benefits under the scheme as currently available and remain as a Sun employee the following will apply:

You may continue to pay into the Sun pension scheme based on the lower salary.

The Company’s basic contributions to the Sun pension scheme will be paid on the higher salary together with a contribution to cover the difference between your own contributions at the lower salary and what your contribution would have been on the higher salary.”

APPENDIX II

Set out below is the relevant sections from the Scheme Trust Deed and Rules.

“16.3 With the consent of the Trustees, a Member to whom Rule 16.1 has been applied may, during the period of absence, suspend any contributions he was previously paying to the Scheme provided that he is not receiving from the Company’s PHI Scheme in which case he may not suspend his contributions. If a Member suspends his contributions the Company may suspend its contributions.

APPENDIX III

Relevant sections of The Limitation Act 1980

Section 2: Time limit for actions founded on tort

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Section 5: Time limit for actions founded on simple contract

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Section 14A: Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual

(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either— (a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above “the knowledge required for bringing an action for damages in respect of the relevant damage” means knowledge both— (a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are— (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and (b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that— (a) the cause of action has not yet accrued; or

(b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred; before the end of the period of limitation prescribed by this section.

Section 32 Postponement of limitation period in case of fraud, concealment or mistake

(1) Subject to [subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

APPENDIX IV

Mr D's calculations of the underpaid pension contributions are set out below:

	Payment actual paid	Amount Due	12% with 5% p.a. Increases	14% with 5% p.a. Increases
01/03/2002	10,300.00	10,800.00	10,800.00	12,600.00
01/03/2003	10,800.00	11,340.00	11,340.00	13,230.00
01/03/2004	10,800.00	13,891.50	11,907.00	13,891.50
01/03/2005	8,100.00	14,586.08	12,502.35	14,586.08
1/4/05 to 31/3/06	10,800.00	15,315.38	13,127.47	15,315.38
1/4/06 to 31/3/07	-	16,081.15	13,783.84	16,081.15
1/4/07 to 31/3/08	3,178.16	16,885.21	14,473.03	16,885.21
1/4/08 to 31/3/09	15,077.03	17,729.47	15,196.68	17,729.47
1/4/09 to 31/3/10	14,352.36	18,615.94	15,956.51	18,615.94
1/4/10 to 31/3/11	14,352.36	19,546.74	16,754.34	19,546.74
1/4/11 to 31/3/12	9,900.00	20,524.08	17,592.06	20,524.08
1/4/12 to 31/3/13	10,800.00	21,550.28	18,471.66	21,550.28
Total	118,459.91	196,865.83		

Amount underpaid £78,405.92

Additional underpayment between for the 8 months between January and August 2014 as per Severance Agreement £15,085.20

Total underpayment £93,491.12