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5th June 2019.

Private and Confidential.

Mr. Anthony Arter,
The Pensions Ombudsman,

Ms. Karen Johnston,
Deputy Ombudsman,

10 South Colonnade,
Canary Wharf
London
E14 4PU.

Dear Mr.Arter and Ms. Johnston,

I last wrote to you on 14th December 2017 to alert you and the Chief Executive of the Pensions Regulator (since gone) to evidence that suggested fraud. You did not reply but I understood, mistakenly it seems, that you were making changes, so I held my hand.

However, with the advent of Mr Coutts' opinion it rather seems that either you never got my e-mail; or that a member of your senior staff intercepted it, which I rather hope to be so because the unconscionable alternative is that what is happening is being orchestrated by you.

Since that has to be taken to be inconceivable, no doubt you will be as keen as I am to avoid malfeasance and put matters right. If so, then if I can assist you in any way in this, I will.

I understand a recent advice of mine saw the Lancashire 'day crewing' pension dispute under settlement and you will find past Opinions of mine in Mr Burns's and Mr N's cases.

What worries me, apart from the callous Windrush like the way these old pensioners have casually been deprived for years what is their due, is that - as matters stand - unless you sort this out there are likely to be a number of criminal prosecutions and I would expect a Court to award exemplary damages to each defrauded pensioner, maybe in a class action.
The paper trail in this matter should alarm you.

To ensure you both get this it will be hard copied to you personally. A copy will also go to Mr Coutts who also stands in the way of indictment.

Whilst it is perfectly reasonable and in the public interest for the State or an industry to minimise its legal costs by Ombudsmen applying the law in alternative dispute resolution. It becomes a criminal enterprise when, to avoid cost to the State, resolution is passed to unqualified laymen to adjudicate on their subjective 'common sense' to the exclusion of legal provision and the common law of England and Wales.

It is, as I am sure you will agree, your personal duty to avoid malfeasance at the hands of those in your offices and it is your personal duty to ensure the unbiased, fair application of the law by those acting under your delegated authority.

An example of failure is the case of Mr. Paul Burns whose pension dispute was adjudicated by Mr. King, an unqualified layman civil servant, now retired. On your appointment to replace Mr. King, Mr. Burns had hoped that under your aegis you would have reviewed and revised his case to give him his due.

I confess that I find it troubling that you have not taken it upon yourself to reverse Mr. King's adjudication whose patent misdirection of himself and avoidance of the law, though indefensible, was pursued on a whim under perceived immunity from redress at the hands of an elderly, long deprived firefighter pensioner layman, with no legal aid.

I trust you will now personally review Mr. Burns's and Mr N's cases. May I also suggest that for the public to accept that you are fair and transparently impartial, where a pensioner wishes to appeal on the law, your service pays the pensioner's costs. Less, and you have a Windrush system denying justice without redress.

I attach the 'Adjudication' given by your office in the case of Mr N.
Mr Coutts, whose adjudication it is, is also an unqualified layman who, being unversed in the law of construction of documents, and feeling no need to seek legal advice, found no more difficulty than Mr King in allowing his 'common sense' to decide on a whim, and on an arbitrary basis, what pension should be paid.
One might as well ask a plumber to do brain surgery.

A further cause for concern is that in having Mr Coutts adjudicate you are acting in breach of Section 145 (4C) of the Pensions Act 1993(as amended) which enables your staff to perform any function of yours 'other than determination' of a matter referred to you.
I am sure that under your aegis the law would have been given proper consideration and these cases settled long ago.

In each case, if only in accordance with the Nolan Principles, Mr. King and latterly Mr. Coutts, were both under a duty to inform themselves, as unqualified laymen, of the way they were required to interpret the law. One would have thought from you and your deputy as the in-house lawyers, but if not, then, at least, as all laymen were required to do, to take guidance on how to give legal effect to the provision by reference to the 1992 SI 192 Home Office Commentary (placed in your office by Mr Burns); 394 pages drafted and promulgated precisely to guide such non-lawyers on interpretation of the legal provision to avoid misfeasance, or malfeasantly, if deliberately misconceiving the SI provisions to defraud the pensioner.

It is not in dispute that Mr. N (and Mr Burns) are both entitled to Rule B3 ill-health pensions under the 1992, SI 192 Firemen's pension provisions nor, that there was a 1992 Home Office 'Commentary' to explain the law basing their ill-health Rule B3 entitlement simply as what "they/you" [there is more than one reference] "could have earned until required to retire by reason of age'. This does not in any way seek to make law – just interpret what the words used in the Statute mean.

The SI specifically excludes a Rule B3 pension due to anyone retiring early of his or her own volition, whose entitlement is a Rule B1 pension (without liability for any future loss). But it is a specific within the SI that a Rule B3 pension is payable to compensate for future financial loss suffered by those forced to retire early due to ill health.
But Mr Coutts knows better. His 'common sense' tells him as he put it at his paragraph 14, all Rule B3 pensions are 'capped at the same level as the Rule B1 Ordinary pension'.

As Mr King and Mr Coutts would have it there is no compensation for loss of earnings, none is due. All that is ever due as an ill health pension is the basic Rule B1 Ordinary pension in all cases.

They take the view that all Rule B3 provision is entirely tethered to the least pension falling due to any retiree who - by choice - is taking early retirement; to use Mr Coutts' word, all Rule B3 provision is 'capped' at that Rule B1 minimum.

It follows that whatever the wording of the 1992 SI 129 Rule B3 it can never mean other than an Ordinary Rule B1 provision; in which case Rule B3, in its entirety, is superfluous, redundant, and without meaning, or effect.

It hardly needs saying that such a reductio ad absurdum is patently wrong. But what has – if not deliberately to defraud - so led Mr. King and Mr Coutts astray?

Lord Justice Evershed in Rookes v Barnard (1964) AC held 'There are only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shown either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed.'.

In Rule B3 the language is plain. For the purpose of a Para 2 – 4 calculation, the 'A' in the formula 'is' the actual Pay [APP], but calculation of the notional pension under Rule B3-5 (2) is 'by reference to' APP.

The error into which Mr King and Mr, Coutts fell, was to depart from the ordinary and natural sense, the meaning of words to allow them to take 'by reference to' to also mean 'is'. If the legislation had intended 'by reference to', to mean 'is', it would have used the word 'is'. Since it did not, 'is' has to be distinguished from 'by reference to'.

To give the legislation its proper meaning requires no speculation on future earnings but simply to follow the Rules to arrive at a notional pension 'by reference to' the current APP. That does not mean to calculate on the retiree's current APP, as for a current Rule B1, but on applying the meaning of 'by reference to' (Courts tend to rely on the SOED), the calculation of the notional pension come to be on an APP taken from the current pay scale, within which the retirees current APP is to be found, no less that are the APPs being paid at the time, from trainee to Chief Fire Officer.

The notional pension is then calculated, not on the retiree's current pay, but on the current APP of the present rank and seniority that the retiree *'could'* have achieved, had they served until required to retire on account of age, and would have earnt but for curtailment of career due to injury.

One may illustrate the correct application and appreciate the subtlety of the provision by looking at pensions falling due to a fireman taking retirement

- One of his own volition
- On grounds of ill health but at the top of his scale and who could not have expected promotion,
- On grounds of ill health but of one who could have expected promotion;

All on £30,000 APP after 25 years' service at time of curtailment of career.

The standard Rule B1 calculation is 30 x APP/60 + 2 x APP x a figure of up to 5 (years served above 25) /60. So a man leaving of his own volition goes with a pension of 30 x 30,000/60 + 2 x 30,000 x 0/60 = £15,000 + £1,000 = £16.000 pa.

The Rule B3 ill health apposite formula (paragraph 4) is 7 x APP/60 + APP x 20/60 + 2 x APP x years served above 20/60. So this ill health retiree has a pension due of £3,500 + £10,000 + £5,000 = £18,500 pa. (Denied by King and Co).

However, Rule B3. 5 specifies that where the formulaic B3 pension 'exceeds' the *notional pension*, it is the sum of *the notional pension* that is paid.

Rule B3. 5 (1) (a) specifies precisely that such a pension is not the Ordinary £16,500, Rule B1, supra, but a Rule B1 arrived at on the basis of what the fireman *'would have become entitled to'* had he *'continued to serve until he could be required to retire on account of age'.*

Calculation of a notional pension requires a consideration by the Chief Fire Officer, or his delegate, to decide, not on probability but more generously, on what 'could' that fireman's career have achieved, but for being cut short.

If the Chief Fire Officer, the retiree concurring, concluded that at he was at the top of his scale and he could not have been promoted but could have served at least another 5 years (as most can on 25 years' service and/or above a certain rank), the *notional pension* he could have earnt would have been calculated as a full term Rule B1 pension, making due £15,000 + £5,000, so the Rule B3 ill health pension would be £20,000 pa. (Denied by King and Co).

But if the Chief Fire Office had concluded that the retiree, but for curtailment, could have been promoted to a rank with a current salary of £40,000 pa then the *notional pension* would be £20,000 + £6.666.66 = £26,666.66 pa. [Denied by King and Co].

Rule 5 finally provides that 'the amount of the ill health pension [that is what is actually paid] is that of the 'notional pension' which accords with 1992 SI 192, Rule L4 (3) that specifies where two sums may appear to be payable "unequal in amount, the one to be paid is the largest of them.", [Denied by King and Co].

The purpose of Rule B3-5 is not as Mr. King and Mr. Coutts would have it, to be of no purpose, since all Rule B3's are Ordinary Rule B1s, but actually to limit pension on enforced early ill health retirement to the most an injured fireman could have earnt but for injury, but it also ensures that he/she gets no less: so no high flyer, cut down in midflight, is denied full compensation for loss of future earnings of a glittering career, lost to them on being required to retire early on ill health, injured in our service.

HMG and the Fire Service Unions arrived at the primary legislation giving rise to

1992 SI 192 to save HMG legal costs of cases that could eclipse damages, the quid pro quo, being acceptance in all, but rare cases, of liability for those retired on grounds of ill health (retirement at 50 meant most would remain fit if not injured on duty) and provision being made in place of common law damages sufficient for the Unions to recommend to their members; in place of continuing to seek damages in Court. The losers were the lawyers!

What was never in question was that any head of damages awardable under common law was being abandoned, yet that is precisely the effect of Mr King's and Mr Coutts's adjudications.

It is not for any Ombudsman, as Mr Coutts expresses himself, to conclude that the applicant has got enough compensation from the other monies paid to him. If a scheme becomes too generous then it is a matter for the legislature to change its terms.

Further, to so find on a whim, knowing of the impossibility for many by reason of age, infirmity or poverty, to challenge such an opinion in the High Court and to do so perhaps to save a local pension fund embarrassment, enquiry, and the expense of meeting legislative provision, could well persuade a court to award aggravated damages.

Under another head, Mr. King's and Mr. Coutts's replacement of law by their personal opinion is clearly arbitrary and oppressive. Should this go to trial it may well attract punitive or exemplary damages, considered by Devlin LJ, in Rookes v Barnard.

It is also, in absence of legislation, unlawful for the Ombudsman to set an arbitrary interest rate since the rate is well established where public money is withheld to the damage of the individual.

There is also the question of criminality.

Unless a reasoned legal and sufficient argument with authority can be adduced to validate a contention that 'is' and 'by reference to' are to be taken mean the same in legislation, and that all Rule B3 pensions are capped in sum as Ordinary Rule B1 pensions, then Mr. King's and Mr. Coutts's adjudications are arbitrary and fraudulent.

I have laid this matter with you in full so that, in so far as I can help you to remedy it as a stitch in time, then that is done without fuss. If not then you adopt the illegality in which case I very much regret to have to point out to you in clear terms that you, your servants or agents, are acting dishonestly in public service, and engaging in a conspiracy to defraud men and women injured in our service and are in most serious breach of public trust, and you will have institutionalised the criminality.

I do so hope that you render further action on my part, or anyone's, unnecessary.

Yours faithfully,

[redacted]

John M. Copplestone-Bruce.
Inner Temple - June 2019.