

Pensions Action Group Newsletter

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Victory in the Court of Appeal!

On 7 February, the Court of Appeal threw out the appeal by the Government following our successful judicial review hearing last spring and even strengthened the original judge's findings. The court confirmed that the Government was wrong to reject the Parliamentary Ombudsman's original decision that Government leaflets had been misleading, and that this constituted maladministration.

In spite of this crushing verdict, the Government asked for permission to appeal to the House of Lords but the judges refused. There is still the possibility of a hearing in the Lords, but the Government would have to persuade the Law Lords themselves that they should pick up the case.

Our thanks and congratulations are due to our legal team (Dinah Rose, John Halford and Tom Hickman) who have put in an amazing performance and sustained it for month after month. Thanks also to the four intrepid claimants who were in court on behalf of all of us. It put

them under enormous strain, especially when, at one point, it looked as though they personally might be liable for all of the Government's costs if they had lost. Our own Ros Altmann was, of course, heavily involved in the case and gave endlessly of her time and expertise to ensure that we put forward the best possible arguments. And thanks to all those who turned out to sit in court through the whole length of the hearing, so that the judges were confronted by some of the people who had been so badly affected by the Government's errors.

This has been an important case in legal terms, as well as for all the people involved as it has helped to define the powers of the Ombudsman and limited the ability of the Government to reject her findings. This was a complex judgement which is available in full here: <http://tinyurl.com/yryf5a>

Our solicitors have provided more details of the judgement in the following press release.

“Irrational”: Unanimous Court of Appeal’s Verdict on Pension Ministers’ Defiance of Ombudsman Report

Three Court of Appeal judges became the latest to condemn the unprecedented stance taken by Work and Pensions Ministers to reject a Parliamentary Ombudsman report that found maladministration and injustice in the treatment of up to 125,000 occupational pension scheme members. They had believed government assurances that their pensions were safe, whatever happened to the sponsoring employer, which the Ombudsman concluded were “inaccurate and misleading”.

Giving the Court's lead judgement, Lord Justice Chadwick commented:

“in the circumstances of this case, it was irrational for the Secretary of State to reject the Ombudsman's finding”.

adding that maladministration identified by the Ombudsman had directly caused:

"a sense of outrage, distress, anxiety and uncertainty... the loss of opportunities to make informed choices or to take remedial action and the distortion of the reality facing scheme members."

Lord Justice Wall agreed, commenting:

"Nobody reading the papers in this case could have anything but the utmost sympathy for the plight of the complainants, all of whom, it seemed to me, were decent, hardworking people who, through no fault of their own, had been – or were at serious risk of being – deprived of that for which they had worked throughout their lives, namely a modestly comfortable retirement."

The solicitor representing the pensions campaigners that brought the test case, John Halford of Bindman and Partners, said:

"The Court of Appeal is the latest independent body to conclude that Pensions Ministers have been wilfully blind to the failings of their Department and the multiple injustices that thousands of working people have suffered as a direct result. Though recent improvements in the Financial Assistance Scheme will be of some help to them, justice still demands acceptance of responsibility, an apology and redress of the outrage and distress caused. Instead of offering those things, we understand the Minister is to Appeal to the House of Lords. The Ombudsman's 200 page report, condemnation by Parliament's Public Administration Select Committee, the High Court and now three appeal Judges is apparently insufficient to persuade Mr Purnell that he just might be wrong."

Dr Ros Altmann who has campaigned for justice alongside the scheme members said:

"It is now 6 - nil against the DWP. How many verdicts will it take to make the Government see sense? Its decision to appeal again merely reinforces the four Judge's verdicts that the Government's decisions in this matter are irrational. For the past few years, it has tried, unsuccessfully, to wear us down and even tried to bully the victims into submission, by threatening to bankrupt them if they lost the case. Enough is enough!"

On 14 March 2006 the Ombudsman ruled that the Department for Work and Pensions had acted maladministratively by failing to warn pension scheme members that they had no more than a 50% chance of recovering their pensions if the sponsoring company became insolvent or wound up its scheme before they had retired. The then Minister, John Hutton, responded the following day, rejecting the Ombudsman's findings and recommendations that pensions be restored.

But in the first judicial review test case of its kind, three of those who complained to the Ombudsman

– Henry Bradley, Andrew Parr and Rob Duncan – argued that the Minister's reasons for snubbing the Ombudsman were irrational and that he should have accepted maladministration had occurred before rejecting her recommendations that lost pensions should be restored, distress compensated for and apologies made. They also argued that the Minister had no power to act as judge in his own cause and that once the Ombudsman had ruled there was maladministration by his Department's officials, he was legally bound to accept that.

In February last year, Mr Justice Bean allowed the campaigners' judicial review and in a scathing judgement held that "no reasonable Secretary of State could rationally disagree" with the Ombudsman's conclusion that the Department's information about pension security had been "inaccurate and misleading". In response the Department made significant improvements to its Financial Assistance Scheme, but maintained that there was no maladministration, nor any injustice caused to the pension scheme members affected. In the Court of Appeal, where the case was heard in July, its legal team sought to portray the Ombudsman herself as "irrational" and "unfair".

The Minister's appeal was today rejected by the Court of Appeal, which upheld Mr Justice Bean's conclusions on the irrationality of rejecting the Ombudsman's key findings, and allowed the campaigners' appeal on the basis that it was wrong to conclude maladministration had not caused a "sense of outrage, distress, anxiety and uncertainty" along with the loss of opportunities to make informed choices or to take remedial action and "distortion of the reality facing scheme members".

The campaigners' legal team have been told that the Minister will seek permission to appeal the judgement to the House of Lords, arguing that he should be allowed to have a "bona fide difference of view" with the Ombudsman, rather than be obliged to give "cogent" and "rational" reasons for rejecting her findings which were conspicuously absent in this case in the Court of Appeal's view. If this further appeal is rejected, the Minister will be forced to consider the Ombudsman's outstanding recommendations: that pensions scheme members and trustees should receive an apology and that non-financial losses, such as distress, should be addressed with consolatory payments.

John Halford, Bindman and Partners

Q and A: What does this ruling mean?

What did the Court of Appeal rule?

The Parliamentary Ombudsman has an important role in ensuring ministerial accountability - if a Secretary of State does not accept a finding of maladministration, he is obliged to provide a full, reasoned and "cogent" explanation to Parliament.

It is not enough for a Secretary of State to have a different, bona fide view from that of the Parliamentary Ombudsman; there must be some respect for her office and the nature of her expert investigation. In the words of Lord Justice Chadwick (para 91):

"I am not persuaded that the Secretary of State was entitled to reject the Ombudsman's finding merely because he preferred another view which could not be characterised as irrational. As I have said, earlier in this judgment, it is not enough that the Secretary of State has reached his own view on rational grounds: it is necessary that his decision to reject the Ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies 1967 Act [which established the Ombudsman's office]: he must have a reason (other than simply a preference for his own view) for rejecting a finding which the Ombudsman has made after an investigation under the powers conferred by the Act."

Here (as Bean J had concluded below) it was not rational for the Secretary of State to reject the Parliamentary Ombudsman's findings that the government material about occupational pensions was misleading. For example, Lord Chadwick commented (at para 94):

"it is impossible to suggest that the reader of leaflet PEC 3 would not have been led to think that both pensioner members and members in service were to be provided with the same degree of protection: the protection would be provided in a manner which reflected the difference between rights to a pension in payment and future rights but the degree of protection would be the same in respect of each class of members."

However, Parliamentary Ombudsman findings are not 'binding' as the campaigners and the Ombudsman had argued, save in the Local Government Ombudsman context which is different because there is no Parliamentary accountability for Councils and the statutory intention was different.

It was not correct for Bean J to find that there was no causal link between the identified maladministration and many of the forms of injustice identified by the Ombudsman - outrage, lost opportunities to make informed choices or take remedial action, distress anxiety, uncertainty and distortion of reality. These were caused by the maladministration and it would be irrational for the Secretary of State to argue otherwise.

The Secretary of State was, however, entitled to conclude that the maladministration had not caused or significantly contributed to all losses, and that he had not acted maladministratively when setting the MFR level on Government Actuary Department advice.

Why is the Pensions Minister appealing to the House of Lords?

He refuses to accept that he should provide cogent reasons for rejecting the findings in any Ombudsman report, or that he was irrational to do so here, or that the maladministration identified by the Ombudsman actually caused injustice. The Court of Appeal will decide whether it will give him permission to appeal in the next few days. [The court has since refused permission - Ed.] The Minister can ask the House of Lords for permission directly if it is refused by the Court of Appeal. Their decision may take as long as six months from now.

Are the campaigners planning to appeal on the parts of the case they lost?

Not at present. An appeal to the House of Lords could take well over a year to be decided. It is more important now that the outstanding injustices identified by the Ombudsman and the Court of Appeal are addressed in the way the Ombudsman recommends. If the case does go to the House of Lords, the claimants will want to defend their position and argue that findings are binding as they have done in the High Court and Court of Appeal.

What are the likely effects of the judgement if permission to appeal to the House of Lords is refused?

The recently extended Financial Assistance Scheme may well meet some, possibly most, of the financial losses identified by the Ombudsman. However, she also concluded there were non financial losses than needed to be remedied.

Specifically, the Ombudsman recommended that

“the Government should consider whether it should provide for the payment of consolatory payments to those scheme members fully covered by my recommendations - as a tangible recognition of the outrage, distress, inconvenience and uncertainty that they have endured.” She also recommended that *“the Government should consider whether it should apologise to scheme trustees for the effects on them of the maladministration I have identified, particularly for the distress that they have suffered due to the events relevant to this investigation”*.

Most likely, the DWP will need to agree to consider individual cases where additional injustice can be shown, or make a further general extension to the Financial Assistance Scheme to address the additional injustice at a general level.

Troublingly, if other Ministers reject Ombudsman findings in future, those who complained to her may well need to use the Courts to establish that those rejections are irrational. This will be impossible for most, given the costs of legal action. The Ombudsman was intended to be an alternative route to justice to the Courts, not a stepping stone.

John Halford, Bindman and Partners

A critique of the Government’s response

By Ros Altmann

The Government has come up with its own version of today’s ruling. It fails to mention that the Government’s appeal against the Judicial Review ruling in the High Court last year was dismissed. It has tried to put a positive spin on this, but it is a bad defeat.

Comment on the DWP press release following its Court of Appeal defeat:

“We are pleased that the Court found in the Government’s favour on the key point relating to the Ombudsman’s powers.”

This was not the ‘key point’ at all! It was one of many technical legal issues, and a major point of legal principle, but the main point in this case was whether or not there was maladministration causing injustice to the victims of occupational scheme wind-ups. On that the Secretary of State lost spectacularly, just as he did in the High Court.

“We applied to the Court for leave to appeal on a protective basis but we will want to consider this

complex and lengthy judgment in more detail with our colleagues in Government before deciding whether to pursue an appeal.”

That is not what his submissions to the Court say - they claim the Court of Appeal and High Court were wrong to hold the Secretary of State to be irrational, and the first point of their submission is that the Secretary of State should not even need to give Parliament cogent reasons for ‘disagreeing’ with the Ombudsman.

“We have already announced a significant settlement which will help some 140,000 people who lost their pensions, bringing the Government’s total commitment to the Financial Assistance Scheme to £2.9 bn in net present value terms. This has been welcomed by campaigners and Parliament.”

Yes, indeed the December extension of the FAS is welcome. However, the FAS is not designed to compensate for the maladministration nor to provide redress for the non-financial consequences of maladministration, which included *“a sense of outrage, distress, anxiety and uncertainty”* along with the loss of opportunities to make informed choices or to take remedial action and *“distortion of the reality facing scheme members.”* What would be appropriate, given this ruling is that the Minister should apologise for the suffering caused, rather than his brass-necked refusal to admit his Department did anything wrong at all to anyone!

“As the Court of Appeal has indicated, it is now for us to apply to the House of Lords should we decide - on considering the judgment further - that we wish to do so.”

“Our initial view is that the judgment :

** Quashed DWP rejection of the Ombudsman’s finding of maladministration in respect of official information issued on the security of occupational pensions.”*

Indeed the three Appeal judges confirmed that that was an irrational decision which no reasonable minister could take.

** “Upheld the DWP decision to reject the Ombudsman’s finding of maladministration in respect of the decision to change the Minimum Funding Requirement in 2002.”*

This was not the claimants or the Ombudsman’s primary concern.

** “Dismissed the Claimants’ appeal in respect of the ECHR.”*

The Claimants withdrew those arguments and did not even pursue this point in Court. Our case focussed on the key issue: was there maladministration causing injustice?

** "Upheld the Government's conclusion that the maladministration was not a significant contributory cause of the financial losses suffered by individuals. However, ruled that some non-financial losses were caused by the maladministration."*

This is a misinterpretation of the judgment. The Court did not conclude that no financial losses were caused by maladministration, rather that not all the losses of all the scheme members were caused by it.

** "Found in the Government's favour on the point relating to the Ombudsman's findings not being binding."*

This only applies to other cases. In this case, the ruling made no difference to the outcome because the Government failed to provide cogent reasons for the rejection.

FAS developments

Following the announcement of improvements to the FAS scheme in December, members of PAG have been liaising with the FAS Operational Unit to ensure that our views are heard and that everything moves forward as smoothly as possible. In particular, there was a meeting on 23 January to explore the Government's position and Richard Nicholl has provided the following report:

The PAG were represented at the meeting with FAS by Ros Altmann, Andrew Parr, Peter Humphreys, Terry Monk and myself. This was to open up a dialogue with the FAS team who are in charge of helping to create the regulations to enact the new amendments announced in December by Mike O'Brien.

This was an extremely positive and very helpful meeting. The FAS team headed up by Bill Galvin and Mike Le Brun, and assisted by Margaret Watchorn and Stephen Balchin, are clearly very keen to speed up the legislation and to get as many people paid as soon as possible. There is nothing to suggest that the spirit of the announcement is not being adhered to.

The July 07 amendments (age tapering, *de minimis* rules and inclusion of solvent company schemes with compromise agreements) were passed in

December, so anyone affected by these changes should push their trustees to ensure that they are in contact with FAS, so that payments can start to be made as soon as possible. There is now no legislative barrier to this particular money being paid.

Since Mike O'Brien's announcement in December the FAS team have worked very hard to identify what changes they can do by regulation, which can be done relatively quickly, and what will need further legislation.

Most of the changes can be done by regulation but the changes that need primary legislation surround schemes which were very close to already paying 90% without any FAS help, and possibly the solvent company schemes without compromise agreements will need some primary legislation, but this is being checked out to see if they can be included by regulation only. In addition the position of any schemes falling between FAS and PPF is also being considered for legislation.

Otherwise the changes will be done by Regulations, in three phases.

The first phase will allow them to pay 90% from Normal Retirement Date. They expect draft regulations to be ready for consultation (including with PAG) by early March. There is cross party consensus to get these through asap, and all parties have agreed to shorten the normal twelve week consultation period to just two weeks, and assuming this happens smoothly they expect payments at this level to be made by May.

The second phase will concentrate on Requirements on Trustees, changes that are needed to the current priority order regulations and consideration for people with ill health. They hope to get these regulations through by July.

Any other issues will be dealt with by the end of this year.

Overall their aim is to get payments to the majority of people who are past their Normal Retirement Date as soon as they possibly can. They have taken a strategic approach to the problem and have also taken on extra staff to help speed things up. They will also set up a 'transitional authority' to manage schemes through wind up, and intend issuing guidance notes to scheme trustees and administrators. They would like to get all affected schemes wound up by 2010, which will include the transfer of assets where annuities have not already been purchased.

They are keen for us to be involved as we can help them with scheme contacts, the PAG views and our own priorities. We have agreed that PAG representatives will attend monthly meetings over the next few months and also someone from PAG will also attend meetings for trustee firms.

We discussed the ill-health/early retirement problems in some detail and we are expecting feedback on that fairly soon.

We have given them our list of questions to which they will respond soon. We will obviously let you know their reply as soon as it is received, and we will also post them on our website.

A couple of queries were answered during the meeting:

If your scheme's normal retirement date was 65 but there was clear provision and agreement with the trustees rather than just discretion for you to retire earlier without penalty, the lower age should apply, but this will depend on your scheme rules.

The calculation of the cap is expected to be that they will calculate your 90% first based on your expected pension when your scheme started wind up, apply the current cap, then add any indexation and if that then takes you over (the current) £26,000pa then that higher amount will be paid. For example if you were originally due a pension of £28,500 the 90% would take that to £25,650, therefore below the cap. Add three years indexation (at your scheme rate) say 3% pa compounding, and your eventual FAS pension will be £28,028 pa, which is above the notional cap. More detail is being worked out on this point so things may change, and unfortunately it won't apply to many of us.

They will work on an Individual Forecast Facility and update their website information as soon as they have the resources available. At the moment all their staff are working on getting those of us over NRD into payments [and increasing the 80% to 90%].

With regard to outstanding issues that were not covered in the new amendments (extra inflation proofing, back payments for pre-2004 retirees, and the potential attraction of higher rate tax bands for back payments paid in one lump) these are not within the remit of the FAS. If you have issues like these, or any other matter, you should write to your MP alerting them to the problem and asking them to put your case forward to the DWP giving them the full details.

In summary we were pleased with the progress that the FAS team have made, and thanked them for that. We hope that any new Ministerial regime does not slow down this progress, and you should push your own trustees to make sure they are giving your scheme's details to the FAS without delay.

We will report back with the answers to the questions you have asked, we will let you know when the next meeting is to be held and obviously keep you informed of any extra details we obtain.

Richard Nicholl

FAS teleconference

In addition to the meeting described above, a teleconference was held on 28 January between Samantha Anthony from the FAS and Terry Monk and Peter Lapinskas of PAG, with a view to improving communications.

The FASOU are aware that their website is a main avenue for passing information and are in the process of revising it. Their aim is to provide separate areas which cover information for trustees and scheme members, so that the former can get the detailed information they need whilst the latter do not become lost in the complexity. They also intend to post details about the new proposals on a news page so that visitors will be able to see easily what stage has been reached. The timescale will not be as short as they would like, as all changes have to be co-ordinated with other parts of the DWP site and, of course, have to be checked to make sure that they are not misleading. It was hoped that initial changes to remove outdated information would be posted by the end of February.

We enquired about the possibility of providing a FAS benefit calculator on the website. However, FASOU have indicated that this is not a priority given the work under way to deliver the extensions to the scheme. In addition FAS are concerned at the complexity of the programming, given the need to avoid misleading results. We requested that this situation be kept under review and FAS have agreed to do so.

The FASOU are considering ways to actively raise the profile of the FAS amongst scheme members, so that they become aware that help may be available. To this end, they have drafted a leaflet which will be available to be sent out by trustees.

They are also investigating whether it would be possible to provide information about FAS through age-related charities and other related pension services.

FASOU estimate that there are about 7,000 people over the age of 65 who may be eligible for FAS assistance.

The FASOU are now well up to date with making payments to all the recipients that they know of. As at 8th February 2008, 4,542, people were receiving payments and there were a further 527 who have been assessed but where the FASOU are waiting for personal information (such as bank details) before they are able to make the first payment.

However, they are also currently working with trustees to improve data received for over 1000 further members, before they can calculate any payments due. This means that they now have some data on about 6,000 of these members.

The FASOU is being proactive in chasing the data it needs for the remaining members over 65, including arranging visits to the offices of trustees in conjunction with other Government departments if necessary. There are around 110 schemes, where trustees have agreed to provide data to obtain initial/interim payments from FAS but where they have yet to do so.

In some cases, especially for members who left employment many years ago, scheme records are not in good shape, so members should keep safely any documentation which they received from their schemes and employers. This should include option letters, pay slips, P45s and P60s, scheme rules, and annuity quotes. However, FAS will usually only accept information from the trustee and administrators in the first instance.

One point that was clarified was that FAS will take into the account the annuity where the member was offered the choice between an annuity or a transfer value, (even where the member decided to take the transfer). This means that where the trustees/administrator can provide this information it will be used rather than the FAS notional annuity rates.

PAG has queried the basis of the factors which were used in calculating notional annuities for the FAS previously and FASOU are currently reviewing these.

If you are over 65, a member of a scheme which started to wind up Between 1 January 1997 and April 2005 as a result of insolvency, and have not heard from the FASOU, you should check the website to see if your scheme has already qualified for FAS or alternatively contact them directly at the following address, giving full details.

Financial Assistance Scheme, PO Box 702, York, YO32 9XR.

Telephone: 0845 601 9941

Email: FAS-Operational-Unit@dwp.gsi.gov.uk

Recognition for Ros Altmann

The Sun newspaper makes a number of awards at the end of each year to people whom it considers worthy of recognition. Here's what they had to say about Ros:

"And now the big one. BUSINESS PERSONALITY OF THE YEAR, which has previously gone to big names like former Vodafone chief executive Sir Christopher Gent and former DEBENHAMS chief Belinda Earl.

This year we're not going for a business leader but someone who led a campaign. Ros Altmann fought tirelessly for years demanding better rights for the 125,000 people whose pensions were wiped out when their employers went bust. She rightly argued that, having told them their long-term savings would be safe, the Government had a moral duty to look after these people financially.

For years, Gordon Brown and his successor Alistair Darling disagreed, despite being told to pay up by the courts and the parliamentary ombudsman. But Ros ploughed on and just before Christmas the Government finally paid up.

Thousands of families can now look forward to a better 2008 thanks to her efforts. She is a worthy winner."

And so say all of us!

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