

## **LONG TERM REFORM OF POLICE PENSIONS MIS-SELLING AND SIMILAR CLAIMS - FREQUENTLY ASKED QUESTIONS**

The questions and answers set out below summarise the legal advice we have had in relation to the possibility of individual claims for misrepresentation or complaints to the Pensions Ombudsman.

### **MIS-SELLING AND SIMILAR CLAIMS**

#### **1. Isn't this pension mis-selling?**

Some references to pension mis-selling or mis-sold pensions relate specifically to the selling of private pension plans in the late 1980s and early 1990s to members of defined benefit occupational pension schemes. Those provisions are not relevant at all to the current position.

We have considered instead the whether members can bring claims or complaints on the basis that they were misled into joining the PPS or NPPS.

For the reasons explained in the questions which follow, such claims and complaints are likely to fail.

#### **2. Don't I have a contract with the Force to provide me with the pension I expected?**

It is unlikely that the Force or Police Authority will have made an express promise to pay something other than what was provided in the appropriate regulations from time to time. Some of the joining materials we have seen are set out in subsequent questions.

However, even if an express promise to pay a pension regardless of any changes was made, a contract claim will not be possible. The rules of the police pension schemes are found in the Regulations made under the Police Pensions Act. There is no power to make additional payments. A public body, including a police authority, cannot, by entering into a contract, give itself powers that it does not already have. Any such contract would be *ultra vires* and void.

This means that even if a police authority made an express promise to a member that was supported by consideration and would ordinarily be a contract, it would still not entitle the member to claim to be paid a pension in accordance with the promise.

#### **3. What about a claim for negligent misrepresentation in relation to what I was told when I joined?**

Such claims are likely to face insurmountable difficulties, for the reasons explained in the following questions.

#### **4. What does a claimant need to show in a claim for negligent misrepresentation?**

In order to bring a claim the following are necessary:

- the force/authority must be under a duty to take reasonable care to give accurate advice of the kind complained about or to ensure that a statement that is made is materially accurate;

- the statement or advice must be negligently wrong. It is not enough for the statement to be wrong or to turn out to be wrong. The statement must have been one that no competent force/authority would give;
- the Claimant must have reasonably relied on the statement to their detriment; and
- the Claimant must be able to show that they have suffered financial loss.

#### **5. Will forces/police authorities be regarded as being under a duty of care?**

Even this hurdle is not as easy as might be anticipated.

The courts are generally very cautious about imposing any duty of care in respect of financial loss caused to a Claimant by reliance on a statement by the Defendant. Some special relationship between the Claimant and the Defendant is generally required before there can be such a duty of care. The fact that the force/authority is the employer is not likely in itself to be sufficient and in a context like the present this will probably require some assumption of responsibility by giving specific individual advice.

A general booklet or advice document, without an additional specific assumption of responsibility will probably not create a duty of care.

#### **6. If a duty of care did exist, how far would it extend?**

If a duty of care did arise then if information was given about rights under the pension scheme the duty is likely to have been limited to taking reasonable care to see that the information actually given was accurate in stating the current terms of the current scheme or any alterations that were immediately in prospect.

There is only likely to have been a duty positively to advise that the scheme might change if advice was specifically sought on that point.

#### **7. Is it likely to be possible to show that statements were negligently wrong?**

It is not enough for the statement to be wrong or to turn out to be wrong. The statement must have been one that no competent force/authority would give.

Clearly the precise position will depend on what was actually said. However, some general points can be made (and the position in relation to some actual documentation is considered below):

- it is most unlikely to be regarded as negligent not to have mentioned the possibility that the pension scheme could change;
- it is most unlikely to be regarded as negligent to have referred to police pensions being secure; and
- it would not have been negligent to have explained that police pensions were made under the Police Pensions Act 1976 and that section 2 contained protections against adverse change.

## **8. Will members be able to show that they relied on the statement to their detriment?**

If a member overcomes the very significant hurdles explained in the previous questions they will then have to show that they did actually rely on the statement and that they would have acted differently if they had been told the correct position.

This is very unlikely indeed. Before the Hutton Review, the changes could not realistically have been predicted and the basic structure of the scheme had been stable for many years. Even when the NPPS was introduced in 2006 the notional value of the employer's contributions remained high at 24.2% and section 2 of the Police Pensions Act 1976 protected the position of existing members.

Against this background a claimant joining before that time will therefore have to show that if they had been told that Parliamentary sovereignty means that the Government always has the power to change the law, including repealing or otherwise avoiding section 2, but that there was no indication whatsoever that that was being contemplated then they would have decided not to join the scheme.

That is inherently improbable, particularly given that any alternatives available at the time would have been likely to be subject to at least the same risk of change.

## **9. Would there be any demonstrable loss?**

If a member can overcome all the obstacles set out in the preceding questions they would still need to show demonstrable loss.

If they can show that they would not have joined the police service, it is likely that their losses will be regarded as too remote or speculative.

If they can show that they would not have joined the pension scheme, then the starting point is:

- they would not have made pension contributions (although they would have paid additional NI contributions, and have been liable to income tax unless the contributions were put in an alternative pension or other tax free investment); and
- they would have lost the notional value of the employer's contribution, calculated at 24.2% every year after the establishment of NPPS in 2006 (and prior to that even higher).

The prospect of establishing that at that point they would (in a case involving a PPS member) have been able to secure a return equivalent to that of 24.2% of salary on a contribution of 11% is vanishingly small.

## **10. What joining information has been considered in reaching the analysis above?**

**PPS and NPPS Members' Guides**

The Home Office Members' Guides to the PPS and to the NPPS have been considered (2006 editions). Each contains sections along the following lines:

"There have been many changes since then [i.e. 1890], but entitlement to a police pension has always been regarded as a key element of the remuneration of police officers to enable them to undertake their role with confidence. The arrangements under the Police Pension Scheme 1987 (abbreviated to PPS in this guide) offer a range of benefits that will provide financial security both in the time up to retirement and beyond. The scheme is controlled by formal regulations. This guide is intended to explain the main details in simpler language than is used in the regulations, although it must be remembered that nothing in this guide can override the regulations".

"The arrangements for PPS are set out primarily in the Police Pensions Regulations 1987, which are made under the Police Pensions Act 1976. The Regulations may be amended from time to time by the Home Office after consulting the Police Negotiating Board. Changes to the Regulations are made by the Secretary of State laying Amendment Regulations before Parliament.

"Your force's pensions administrator has an up-to-date list of amendments."

There can be no expectation based on material similar to this that the terms of the pension scheme would remain unaltered in respect of any future service or future contributions they might make.

#### **Joining information from 1994**

A document setting out terms and conditions of service given to an officer on joining and dated and signed in July 1994 included the following:

"Conditions of service for the Police are governed by the Police Acts, The Police Pensions Act 1987, and made by the Secretary of State under those Acts. The following paragraphs summarise, in general terms, the more important conditions of service currently in force" (emphasis added)

A description of the opt-out arrangements permitted by the Social Security Act 1986 with effect from 6 April 1988 and which allowed police officers to take out a pension with a personal pension provider rather than continue to contribute to the PPS was included and the note then continued:

"This note outlines the range of choice, describes the benefits provided by the Police Pension Scheme and suggests factors which an individual should weigh up before deciding to opt for other than the PPS. It provides factual information only. The final choice is for the individual".

The note then went on to describe the various options. In respect of the PPR it said:

"a) Secure benefits: The PPS is governed by legislation approved by Parliament and therefore the benefits have the advantage of statutory protection. (emphasis added)

b) Under section C – "Your Pension Choice – Points to Consider" the note said:

"Your pension choice is one of the most important decisions you may have to make....

“Make sure you are in possession of all the relevant facts before making your decision. If considering opting not to contribute to your occupational pension scheme, give full weight to the following advantages of the scheme in taking your decision:

- “Security of benefits.
- “Index linking.
- “High level of employer’s contribution.
- “Free” administration; i.e. your benefits are not reduced to pay for administrative costs, commission etc.
- “Scheme tailored to the particular need of the Police Service, i.e. retirement pension payable well before the “normal” age of 60.
- “Further information as to what the occupational scheme provides for you is available via the Assistant Personnel Officer, Personnel department, at Force Headquarters.
- “If considering a personal pension, make sure that you:
- “Ask for particulars from several personal pension providers.
- “Ask about the level of benefits that are guaranteed.
- “Ask what costs are charged by the provider.
- “Ask about the level of increase once put into payment.
- “Ask when the pension will come into payment.
- “Will you be covered from the date of your actual retirement?
- “Ask about provision if you have to retire earlier on health grounds.
- “Ask about provision for dependents – both spouse and children.

“In particular make sure you know the rate of return assured on investments. Remember the impact of inflation can be considerable, and that your benefits in the Police Pension Scheme will be based on your final pay. Ask yourself what your final pay would be if your annual pay was increased by the same rate as assumed and compare what your benefits in the Police Scheme would be with what the Personal Pension Provider is promising...

“Police Pensions are increased in line with increases in the cost of living, subject to the attainment of the age of 55 or earlier permanent incapacity to carry out any regular full time employment”.

Thus, this document refers to “secure benefits” and to the PPS being governed by legislation and having the advantage of statutory protection.

None of this is likely to be regarded as negligently incorrect.

## **11. Is the position any different in relation to financial planning decisions taken after joining and while a member of the scheme?**

The legal principles are the same as set out above.

In relation to reliance and loss the position it would still be necessary to show that the mere possibility of what would have seemed a very unlikely change in pension scheme structure in the future would have made a difference.

As with the above examples this will be extremely hard to show. There are many other contingencies that may affect financial planning including the possibility of ill-health and unemployment, fluctuations in the property market and so on. If these did not deflect the arrangements from their intended course then it will be difficult to establish why the risk of legislative change would have done so.

Again the question is not whether the claimant would have acted differently if they had known the effect of the pension changes but whether they would have acted differently if they had been alerted to the remote possibility of some unspecified change at some unspecified time or not at all.

## **12. What about divorce cases?**

Again, we are advised that claims are unlikely to arise.

In some cases members will have entered into a divorce settlement on the basis of their projected pension. It is possible that the settlement may have been reached on the basis of a projection which made them look wealthier at the time than they will turn out to be on retirement.

In some cases (not involving a clean break) it may be open to the paying party to seek to re-open the matter on the basis that their financial position has changed. Any settlement will depend on its precise facts and any member who considers there are grounds to re-open the matter will need to seek advice from their family solicitors. We do not consider there will be many (if any) cases where it is possible to re-open the matter.

In a clean break lump sum case the court (or each party if the case settles) has to make a judgment based on a range of factors including the assets that are or are reasonably available to each party to the marriage. One of these assets is the current capitalised value of a pension that will only fall into payment at some point in the future.

The court (or each party) has to make the best estimate that it can of this value including factors that may affect it in the future most obviously the risk of involuntary unemployment – perhaps through illness or injury.

Similarly to the position in relation to the point of joining the Force, which is considered in more detail above, it is necessary to consider what the effect would have been if the court or each party had been told that there was a remote possibility of some legislative change at some point in the future affecting the basis on which the pension will be calculated for the future.

The core problem is similar to that above. If the true picture had been known, given there was no reason to believe a change would occur it is unlikely that either party or the court would have given any discount for the risk.

## **PENSIONS OMBUDSMAN**

### **13. What powers does the Pensions Ombudsman have?**

The Ombudsman:

- can investigate and determine complaints that there has been injustice in consequence of maladministration in connection with the management of a pension scheme;
- cannot give a better remedy in respect of legal claims than would be available in the courts;
- can deal with “maladministration” even where there is no legal claim; and
- can award compensation including limited amounts for distress and inconvenience.

More information is available on the Ombudsman’s website:

<http://www.pensions-ombudsman.org.uk/#>

### **14. How is a complaint made to the Pensions Ombudsman?**

It is first necessary to exhaust the scheme’s Internal Dispute Resolution Procedure (IDRP) which in the context of the PPS/NPPS generally involves using the Force’s IDRP.

A complaint is then made in writing to the Ombudsman.

### **15. Are complaints to the Ombudsman likely to succeed?**

For reasons similar to those explained in relation to misrepresentation, we do not consider that complaints are likely to be upheld.

Ian Rennie

General Secretary

**8<sup>th</sup> November 2012**