

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:**ALMA KEARNEY EWING****(Complainant) Respondent;****-and-****THE TRUSTEES OF THE STOCKHAM VALVE LIMITED STAFF RETIREMENT
BENEFITS SCHEME and ARTHUR COX NORTHERN IRELAND (A FIRM)****(Respondents) Appellants.**

CARSWELL LCJ**Introduction**

This is an appeal from a determination of the Pensions Ombudsman, Dr Julian Farrand, dated 16 September 1999, whereby he decided that the appellants had been guilty of maladministration of the Stockham Valve Staff Retirement Benefits Scheme causing injustice to the respondent, Miss AK Ewing, a member of the scheme, and ordered that each appellant should pay her the sum of £200.00 in compensation.

The Statutory Provisions

The functions of the Pensions Ombudsman, whose office was constituted by the Pension Schemes Act 1993, are defined in respect of pension schemes in Northern Ireland by section 142 of the Pensions Schemes (Northern Ireland) Act 1993 (the 1993 Act).

Subsections (1) and (2) of that section provide as follows:

“142.-(1) The Pensions Ombudsman may investigate and determine any complaint made to him in writing by or on behalf of an authorised complainant who alleges that he has sustained injustice in consequence of maladministration in

connection with any act or omission of the trustees or managers of an occupational pension scheme or personal pension scheme.

(2) The Pensions Ombudsman may also investigate and determine any dispute of fact or law which arises in relation to such a scheme between -

(a) the trustees or managers of the scheme, and

(b) an authorised complainant,

and which is referred to him in writing by or on behalf of the authorised complainant.”

It was not in dispute in the appeal before us that the respondent comes within the definition of an authorised complainant for the purposes of section 142(1), since she qualified under section 142(7) as a "member", which by section 142(8)(a) includes a person who has been in pensionable service under the scheme.

Section 142(4) empowered the Department of Health and Social Services to make regulations in relation to the application of the Act:

“(4) The Department may by regulations provide that, subject to any modifications or exceptions specified in the regulations, this Part shall apply in relation to -

(a) the employer in relation to any description or category of employment to which an occupational pension scheme relates or has related, or

(b) any prescribed person concerned with the financing or administration of, or the provision of benefits under, any occupational or personal pension scheme,

as it applies in relation to the trustees or managers of such a scheme.”

That power was exercised by the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations (Northern Ireland) 1997, Regulation 2(1) of which provides:

“2.-(1) The Pensions Ombudsman may investigate and determine a complaint concerning the administration of an occupational or a personal pension scheme made to him by or

in respect of an actual or potential beneficiary of the scheme who alleges that he has sustained injustice in consequence of maladministration in connection with an act or omission of an administrator.”

An "administrator" is defined by Regulation 1(1):

“‘Administrator’ means any person, other than a person responsible for the management of an occupational or a personal pension scheme within the meaning of section 142(3) and (3A) of the Act, concerned with the administration of the scheme.”

By section 147(4) of the 1993 Act an appeal on a point of law lies to this court from a determination or direction of the Pensions Ombudsman.

The Factual Background

The basic facts were fully set out by the Ombudsman in his determination, followed by his findings. The respondent, who was born on 19 November 1933, was employed by TRW Mission Ltd, which has now been renamed Stockham Valve Ltd, for 27 years until she left the company's service in 1986. For the last eleven years of her employment she was the personnel manager. For some time before her retirement she was a trustee of the company's staff retirement benefits scheme (the Scheme). She received a statement of preserved benefits which informed her that her estimated pension at her normal retirement date in November 1993 would be £5645.82 per annum and that she could commute part of this for cash, provided that the maximum cash sum did not exceed £16,526.75.

In 1987 the respondent and four other former members of the Scheme consulted an independent financial adviser, following which a policy was purchased for her from Eagle Star with a sum of £37,560, which was paid out from the Scheme on her behalf. In applying for this transfer the respondent signed a declaration on 11 May 1987 in the following terms:

“I hereby agree that the Trustees of [the TRW Scheme] should purchase an [Eagle Star] policy to be granted to me individually in substitution for all my rights and those of my present and future dependants to the whole or such part of the

preserved benefit within the said Scheme surrendered in exchange for the [Eagle Star] policy.”

By a letter dated 22 December 1993 Sedgwick Noble Lowndes, acting on behalf of the Trustees of the Scheme, informed the respondent that she was entitled to receive a pension of £5712 per annum from the Scheme. This, as the Ombudsman found, was an error of fact on their part, which appears to stem from faulty records relating to the respondent and some other members of the Scheme, by reason of which they did not realise that the respondent's assets had been transferred out some time before. On 4 January 1994 the respondent signed a form by which she elected to take the maximum tax-free cash sum of £16,256.75 from the Scheme, the annual pension then being fixed at £3875.64.

The cash sum was paid to the respondent, and she received the annual pension instalments until in 1997 the Trustees of the Scheme realised the error. They told Sedgwick Noble Lowndes to cease payments and instructed their solicitors Arthur Cox Northern Ireland to write to the respondent reclaiming the money overpaid to her. Arthur Cox wrote on 15 May 1997 in the following terms:

“Re: Stockham Valve Limited
Staff Retirement Benefits Scheme

Dear Madam

We act for the Trustees of the above Scheme.

We are instructed that on 10 January 1994 you received a payment of £16,526.75 from the above scheme. We are further instructed that since 1st December 1993 you have been paid a pension of £3875.64 per annum increasing at 3%.

Our client instructs that these payments were made to you as a result of a mistake of fact. The full value of your benefits in the above scheme had in fact been paid to you in or about 1989.

We are instructed to write to you to demand that you return all payments made to you since December 1993 (including the

lump sum payment and annual pension payments) within the next seven days. If you fail to do so then we are instructed to institute legal proceedings against you to seek recovery of same.

We would further advise you that our client has instructed Sedgwicks the Administrators of the Scheme to cease any future payments to you.”

The respondent and her solicitors then entered into correspondence with Arthur Cox, which it is unnecessary to rehearse, in view of the Ombudsman's finding of fact (which we shall set out more fully later in this judgment) that the respondent was aware that she was not entitled to receive the disputed benefits and was not acting bona fide in her assertions. The Trustees of the Scheme issued a writ of summons on 11 November 1997, claiming the return of the moneys paid from the respondent, but the action was stayed pursuant to section 144 of the 1993 Act pending completion of the Ombudsman's investigation. The respondent has not repaid any moneys to the Trustees.

The respondent made a complaint through her solicitors on 26 June 1997 to the Occupational Pensions Advisory Service, who carried on correspondence for some time with the parties. Then on 24 November 1997 the respondent wrote to the Ombudsman making a complaint of maladministration. The Ombudsman carried out his investigation and issued a notification of preliminary conclusions on 28 June 1999 and his final determination on 16 September 1999.

The Ombudsman's Findings

The findings made by the Ombudsman and the conclusions reached by him in his determination may be summarised as follows:

(a) The incorrect quotation to the respondent in December 1993 and the consequent overpayment of benefits constituted maladministration.

(b) The respondent was aware that the benefits provided by the Eagle Star policy were in

lieu of those quoted in her statement of benefits. She had asserted that she believed that a "residue" in the Scheme could still provide her with the amount originally quoted to her, notwithstanding that she had arranged that her pension entitlement under the Scheme had been transferred out to Eagle Star. The Ombudsman did not accept that she did believe this. She was aware that she was not entitled to receive the disputed benefits and her alleged change of position was not bona fide.

(c) Her enrichment was unjust because she had no rightful entitlement to the sums paid out by the Trustees and the Trustees are not estopped from requiring repayment.

(d) The demand for return of the moneys was maladministration, which caused injustice to the respondent, because, as the Ombudsman stated in paragraph 39 of the determination –

"any attempt to obtain reimbursement must not cause injustice and should therefore take reasonable account of her ability to make repayments and should involve consideration of repayment by instalments if appropriate. In particular, before considering any enforcement action, the Trustees should invite Miss Ewing to co-operate in reaching a mutual agreement on terms for any repayment which might involve asking her to provide details of her financial circumstances."

(e) The Ombudsman is entitled to order payment of a sum to a complainant by way of compensation for distress.

(f) The respondent was not entitled to compensation for the disappointment of reduced expectations, when she knew that she was not entitled to receive the benefits overpaid. She was entitled to compensation for distress occasioned by the manner of the demand for the return of the moneys.

(g) Arthur Cox fell within the definition of an "administrator" and the complaint against them of maladministration, consisting of sending a demand by their letter of 15 May 1997 to the respondent, was within the jurisdiction of the Ombudsman.

(h) The appellants must each pay the sum of £200 to the respondent as compensation for

distress.

The Issues

The issues which were argued before us were the following:

(i) Whether Arthur Cox were "administrators" of the Scheme and so within the jurisdiction of the Ombudsman when he was considering the existence of maladministration.

(ii) Whether instituting a claim against the respondent in the terms of the letter of 15 May 1997 could be classed as maladministration.

(iii) If it could, whether the respondent suffered any injustice.

(iv) Whether the Ombudsman had jurisdiction to award compensation for distress.

(i) Solicitors as administrators

The work done by a solicitor may vary considerably from case to case. He may be engaged to perform tasks which are connected with the running of the affairs of his principal.

It is, as counsel rightly submitted, a matter of fact and degree, depending on the terms of the solicitor's retainer. Where he is simply instructed to write a letter of claim to a debtor he is acting as the agent of the principal in carrying out his instructions. We do not consider that it can be said that in these circumstances he is concerned with the administration of the affairs of the principal. Arthur Cox were in that position. They were merely instructed to seek recovery of certain sums of money from the respondent, and wrote a letter of claim accordingly. In our view this cannot be said to have been "concerned with the administration of the scheme", and the Ombudsman was in error in so holding.

(ii) The letter of claim as maladministration

If writing to the respondent in the terms of the letter of 15 May 1997 could be classed as maladministration, the Trustees will be liable for it, since they instructed the solicitors to make the claim, and if they did so in a wrongful manner they were acting as the agents of the Trustees.

The term "maladministration" has not been defined by Parliament, nor have the courts attempted to give a comprehensive definition. In *R v Local Commissioner for Administration, ex parte Bradford Metropolitan City Council* [1979] QB 287 Lord Denning MR derived some assistance from the debate reported in Hansard (retailed in a leading textbook, so that he felt justified in considering it). He said at pages 311-12:

"So this is the guide suggested to the meaning of the word 'maladministration'. It will cover 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on'. It 'would be a long and interesting list', clearly open-ended, covering the *manner* in which a decision is reached or discretion is exercised; but excluding the *merits* of the decision itself or of the discretion itself. It follows that 'discretionary decision, properly exercised, which the complainant dislikes but cannot fault the manner in which it was taken, is excluded': see Hansard, 734 H.C. Deb., col 51."

The letter of 15 May 1997 is in an entirely recognisable form as a standard letter sent by solicitors to debtors. It is undoubtedly peremptory in tone, but letters of this nature are constantly sent by solicitors on behalf of creditors to those who owe them money and it is generally necessary that they should make a firm demand for payment. The submission on behalf of the Ombudsman was that the Trustees and their solicitors did not know at the time when the letter was written whether the respondent had received the overpayments without realising that they were not due to her, or had been under some mistaken belief. All that they then knew was that the overpayment had occurred in consequence of an error on the part of those acting on behalf of the Trustees. The Ombudsman took the view in paragraph 45 of his determination that they should have adopted a softer or more conciliatory approach in the first instance.

We find it very difficult to agree with the Ombudsman's conclusion. The Trustees knew that the respondent had herself been a trustee of the Scheme when she was employed by TRW Mission Ltd and was, as the Ombudsman held, "acknowledged as the sole point of

contact for members who wished to enquire about their benefits." She and others had themselves initiated the transfer of their pension funds to the Eagle Star. In these circumstances the Trustees must have had grave suspicions about the bona fides of the respondent. We find it extremely difficult to say that the Trustees and their solicitors were unjustified in writing in peremptory terms to the respondent. Nor should we ourselves regard it as wrong of them to persist in "uncompromising responses" when the respondent equivocated and prevaricated in her replies to them.

We certainly are quite unable to agree with the Ombudsman's description of the handling of the matter by the Trustees and their solicitors as "quite disgraceful". If the matter were open to us for decision as *res integra*, we should not hold that there had been maladministration, but we are not prepared to go quite so far as to say that the Ombudsman was not entitled so to hold and that he made an error of law in so doing.

(iii) Whether the respondent suffered injustice

Under section 142(1) of the 1993 Act it has to be established that the complainant "suffered injustice" in consequence of maladministration. The Ombudsman found that there was maladministration, but has not addressed in his determination the issue whether the respondent suffered any injustice. He has simply stated in paragraph 46 that the maladministration "must have caused Miss Ewing considerable distress", then in paragraph 49 he makes an award in her favour of compensation "for the injustice she has suffered".

We find it impossible to regard the respondent as having suffered any injustice, in view of the Ombudsman's findings to which we have referred that she knew all along that she had been overpaid and that her alleged change of position was not bona fide. The recipient of a letter of claim in such circumstances has no valid ground of complaint if its terms were excessively brusque or peremptory. In our view there was no injustice to her, nor could any reasonable tribunal have held that there was. We therefore do not find it necessary to remit

the matter to the Ombudsman for any further findings.

(iv) Compensation for distress

Our conclusion on the last issue makes it unnecessary for us to deal with the question whether the Ombudsman has jurisdiction to award compensation for distress. We are conscious that there has been a division of opinion between experienced judges on the point and that in *Westminster City Council v Haywood* [1998] Ch 377 at 410 the Court of Appeal was careful to leave the point open for future decision. We therefore shall not attempt to decide it ourselves in this judgment.

Conclusion

For the reasons which we have given we consider that the award made by the Ombudsman in favour of the respondent cannot stand. We therefore allow the appeal and set aside his award.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ALMA KEARNEY EWING

(Complainant) Respondent;

-and-

THE TRUSTEES OF THE STOCKHAM VALVE LIMITED STAFF RETIREMENT
BENEFITS SCHEME and ARTHUR COX NORTHERN IRELAND (A FIRM)

(Respondents) Appellants.

J U D G M E N T

O F

C A R S W E L L L C J
