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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **12/01/2015**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM A DETERMINATION OF THE DEPUTY PENSIONS OMBUDSMAN

BETWEEN:

ALICE LENNON

(Applicant) Respondent;

-and-

SOUTH EASTERN EDUCATION AND LIBRARY BOARD

(Respondent) Appellant.

Before: Morgan LCJ, Girvan LJ and Gillen LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision of the Deputy Pensions Ombudsman ("the DPO") whereby she held that there had been maladministration by the appellant, the South Eastern Education & Library Board ("the Board") in that it had failed to advise the complainant, an employee, that she could transfer her existing pension into the NI Local Government Officers' Superannuation Scheme ("NILGOSS"). The Board appeals from that decision on the grounds that the DPO erred in her application of the burden and standard of proof; in finding that an injustice had been caused by the maladministration; in finding that the appellant had breached relevant Regulations; in not holding an oral hearing; and in finding the complaint was not statute barred.

[2] Mr Coll appeared on behalf of the Board. The respondent Ms Alice Lennon, informed the court would not be appearing or be represented at the hearing of the

appeal. She has not lodged a skeleton argument. The court is grateful to Mr Coll for his helpful written and oral submissions.

History and Background

[3] The respondent was employed by the Board in 1988 in a permanent teaching post and in that capacity she became a member of the Teachers' Pension Scheme ("TPS"). In 1990 she was seconded to a teaching/advisory support role with the Board but remained in the TPS pension scheme. On 1 September 1992 the complainant took up a full-time appointment within the Board as an assistant advisory officer.

[4] In advance of her new appointment as an assistant advisory officer, Mr Gillies in the Board's personnel department sent the respondent a letter dated 13 August 1992 confirming appointment, salary and starting date. This letter did not mention pension details. On 2 September 1992 the Board sent the respondent two copies of the Statement of Terms and Conditions of Service. Section 10 of the terms and conditions under the heading 'Superannuation' stated: "You may join the Northern Ireland Local Government Officers' Superannuation Scheme." The respondent signed one copy dated 23 September 1992 and returned it to the Board.

[5] Nearly three years later on 3 March 1995 an administrator within the Board completed a NILGOSS Superannuation Form/Admittance Form (known as the "LGS1 Form") and sent it to the NI Local Government Officers' Scheme Commissioners ("NILGOSC") indicating that the respondent wished to become a member of NILGOSS. That document was not signed by the respondent who was unaware that it had been filled in and sent to NILGOSC. The LGS1 Form contained portions for each of the employee and employer to complete. Part 1 required the employee to complete basic personal details. Sections A and B required the employee to provide details of preserved benefits with other pension arrangements and whether she required NILGOSS to obtain details of the transfer value payment from the former pension arrangement. The LGS1 Form submitted on behalf of the respondent had personal details missing. Sections A and B were not completed and, having regard to the fact that the form was being sent to NILGOSC three years after the respondent had been first engaged as an assistant advisory officer it was sent to NILGOSC at a time long after the twelve month cut-off date for the transfer without financial penalty of the respondent's pension funds in the TPS. It is common case between the parties that the LGS1 Form was completed by the administrator and submitted to NILGOSC without the complainant's knowledge. On 23 March 1995 NILGOSC issued a membership certificate in respect of the respondent.

[6] The respondent lodged a formal grievance with the Board in August 2009. The matter was investigated by the Chief Administrative Officer and the Human Resource Manager and in a joint report to two Board Commissioners they submitted that the relevant pension documents had been issued to the respondent at the time of her appointment in 1992. They contended that an employee must take personal

responsibility to query any statement in the terms and conditions before signing them. The Commissioners dealing with the grievance concluded that it could be argued that an element of doubt existed with regard to whether the LGS1 Form was issued at the time of appointment as it is not recorded as an enclosure in the letter of appointment. The Commissioners suggested, without authority, a compromise between the parties but this was rejected by the respondent and she appealed against the Commissioners' decision. The matter was considered by two alternative Commissioners. They rejected the respondent's arguments and concluded that it was reasonable to accept as satisfactory evidence the documentation on file which purported to indicate that the relevant forms were sent to the respondent at the time of her appointment.

[7] On 6 July 2012 the complainant complained to the Pensions Ombudsman on the grounds:

(i) the Board did not advise her of the option of a pension transfer when she commenced employment in September 1992 and specifically did not inform her that there was a time limit of 12 months for her to make an application for a transfer on a transfer "club" basis;

(ii) the Board wrongly failed to exercise its discretion to allow a retrospective transfer; and

(iii) the Board acted incorrectly in completing an application form without her consent.

The role of the Pensions Ombudsman

[8] The office of Pensions Ombudsman was established by section 145 of the Pensions Schemes Act 1993. Insofar as relevant to the present proceedings, in relation to matters and complaints in Northern Ireland he is governed by Part X of the Pensions Schemes (Northern Ireland) Act 1993. Section 142 thereof provides that the Pension Ombudsman may investigate and determine, inter alia, 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. For the purposes of this provision both the trustees of the scheme and the employer are considered to be persons responsible for the management of the scheme (see section 142(3)). Section 145(3) makes provision for the making of procedural rules which may include procedural requirements applicable when the Ombudsman holds an oral hearing as a part of his investigation. The Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules (Northern Ireland) 1995 require that where the Ombudsman "considers it appropriate for an oral hearing to be held in connection with any investigation conducted by him" he must notify the parties of the time and place of the hearing (Rule 10). Rule 12(1) provides that any hearing by

the Ombudsman shall be conducted in public (subject to certain specified exceptions). A determination or direction made by the Ombudsman can be appealed to the Court of Appeal on a point of law only (section 147(4) of the 1993 Act).

Decision of the Deputy Pensions Ombudsman

[9] The DPO issued her decision on 14 May 2014. She noted that the Board had requested an oral hearing but she considered that, given that her role was investigative rather than adversarial and given the passage of time since the issues in question took place with its consequent effect on people's memories, oral evidence would not assist her in the determination of the issues and that the documentary evidence, together with written submissions, was more reliable. The DPO noted the contents of the 'Engagement Form' dated 31 August 1992 which stated in the 'Comments' section, "S/A forms sent". She agreed with the Board that it was reasonable to conclude that this was a reference to the Superannuation Admission Form LGS1. She further noted that there was no date stated as to when the 'S/A forms' had been sent nor was there any reference to them being enclosed with the letter sent to the respondent two days later on 2 September 1992. She did not dispute the Board's stance that the practice at the time was not to make reference to the pension documentation in the letter sent out to new employees but she was not convinced that this was definite proof that the LGS1 Form and accompanying literature were indeed sent, especially since the respondent was already an employee of the Board at the time. In those circumstances she considered that there was still an element of doubt that the respondent received the pension literature or LGS1 Form informing her of her automatic admission to NILGOSS and that this constituted maladministration. The DPO then looked at whether the respondent should have known, in any event, that she was in a separate pension scheme. She noted that the respondent had been an existing employee with the Board; that the post which she took on in 1992 was the first of its kind within the Board thus placing the complainant in a unique position; that the statement of terms and conditions wrongly stated that she "may" join NILGOSS; and that her payslips did not indicate she had moved to a different pension scheme. She rejected the Board's contention that the complainant should have queried the statement in the terms and conditions and also found that the Board had been required by the Occupational Pension Schemes (Disclosure of Information) Regulations 1986 to provide the respondent with the relevant information. The DPO further determined that maladministration also meant the complainant was not aware of the 12 month limitation period for transferring her existing TPS pension into NILGOSS on a 'transfer club' basis. The DPO directed the Board to meet the cost of the additional pension as if the complainant had transferred her TPS pension into NILGOSS within the 12 month time limit. She also awarded the complainant £250 for distress and inconvenience caused by the maladministration. She further declined to determine the remaining two elements of the complainant's complaint.

Grounds of Appeal

[10] The Notice of Appeal contains a total of 8 grounds of appeal, but in its skeleton argument the appellant contends there are 5 issues to be determined by the Court:

(a) Whether the Deputy Pensions Ombudsman misapplied the burden and standard of proof in placing the onus on the appellant to prove beyond all doubt that the LGS1 Form was provided to the complainant upon the commencement of her permanent employment with the appellant in September 1992;

(b) Whether the Deputy Pensions Ombudsman failed to address the question of whether the maladministration gave rise to an injustice to the complainant and whether the complainant mitigated any loss arising therefrom;

(c) Whether Deputy Pensions Ombudsman erred in finding the Occupational Pensions Schemes (Disclosure of Information) Regulations applied in the present case;

(d) Whether the Deputy Pensions Ombudsman erred in law in failing to convene a hearing;

(e) Whether the complainant's complaint to the Deputy Pensions Ombudsman was statute barred.

The onus of proof issue

[11] Mr Coll on behalf of the Board contended that the DPO misdirected herself as to the appropriate burden and standard of proof in the investigation conducted by her and, in effect, placed the onus on the Board to demonstrate beyond a reasonable doubt that it had provided the respondent with the LGS1 Form in 1982 at the time of her appointment as assistant advisory officer. Counsel cited Wakelin v Read [2000] Pens. L.R 319 and argued that in determining whether a complainant has sustained injustice in consequence of maladministration the Pension Ombudsman acts in a quasi-judicial capacity akin to that of a tribunal. Since the complaint is civil in nature the civil standard is appropriate and the burden was on the respondent to prove on the balance of probabilities that the LGS1 Form had not been provided to her in 1992.

Discussion

[12] A key question which fell for determination in relation to the respondent's complaint was whether she had been provided with adequate and proper information relating to her pension rights on appointment as assistant advisory officer. It is not disputed that she was informed in the statement of terms and

conditions that she might join the NILGOSS ("you may join"). Mr Coll conceded that this was misleading and tended to suggest that she had an option to do so whereas in the NILGOSS scheme explanatory documentation it was stated that "all whole time employees join the scheme immediately on commencing employment with a right to opt out at any time". It was the Board's case that the respondent had been sent on 13 August 1992 the LGS1 form and the NILGOSS scheme explanatory document with her letter of appointment effective from 1 September 1992. It was the Board's case that the respondent should have read those documents and that if she had done so she would have been aware that she was joining the NILGOSS scheme. It was the respondent's case that she did not receive those documents and only received the letter which misleadingly indicated that joinder of the scheme was optional. This gave rise to the suggestion that if she did not opt to join it she might remain in her existing scheme.

[13] While the resolution of the question whether she did or did not receive the disputed documents is not necessarily definitive of all issues in the case an answer must be found to the question. If the respondent did receive the documents the outcome of her complaint could well have been different. In any event different issues would arise. It was a question of fact whether these documents were or were not sent. This being a complaint made by the respondent it was incumbent on her to prove her case on a balance of probabilities. The true question for determination by the DPO was whether, on a balance of probabilities, the Board sent LGS1 and the explanatory guide document to the respondent in August 1992.

[14] The evidence relied on by the parties was radically at odds on the central question of fact. Normally where there are conflicts of evidence and of recollection of events a proper resolution of the disputed question of fact will call for oral evidence so as to give the parties a full opportunity to probe the conflicting testimony of the witnesses. The DPO concluded that although there were disputed issues she could properly determine the case on the basis of detailed written representations and on the documents submitted by the parties. She concluded that "a far more reliable basis on which to reach conclusions was on the basis of the papers alone." While the DPO was not bound to hear oral evidence and a tribunal of fact can make findings of fact on a balance of probabilities without hearing oral evidence and from an analysis of documents (and might have to do so where, for example, relevant witnesses are dead or are unavailable) we doubt if it can be properly suggested that the papers provided a "far more reliable" basis on which to reach her conclusions. Oral testimony in conjunction with the written documentation may well have provided considerable assistance notwithstanding the passage of time.

[15] The DPO subsequently went on to express a conclusion that "there was more than a reasonable doubt in this case that the appropriate literature and LGS1 was issued". She concluded that "if there is a reasonable doubt that she received the pension literature and form LGS1 there was no way for her to know that she had been automatically admitted to NILGOSS then this constitutes maladministration".

The wording of the DPO's decision clearly suggests that she considered that if the complainant could establish a reasonable doubt as to whether the documents were sent the case for maladministration could be established. However, what the law requires is a determination of the question whether on a balance of probabilities the documents were or were not sent to the complainant. If the DPO had appreciated the fact that that was the appropriate test she would have been bound to reconsider her view that the case could best be decided on the papers alone. While an oral hearing might be impossible where, for example, the witnesses are dead or disabled, if the hearing of oral evidence was possible then the overall quality of the evidence available to decide the case might well have been enhanced by oral testimony.

[16] We conclude that the way in which the DPO has expressed herself in her decision suggests the real possibility that she applied the wrong burden and quantum of proof. It is true that in paragraph 52 she stated that "there was more than a reasonable doubt" that the documents were served. She does not, however, make clear that she recognised where the onus of proof lay and whether the respondent had proved her case on that issue on a balance of probabilities. The wording of the decision suggests that the DPO misdirected herself both on the question whether an oral hearing was inappropriate and on the question whether on a balance of probabilities the documents had or had not been sent to the respondent.

[17] There is evidential material which the respondent could call in aid to support her case on a balance of probabilities. It is clear that the Board dealt with the matter in an entirely unsatisfactory way. Firstly, the reference to sending the documents was only a handwritten insertion in the letter. The letter did not incorporate any express reference to enclosures and to what was required of the respondent in relation to the LGS1 form. It was sent with a misleading indication that joining the NILGOSS was optional. Secondly, if the documents had been sent there was no follow up by the Board when they were not received back from the respondent. LGS1 on its face required that the document be returned to NILGOSC within two weeks of the employer joining the scheme. It was for the Board to return the document to NILGOSC. The absence of any follow up, the absence of any reminder to the respondent and the failure by the Board to return the document to NILGOSC within the time limited indicated significant procedural inadequacies within the Board in relation to securing the pension entitlement of staff. Thirdly, those inadequacies are further highlighted by the fact that the Board took upon itself to complete the LSG1 form without any discussion with the respondent and without informing her that they were doing so. Not merely was this discourteous to the respondent employee but it deprived the respondent of an opportunity to explore what consequences flowed from the delay in the return of the form. Fourthly, following the late submission of the form the respondent was then informed that she was too late to obtain a cost free transfer of her accrued pension rights to NILGOSS. She was not given any advice on what steps could be taken to minimise the on-going loss of pension rights that she would suffer as a result. These various shortcomings on the part of the Board form part of the factual context to be considered in looking at the question whether the respondent was more likely than not to be correct in her

evidence that she did not receive the documents. However, it is for the appropriate decision-maker to make the judgement whether the respondent's case was to be preferred on a balance of probabilities to that of the Board on the issue of whether the documents had been sent.

[18] Since for the reasons given the wording of the DPO's decision tends to indicate that she did not apply the right test this case must be remitted for redetermination applying the proper test.

[19] There is one further matter to which reference must be made. In Scally v Southern Health Board [1992] 1 AC 294 the House of Lords subjected to careful analysis the question of the contractual duty of employer to an employee in relation to properly publicising to the employee the relevant terms in relation to the employer's applicable pension scheme. In that case by the terms of 1974 Regulations, NHS employees who were too late to complete 40 years' service before retirement were given the right to purchase added years of pension entitlement on advantageous terms in order to make up the full 40 years contribution. Such right was only exercisable within 12 months of the date of coming into force of the Regulations or of the commencement of employment, if later. Thereafter the right could be exercised only on less favourable terms. The plaintiffs, four doctors who each required to purchase added years in order to qualify for full pension benefits, had not been informed by the Boards of their right to do so. They brought actions against the Boards by whom they were employed claiming damages for breach of contract, negligence and breach of statutory duty. The House of Lords held that the plaintiffs' common law claims were to be considered by reference to the parties' contractual relationship. Where a contract of employment negotiated between employers and a representative body contained a particular term conferring on the employee a valuable right contingent upon his acting as required to obtain the benefit of which he could not be expected to be aware unless the term was brought to his attention there was an implied obligation on the employer to take reasonable steps to publicise that term. Accordingly, the Board's failure to notify the plaintiffs of their right to purchase added years had been a continuing breach of contract and the cases were remitted to the judge for assessment of damages in respect of the losses falling within the relevant limitation period.

[20] The House of Lords decision in that case has a clear resonance in the instant case and when this matter is reheard the implications of that decision must be teased out since it may well impact on the question of maladministration, on the issue of the failure by the respondent to mitigate (where the onus of proof lies on the Board) and on the issue of delay and the passage of time.

[21] Even assuming that the Board did send the NILGOSS explanatory document to the respondent the question may well arise as to the adequacy of the information supplied in that documentation in relation to the transferring of existing pension rights to the NILGOSS following the respondent's change of employment. Reckonable service in paragraph 5 of that document refers to bought service or

transferred in service in terms that additional service may be purchased by payment of a transfer value from another pension arrangement. Application for such a transfer should be made through the employing authority immediately on commencing employment. A question may arise as to whether even if the document had been served on the respondent and she had properly read and digested paragraph 5(b) that constituted sufficient publication of the applicable term.

[22] While it is clear from the grounds of appeal that there are other distinct issues arising in the appeal over and above the question of the onus and quantum of proof on the issue of the sending of the documents, we have concluded that it would be inappropriate to determine any of those other grounds of appeal bearing in mind that the case must be reheard. Any new decision-maker will be reviewing the case in the light of the evidence and arguments before him or her. Furthermore the case of Scally may have a significant impact on these other issues. It was not referred to in the DPO decision and does not appear to have been considered by her.

[23] In result we conclude that the case must be remitted for rehearing by a new decision maker.