

Final Determination of the Pensions Ombudsman for the Isle of Man Mr L v (1) BRAL Trustees (IOM) Limited (“Trustee”) and (2) Mercer Limited (“Mercer”) in relation to the British Regional Airlines Group Pension Scheme (the “Scheme”) – 5th July 2021

Summary of Complaint and Findings

Mr L has complained, among other things, that he was treated with “utter contempt” by the Trustee and Mercer (as Scheme administrator) in relation to the manner in which his applications first for early retirement and then to retire from his normal retirement date were dealt with. Mr L has also identified a number of instances of alleged maladministration to support his submissions that he was treated with utter contempt. I have treated these allegations as separate and additional complaints of maladministration for the purposes of this determination.

Mr L has also questioned whether the Trustee were correct not to pay his early retirement pension from the originally agreed date and also certain other decisions which impacted on his benefits. I have treated this allegation as both a dispute of law and also as a complaint of maladministration. Mr L accepts, however, that his benefits should be scaled down on wind up like other members in the same situation under the Scheme rules (i.e. in the same way as other UK Scheme members who have retired before normal retirement age).

Both the Trustee and Mercer dispute the fact that Mr L was treated with utter contempt. They note that Mr L’s original request to take early retirement and then take his pension from his normal retirement was made during the period that Flybe (the sponsoring employer) went into administration and the Scheme entered an insolvent wind up. This necessitated the Trustee taking a series of decisions over during a period when there were fast moving events in the interests of the members of the Scheme generally which, due to very unfortunate timing, impacted severely on Mr L. Mr L may have perceived the manner in which the decisions impacted on him as being in utter contempt but that was not the case.

Mercer have, however, accepted that there were a number of issues relating to the timeliness of its communications and the inconsistencies in how communication was presented and delivered. Mercer has apologised and issued Mr L with £50 in vouchers and later made an offer to pay him £500 for distress and inconvenience after I became involved.

Having reviewed the detailed time line of events I do not uphold the higher level complaint against either the Trustee or Mercer that Mr L has been treated with “utmost contempt”. However, I partially uphold certain of the other complaints and disputes against Mercer and the Trustee. I also consider in particular (to the extent that Mr L is complaining against these issues) that the decisions made by the Trustee to

- (a) soft close the Scheme to early retirements; and
- (b) the decision not to allow early retirements after 5 March 2020;

were not in breach of law and did not amount to maladministration. Both decisions were made in a manner which was consistent with the Trustee’s fiduciary duties to the members of the Scheme. I do, consider, however that Mercer should have subsequently checked with the Trustee at an earlier stage that the general decision to prevent and further early retirements should apply to Mr L given that consent to early retirement had previously been granted and Mr L had completed all the necessary paperwork did amount to maladministration by Mercer.

If this issue had been raised I am satisfied that specific legal advice on this issue would have been taken earlier and many of the problems which later arose would not have occurred.

Mr L has not complained about the decision to wind up the Scheme and scale down benefits in accordance with the rules. I would, however, like to observe in passing that in my view this decision is entirely consistent with the Trustee's fiduciary duties to protect the interests of the members as a whole.

Despite my finding on the issue of maladministration about the decision to introduce a general ban on further early retirements, I consider that the Trustee did not, as a matter of law, have power to withdraw the consent to Mr L's early retirement from 20 April 2020. The failure to pay the benefit on 20 April amounted to breach of law but, in the circumstances of the decision did not amount to maladministration (not all breaches of law amount to maladministration).

Mr L has however already been compensated for the breach of law following the later decision to reinstate his early retirement pension made by the Trustee on 28 September 2020 other than in relation the payment of interest from the due dates of these payments until the arrears of lump sum and pension were actually paid. I consider interest should be paid by the Trustee to reflect the late payment in breach of the rules.

I find that the manner in which Mercers implemented and communicated certain (but not all of) the decisions made the Trustee (as detailed in this determination) amounted to multiple instances of maladministration and, as a consequence, Mr L has sustained severe non-financial injustice (distress and inconvenience) for which an award of £1500 is appropriate.

More generally I do recognise that a number of decisions needed to be made in the interests of the generality of the membership in a fast moving situation and having regard to how these decisions impacted on the different categories of members under the winding up priority order. This would have impacted on normal administrative processes but in my view do not excuse the failings by Mercer.

In relation to the wind up generally and, while recognising that none of these issues are the subject of a complaint by Mr L, I consider (on the information I have which is necessarily limited) that the manner in which the wind up has been dealt with by the Trustee is exemplary and the communication exercise with the membership has been of a high quality. The Trustee with the assistance of Mercer and the Scheme Actuary has I understand managed to obtain two annuity buy-out quotes securing the benefits of Scheme members in a very difficult annuity market. I understand the Trustee is going to be shortly in a position to lock in one of these quotes. In a wind up situation it is generally in the interests of members if there is no alternative sponsor willing to take over responsibility for the Scheme to wind up the Scheme as quickly as reasonably practicable (assuming the membership data is in a sufficiently good state to ensure benefits can be bought out correctly) as this minimises costs and reduces future funding risk which may impact on the percentage of members benefits which can be secured.

In conclusion the impact of all the events on Mr L has been extremely unfortunate in terms of timing but Mr L has not been treated with contempt by either the Trustee and Mercer. However Mr L is entitled to be compensated for the administrative failures by Mercer in

implementing the Trustee's decisions in the run up and during the winding up process which has caused him severe inconvenience and distress and also is entitled to be compensated in relation to the delay in paying his early retirement pension and lump sum.

The Pensions Ombudsman's powers

The statutory provisions governing the IoM Pensions Ombudsman's can be found in Part X of the Pension Schemes Act 1993 (as applied to the Isle of Man). These provisions are similar to the equivalent provisions governing the UK Pensions Ombudsman's jurisdiction under Part X of the Pension Schemes Act 1993 in the UK (with minor differences).

The IoM Pensions Ombudsman core jurisdiction (like the UK Ombudsman), is to investigate and determine:

- (1) complaints brought by an actual or potential beneficiary that he or she has sustained injustice as a consequence of maladministration in relation to an act or omission of a person responsible for the management of an occupational or personal pension scheme (Section 146(1)(a) Pension Schemes Act 1993); and
- (2) disputes of fact or law between an actual or potential beneficiary and a person responsible for the management of an occupational or personal pension scheme (section 146(1)(c) Pension Schemes Act 1993).

There is an extensive body of case law relating to the UK Pensions Ombudsman's powers and jurisdiction. The UK case law is not binding on me but, I do have regard to it when determining a complaint or a dispute. If a complaint or dispute was appealed on a point of law to the Isle of Man High Court, to the extent that there is not direct IoM authority on an issue, the High Court can have regard to UK authorities in relation to the UK Ombudsman's jurisdiction as persuasive authority when determining how the IoM Pensions Ombudsman's jurisdiction should be exercised. Generally I will take the same approach as the UK Ombudsman having regard to the same authorities unless there are particular IoM related reasons for taking a different approach or there are differences in the applicable law between the IoM and the UK. All complaints and disputes are however very fact dependent and in relation to the exercise of any discretion I cannot fetter my discretion.

Broadly in relation to the UK Pensions Ombudsman's jurisdiction it has been held that:

- (1) the Pensions Ombudsman must decide complaints that a member has sustained injustice as a consequence of maladministration (comprising an infringement of legal rights) and disputes of law in accordance with established legal principles rather than by reference to what the Pensions Ombudsman considers fair and reasonable¹; and
- (2) the Pensions Ombudsman has power to direct the payment of reasonable compensation for non-financial injustice (distress and inconvenience) sustained as a consequence of maladministration. Any injustice must be sustained in consequence of maladministration.² Recent UK cases (to which I can have regard) indicate that

¹ See *Henderson v Stephenson Harwood* [2005] PLR 209 (at 12); *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, 899; *Wakelin v Read* [2000] PLR 319; *Edge v Pensions Ombudsman* [1998] Ch 512, 520; and *Arjo Wiggins v Ralph* [2009] 079 PBLR at paragraphs 13 to 14.

² *NHS v Business Services v Leeks* [2014] 056 PBLR at paragraph 20.

higher levels of compensation may now be appropriate than were initially indicated as appropriate by the UK courts).³

It follows that the IoM Pensions Ombudsman (like the UK Pensions Ombudsman) is generally (other than in relation to complaints of non-financial injustice arising as a consequence of maladministration) required to determine a complaint in accordance with established legal principles. In the current case, however, I am satisfied that the legal principles applicable to this complaint are the same both under the Isle of Man and the UK despite the fact that the Scheme contains UK and IoM members.

The British Regional Airlines Group Pension Scheme (the Scheme)

Mr L was a member of Scheme during the period of time the events which are the subject of his various complaints occurred. The Scheme is a defined benefit pension scheme set up under trust in the Isle of Man and currently governed by a trust deed and rules dated 27th April 2012 (as subsequently amended). The principal employer of the scheme is currently FBE Realisations 2021 Limited (formerly Flybe Limited) (now in administration) and the trustee of Scheme is BRAL Trustee (IOM) Limited (the Trustee).

The Scheme has both Isle of Man members and UK members. The Scheme is subject to regulation by the Financial Services Authority in the Isle of Man under the Retirement Benefits Schemes Act 2000 (an IoM statute). The Scheme is also subject to regulation by the UK Regulator under the Pensions Act 2004 (a UK statute). The Scheme is a registered pension scheme for UK tax purposes under the Finance Act 2004 in the UK in relation to its UK members and has exempt approved status from the Assessor of Taxes in the IoM in relation to its Isle of Man members. Effectively the scheme has dual registration and dual tax approval. The Scheme, however, is not an eligible scheme for PPF entry purposes in the UK as, I understand, it has its main place of administration in the IoM not the UK.

Whilst Boal & Co (Pensions) Limited is registered as the administrator with the Isle of Man Financial Services Authority it is Mercer who undertake the day to day administration of the Scheme on behalf of the Trustee. I am satisfied that Mercer are an administrator for the purposes of my jurisdiction and I am able to determine complaints of maladministration against Mercer.

The trust deed states that the law governing the Scheme and its administration is Isle of Man law. However, the trust deed is drafted on the basis that in relation to many of the provisions in the trust deed and rules the legislation applicable to IoM members is Isle of Man legislation and the legislation applicable to UK members is UK legislation. However, in contrast to some of the other provisions in the Trust Deed, there is nothing specifically relating to dispute resolution procedures or the Ombudsman in the deed. The interpretation provisions in the Scheme rules states that references to UK legislation are interpreted as including the corresponding IoM legislation in relation to IoM members. The Scheme rules also refer to IoM Members and UK Members.

³ Westminster CC v Haywood (No 1) [1998] Ch 377 and City of County of Swansea v Johnson [1998] Ch 189 and Baugniet v Capita Employee Benefits (Teachers' Pensions) [2017] 059 PBLR (019) and Smith v Sheffield Teaching Hospitals [2018] 004 PBLR);

This does not mesh together perfectly. The trust deed might have been better drafted if it had provided that the governing law applicable to Isle of Man members is IoM law and the governing law applicable to UK members, such as Mr B, is UK law. There is also nothing in the trust deed stating that UK common law applies to the UK members and IoM common law (which is similar but not always identical) applies to IoM members. There is also no exclusive jurisdiction clause under which the Trustees submit the exclusive jurisdiction of the IoM in relation to IoM members or to the UK Courts in relation to UK members or say that both the IoM and UK Courts have jurisdiction.

However, nothing turns on this issue as I am satisfied in relation to this complaint/dispute that the law applicable to this complaint in the IoM and the UK is all material purposes the same (other than in relation to the winding up priority order) and I do have jurisdiction as the Scheme falls within the definition of “occupational pension scheme” under section 1 of the Pension Schemes Act 1993 (as applied by Tynwald to the Isle of Man).

Background to the complaint

Mr L’s complaints relate to the events surrounding the commencement of his retirement pension under the Scheme in 2020. Mr L was a deferred member of the UK tax approved section of the Scheme approaching his normal retirement age of 60 (his 60th birthday was on 12th June 2020).

As I will expand on below, the timing of Mr L’s application to take early retirement and then retirement at normal retirement date took place during the period that the sponsoring employer of the Scheme entered into administration and an insolvent winding up commenced. During this period various decisions were taken by the Trustee which potentially impacted on Mr L and had to be implemented by Mercer.

Mr L had previously obtained two retirement quotes. Mr L applied on 7 January (before Flybe entered into administration) to take early retirement with a reduced pension with a start date of 20 April 2020 and take maximum tax free lump sum.

Mr L chased for a response and Mercer confirmed on 14 January 2020 he would receive a response within the next 20 days. Mercer allege that they issued an early retirement quote on 22nd January 2020 but this was never received by Mr L.

On 6th February 2020 due to concerns about the financial position of Flybe the Trustee directors made a decision to put a “soft hold” on the issue of early retirement quotes and Mercer were instructed to stop issuing early retirement quotes. Under the Scheme rules members have a right to retire at their normal retirement date but early retirement requires Trustee consent. Mercers were instructed by the Trustee however not to proactively announce this and not to say that early retirements were on hold. Mercers were simply instructed to say that early retirement is subject to Trustee consent and the Trustee is currently considering the member’s application.

Mr L chased Mercer again for a response on 12 February by email and then by phone on 14 February and on 14 February he made a complaint about the delays he was encountering and failures to respond to his enquiries.

On 14 February Mercer approached the Trustee for instructions explaining that Mr L had applied for early retirement on 7 January 2020. After discussing the matter with the actuary the Trustee agreed to Mr L taking early retirement on 18 February 2020. Mercer confirmed to Mr L by email that the Trustee had consented to Mr L taking early retirement and resent him the early retirement quote by email and post.

Mr L completed the early retirement pack and this was logged on Mercers system on 26 February 2020. Mercer confirmed to Mr L on 26 February 2020 that the first pension payment would be made on 1 May 2020 directly into his bank account and this would include a part payment from 20 April to 30 April and the cash sum would be paid into his bank account on 20 April 2020.

On 5 March 2020 Ernst & Young were appointed as administrators to Flybe (the sponsoring employer of the Scheme) at 3 am in the morning and the Trustee issued an announcement advising the members of this and referred them to an earlier announcement about this might affect their pension if the scheme was wound up.

On 5 March 2020 the Trustee had an emergency meeting with their lawyers and actuary to discuss the implications of an insolvent wind up of Flybe. It is understood that in addition to various other matters a decision was taken to formalise the earlier soft decision to cease all future early retirements. This decision was communicated by the Scheme Actuary to the Mercer administration team on 6th March 2020. I understand from the Trustee's lawyers that this was a general decision made at short notice during a meeting at which many other issues were discussed and there is no record (or recollection) of discussing individual cases or exceptions including Mr L's case.

A member update was placed on the website and it was confirmed that to save future cost any future wind up progress announcements would be placed on the website unless individual requests were made by email.

On 13 March 2020 members were told that once the Trustee has a clearer understanding of what recovery it can make from Flybe and Connect given the debts owed and the security and guarantees the Trustees hold the Trustee will be able to assess the effect of Flybe's administration on members' benefits. It was confirmed that

“Therefore at this point in time, we cannot confirm what impact Flybe's administration will have in respect of the benefits you are due under the Scheme other than to confirm it is likely you will not receive your full benefits. However, we will do everything possible to action this as soon as we can, and we appreciate the concern you will be experiencing..”

It was confirmed, as explained in previous communication, that the Scheme was not covered by the PPF.

On 23 March the first Covid lockdown commenced in the UK which may have impacted on Mercer's ability to deal with administrative enquiries from their UK offices.

On 1 April 2020 Mercers wrote to Mr L referring to his early retirement request and stating that Mercer have been advised by the Trustee that they were unable to approve the request at the current time. Mr L alleges that he did not receive this letter until 9 April giving him only 11 days' notice of the withdrawal of this option from the original early retirement date of 20 April.

Mr L then contacted Mercer to confirm that his pension would still come into payment on his 60th birthday and whether he needed to go through the whole process of applying again. Mercers allegedly said that they would arrange for someone to call him Mr L asked them to contact him by email if they could not get hold of him on the phone.

Mercers did not contact Mr L and on 22 April 2020 he complained about the delays.

On 1 May the Trustee decided to wind up the Scheme and a winding up announcement was issued explaining in broad terms the impact of wind up on benefits.

On 1 May Mercer responded to Mr L giving him a winding up quotation and confirming that he would be able to retire at 60 and were in the process of preparing a new benefit statement but stating he would need to complete a new decision and lifetime allowance form. Mercer's apologies for the disruption the decision to withdraw the early retirement option and offered him a voucher for £50 for distress and inconvenience.

On 3 May Mr L was sent a new retirement application pack on the basis he would be retiring on his 60th birthday. The completed form was emailed to Mercer and sent to post on 4 May and logged on the system and Mercer confirmed that they could accept the scanned copy.

Because of the decision to wind up the Scheme, Mercer needed to refer the decision on how to calculate the retirement benefits to the actuarial team for advice (i.e. how much the quote should be scaled down to reflect the underfunding and Mr L's status as a member of the UK tax approved section).

On 22 May following the decision to trigger the commencement of the winding up various wind up announcements were issued to various categories of members specifying the reduction which would be applied to their pension or pension benefits to reflect the degree of underfunding of the Scheme and the share of the assets of the Scheme which were estimated to be available for the different categories of members depending on their status in the wind up priority order and whether they were in the UK and IoM sections.

The letter sent to Mr L would have included the following wording:

Reduction in level of scheme benefits

The value of the assets which will ultimately be available to secure benefits is currently uncertain. This will depend on a number of factors beyond the Trustee's control. These include fluctuations in the market value of the Scheme's investments,

the value of any assets recovered by the Trustee from Flybe and/or Connect , as well as the cost to the Scheme of securing your benefits with a third party.

As there is insufficient money to secure full benefits, legislation requires the Trustee to apply the assets in a particular “priority order” to the various categories of benefits. The Trustee has no discretion as to the level of benefits which will be paid at the end of the process.

Different priority orders apply to those members who earned their benefits whilst tax resident in the UK (UK Member). The Trustee’s current understanding of the relevant legislation is that the assets held by the Scheme would be split between those two groups of members and then used to provide benefits separately for each group in line with their respective statutory priority orders. Where a member earned benefits in both locations at different times, the member’s benefits will be split into the two elements and each will be treated separately for the purposes of the allocation calculations.

As part of securing your benefits, the Trustee will also review the Scheme’s records to ensure that the benefits payable to you accurately reflect your legal retirement.

The Trustee believes that your deferred benefits were earned whilst you were receiving tax relief in the UK. If you believe this is incorrect and you have earned whilst you were receiving tax relief in the UK. If you believe this is incorrect and you have evidence to support this, please contact bralgrouadmin@mercer.com.

Reduction in level of your benefits

Unfortunately, there will be insufficient assets to secure the Scheme’s liabilities in full. Therefore the Trustee is very likely to have to reduce the benefits you will receive upon retirement and may, subject to the advice that is being worked through, remove or reduce some or all of the future pension increases due in respect of your pension. It is not clear at this stage what the ultimate reduction in your benefits will be (including level of increases). Towards the end of the wind up, which could take many months to complete, you will receive a statement confirming the final benefits that been secured for you.

Drawing your pension

Any member wishing to draw their pension is able to do so at their Normal Retirement Date, unfortunately these are likely to be subject to the reductions mentioned above. Once the benefits of the Scheme have been secured, it is likely that early retirement will also be available.

During the period from 28 May to 9th June it would appear that urgent legal advice was taken about how to treat certain specific members, including Mr L, in the light of the decision to wind up the scheme. It was concluded by the Scheme Actuary on 29 May that it would be necessary to write to Mr L and enclose a wind up notice and explain that because of the wind

up his benefits will need to reduce from what was quoted. The benefits needed then to be set at 58% of the full benefits. A new benefits statement was prepared by Mercer by 1 June. The Scheme actuary advised on 2 June that Mr L should be given the option to reconsider the level of tax free cash and pension. It was recognised this would delay his pension but the Scheme Actuary considered it was not fair to assume the member would make the same decision on tax free cash. This necessitated producing a new letter and benefit statement to be sent to Mr L.

On 9th June a new benefit quote was sent to Mr L by post by letter which Mr L alleges was not received. Mr L had previously asked Mercer to ensure correspondence was by email but Mercers did not do this. Mercer also did not appear to have sought to contact Mr L by phone before his 60th birthday, Given that there were only 3 days before his retirement date when Mercer had previously confirmed he would receive the tax free cash I find this surprising.

On 12 June (Mr L's 60th birthday) given the previous correspondence Mr L states he was expecting to receive his lump sum. Mr L has advised me that he spent most of the afternoon of his 60th birthday trying to establish what had happened and he was informed that Mercer had written to him on 9th June informing him that the pension must be reduced because the Trustee had made a decision to commence a winding up of BRAL Mercers said they had not been able to prepare a benefit statement as the individual dealing with it had been "toing and froing" over the last few days trying to get him on. Mr L has said in his submissions that he reminded Mercer that it had been agreed all correspondence should be by email but Mercer were reluctant to do so.

Following the calls Mercer emailed the retirement quote on 12 June (password protected) Mercer apologised for not sending it before by email and said their records had been amended so that all future correspondence should be by email. Mercer notified Mr L of the independent dispute resolution process (IDRP) option to make a complaint.

On 19th June the hard copy retirement quote sent in the post arrived.

Mr L then made an IDRP complaint stating, among other things, that he had been treated with utter contempt by the Trustee and Mercer as administrators.

The Trustee then, I understand, took legal advice on the complaint. On 28 September the Trustee considered the complaint and on the basis of the legal advice received confirmed to Mercer that the full lump sum and residual pension should be reinstated from an early retirement due date of 20 April and then subsequently reduced in payment from 1 August 2020.

The 30 September IDRP decision letter to Mr L stated

"I have read your submission and the accompanying correspondence and I have sympathy for your position. However, your statement that "I have been treated with utter contempt by you and the administrators. You have constructed delays to avoid paying my full pension on the due dates" is not accepted. This is the first contact the

Trustee has had with you so it is difficult to see how the Trustee could reasonably have treated you with the contempt you suggest.

Nevertheless, I have revisited the unique circumstances surrounding your request for early retirement and associated timelines. Based on the facts presented, I have recommended that the Trustee reinstate your early retirement benefits with effect from 20 April, thereby entitling you to:

A lump sum that is not affected by the necessary reductions that were applied to pensions as a result of the Scheme's subsequent winding up as from 1 May 2020; and

Your pension will be backdated to come into payment from 20 April 2020

Details of the additional lump sum and revised pensions from that date will be provided shortly by Mercers. (Please note that although your lump sum will be paid by reference to your unreduced pension, the pension payments you receive will necessarily reflect the level of reduction applicable to you given the Scheme's winding up (albeit the pension that would have been payable to you prior to the reduction being applied will be without reduction) The Trustee will ask Mercer to provide you with detail as to how your backdated pension payments are calculated so you can verify the level of pension being paid before and after the reduction has been applied.

Mr L did not hear anything from Mercer and chased for the additional lump sum promised on 21 October by contacting the Trustee Chair.

The Trustee Chair confirmed that Mercer had been instructed to make the extra payment in September. The instruction was given on 28 September and had asked Mercer to confirm when it would be paid and apologised for the delay.

The pension does not however appear to have been reinstated until 6 November following further emails from Mr L to the Trustee Chair and the Trustee Chair chasing again although Mercer confirmed to the Trustee Chair that the payment had been processed the week before.

Mercer committed to the Trustee Chair to call Mr L but did not do so at the time.

The lump sum was paid into Mr L's bank account on 6th November but Mr L was not told until 12 November.

In the meantime the Trustee Chair had emailed Mr L on 8 November to check whether Mercer had made contact with Mr L. Mr L confirmed they had not and asks again for Mercer to communicate by email as previously agreed.

On 11th November Mr L emailed the Trustee Chair to say he had not been contacted by Mercer. On 12 November Mercer then contact Mr L with a copy of the revised settlement documents.

Mr L's Stage 2 – IDRPs Complaint

On 18th November 2020 Mr L emailed the Trustee Chair to say he did not accept the IDRPs response that he had not been treated with contempt. The email states

“In your letter of 30 September 2020 you asked that subject to receiving information from Mercer I could respond with my satisfaction of the outcome of my complaint.

Contempt

- the feeling that a person or a thing is worthless or beneath consideration
- disregard for something that should be considered

I do not accept your finding that you do not accept that I was treated with utter contempt.

It occurred on 3 occasions.

- I had just 11 days notice that the Trustees were not allowing my early retirement on 20th April 2020 even though it had been previously agreed.
- I had no notice whatsoever that the Trustees were not allowing my normal retirement on 12th June 2020 even though it had previously been agreed.
- I had no information from the Trustees in advance of 12th June that my pension was being reduced, It was not until 17:52 on my 60th birthday that I had a copy of the reduced terms

I would invite you to consider how you would feel if you had been treated in this way”

Mr L also emailed Mercer as follows:

“During the course of the correspondence I had with Mercer leading up to my retirement, I made two formal complaints. On both occasions you accepted you were not keeping me informed. You did not manage my expectations pro-actively, you were causing disruption & you assured me that senior management were aware of my case and actions had been fed back to ensure that it does not happen again.

I had a letter from the Trustees on 30 September informing me that my pension would be backdated so as to come into payment from 20th April 2020 & that details would be provided by Mercer shortly.

After 3 weeks of waiting with no details from you I had to get in touch with the Trustees again.

On 6th November [a member of the Mercer admin team] sent an email to The Trustee Chair where she stated

“It was processed last week & Mr L should have received notification. I will call Mr L today to confirm.”

I asked for a copy of the email you would have sent me for notification and there wasn't one.

You should not be calling me. I asked for & you agreed that ALL communication with me should be via email.

You made a payment into my account on 6 November but I didn't get notification of this until your emailed letter of 12th November.

After the way you treated me in the run up to my retirement & especially on my 60th birthday (12 June 2020) where my pension payment was not paid, as agreed, I made a detailed formal complaint to the UK Ombudsman. They agreed to take up my case & after a call with them today they have asked me to update my case file with the latest letters and emails.

Payment of the balance of my lump sum and the promise to pay my pension arrears on 1 December will put me in a position I should have been from 20 April 2020. It does not compensate me for the personal and financial loss suffered.”

Mr L also provided a timeline in which he noted:

- (1) He had applied to retire on 7 January 2020 on 20 April (53 days' notice);
- (2) He had received a retirement benefit statement which was returned and confirmation was received the cash sum would be paid into his bank account on 20 April and pension payments would commence on 1 May;
- (3) On 9th April he received a letter from the administrator giving just 11 days notice the payments would not be made;
- (4) He applied again to take his pension at normal retirement date on 12 June 2020. This was returned and confirmation was received that the administrator would ensure funds would be available to pay the pension on 12 June. Mr L was informed by the administrator [after he called to find out why the lump sum had not arrived on 12 June] that a statement was in the post. This arrived on 19th June.
- (5) It did not become apparent until the 12 June that the lump sum would not be paid when he was informed that a decision had been made not to pay the pension
- (6) Mr L noted the reduction to his pension and asked the Trustee to reconsider the decision and also advised them he had contacted the Pensions Ombudsman.

Trustees and Mercer response to IDRP 2 complaint

The Trustee asked the Scheme Actuary at Mercer to comment on Mr L's complaint which Mercer did in a letter which was sent with the intention this should be shared with Mr L. The letter stated

“This letter is addressed to the Trustee in response to Mr L's letter of 18 November 2020.

In that letter Mr L noted that the Trustee did not accept that he had not been treated with contempt when his retirement benefits were put into payment earlier in the year. Mercer acts as administrator of the Scheme and I would like to reassure Mr L that the Trustee and Mercer did not take actions that we did out of contempt for him, and as you know we have been working closely with the Trustee with regard to the unfortunate situation that Mr L and other Scheme members find themselves in.

Determining any member's entitlement on the wind up of a pension scheme will depend in detail on the exact circumstances on the member and the scheme and it is something that can be changed by developing events. What the Trustee expects to be the appropriate benefit to pay to a member can change day by day as new information emerges or events happen, for example in this case, the administration of Flybe. The Trustees had to make a number of decisions in the first 6 months of the year given the events and the fast changing situation. These decisions were the main driver for the short notice given to Mr L in a number of instances and which he identified to be "contempt".

During January and February the Trustee was very mindful that Flybe's position was changing rapidly and that there was an increasing possibility that the scheme would be wound up with little or no further cash being obtained from the employer. In those circumstances the trustees must act to ensure that no member receives more assets than their "share" of the available assets in case the Employer was no longer available to sponsor the Scheme. When in fact this event occurred in early March, it became even more critical to ensure that no benefits were paid out which a member would not be expected to be entitled once the wind up was complete.

Unfortunately it was during this period of time that Mr L was seeking to retire from the fund and it was therefore difficult for the Trustee as the decision maker and Mercer as administrators to make the appropriate decisions and to communicate those decisions to Mr L in a timely way, We understand that this could have come across to Mr L as lack of care for him as an individual and his situation.

However, the trustee came to the decision in the context of a situation that developed quickly during that period, resulting in the need to change the previously issued decisions and potentially going back against quotations issued in good faith, when they were no longer appropriate. There have been many other quotations and illustrations of benefits that have been issued over the last few years.

That are no longer valid and will unfortunately not be fulfilled.

Following Mr L's formal complaint and with the additional time available to consider Mr L's situation again the Trustee determined that his situation was unique and it was appropriate to honour the original decision. They reached the final decision after taking legal advice and after considering the impact on other members of the Scheme. The care that was taken to ensure that a fair decision was reached that balanced his interests with those of the other members of the Scheme again evidences that there

was no contempt simply an obligation to act fairly in the interests of all the members of the scheme in a difficult time.

I hope this letter goes to reassure Mr L that his situation was considered with great care.”

The Trustee Chair then formally responded to the IDRPs complaint attaching the letter from the Scheme Actuary as follows:

“Thank you for your letter of 18 November which was considered by the Board at their December meeting.

We are obviously very disappointed that you feel that you were treated with “utter contempt” by the Trustee and its advisers. Our Scheme Actuary is [] at Mercer and they deal with all the Scheme Administration, we asked him to comment on the points you have raised.

His reply to me dated 22 December is attached. And I have nothing further to add other to reassure you that in line with the Scheme Actuary’s email that a key principle for us as the Board of the Trustee is to ensure that members are treated equitably in accordance with the law. All members both existing pensioners and deferred members, have been adversely affected by the demise of Flybe. Just at the time of your retirement we had to make difficult decisions and communicate them to Mercer, and then onto the membership, Unfortunately, this appeared to you to be specific to your situation but this was not the case. We apologise if this came across to you as contempt for your situation (and we do appreciate that this was a stressful time for you given the circumstances). However, we are satisfied that we acted to satisfy our legal requirement to treat all members fairly and it was simply the case that your timetable was such that you were directly affected at every stage of the process.

This was unfortunate but unavoidable in the circumstances.

I hope the time take to further explain our position, and the fact that we have taken into account your specific circumstances in revisiting your tax free sum, provides reassurance that we treat member’s concerns seriously and that where there is merit in a particular case will respond accordingly.

Finally we appreciate that 2020 has been an extremely difficult year for members of the Scheme, in the light of Flybe’s situation, and there has been a considerable amount of stress and uncertainty that comes with that. Much of the work that we have done in 2020 has been focussed on ensuring that we have viable options for securing members’ benefits, which all things considered, has not been straightforward. However, we have made good progress and our focus for 2021, will be securing the best outcomes we can for members within a limited annuity market so as to enable an orderly and cost effective winding up of the Scheme as quickly as we can. We will of course be writing to members to provide an update on our progress to date.”

Mr L's complaint to the UK Ombudsman

Mr L was not happy with the response and referred the matter to the UK Ombudsman who eventually referred the complaint to me as it concerned an Isle of Man scheme. The UK and IoM Pensions Ombudsman potentially overlap and until 2015 the role of IoM Ombudsman was performed by the UK Ombudsman.

Mr L provided a copy of the earlier IDRPs correspondence setting out his complaint and the Trustee and Mercer complaint and a timeline of his complaint. The complaint remains essentially as set out above in relation to the IDRPs complaint.

In my view the complaint is more than just a complaint that Mr L was treated with "utter contempt" - there are also a number of separate allegations of maladministration which Mr L uses to evidence his complaint that he has been treated with utmost contempt. I therefore need to deconstruct the complaint and consider all its constituent elements separately.

Trustee's Position

The Trustee's position is essentially as set out above. The Trustee has also sent me their own timeline of events and various other documents relating to the internal exchanges which occurred between the Trustee and Mercer relating to the decisions made during the period to which Mr L's complaint relates. The Trustee's lawyers have also provided information about the communication process with members and which announcements were issued to which categories of members.

Mercer Position

Mercer has responded to the Ombudsman complaint on 25 February 2021 with their own timeline of events.

Mercer recognised in the response to the Mr L's complaint sent to my office that: the member raised a number of complaints to Mercer regarding the timeliness of its communications and the inconsistencies in how communication was presented and delivered. Mercer acknowledged the complaints and sent retail vouchers as a goodwill gesture to Mr L. However, Mercer recognised that that they did not thereafter consistently take steps to prevent repeated experiences, and Mr L experienced further delays and inconsistencies.

In recognition of this, and the distress and inconvenience caused, Mercer indicated it would be willing to make a settlement offer for £500 for distress and inconvenience.

The offer was however expressed to have been made on a without prejudice basis which is not appropriate in the context of an ombudsman complaint considering that the without prejudice offer was referred to in an open letter to the Ombudsman. As a matter of law this is not a without prejudice offer.

Effectively Mercer have accepted in open correspondence that delays and inconsistencies in dealing with Mr L's complaint have resulted in distress and inconvenience for which they consider that a distress and inconvenience award of £500 is appropriate.

Mr L's response to Trustee and Mercer's response

Mr L confirmed that after what he had been put through during the period of applying for my pension and the missed early retirement date of the 20th of April 2020 and the missed normal retirement date of the 12th of June 2020 where no payments were made, the offer of £500 for distress & inconvenience sustained was, in his view, derisory.

Mr L noted that in his initial complaint to the Trustees he felt he had been treated with utter contempt by them & the administrators Mercer, & that they had both constructed delays to avoid paying his full pension on the due dates. Mr L's view has not changed.

- The Trustee had stated that there were unique circumstances surrounding his request to retire early. However, the Trustee decided to refuse his early retirement, which had been previously agreed and then decided to refuse payment of his full pension on his normal retirement date of the 12th of June 2020, Mr L considers that they were treating him with contempt (i.e. beneath consideration).
- Mr L considers that the Trustee should have communicated with him directly given their time line. It was not acceptable under any circumstances not to pay a pension lump sum & start pension payments on a normal retirement date.
- The Trustee made the decision and he was not informed.
- No pension payments were paid into his account on the 12 June 2020.
- The refusal of his early retirement & subsequent "U turn" to allow the back dated payment only after he complained demonstrates that their original decision to refuse it was wrong.
- Mr L considers merely to just offer just an apology when the pension Mr L was entitled to was paid 7 months later, is not acceptable.
- Mr L still considers that Mercer have failed at almost every level, and considers that they do not keep promises & their level of timely communication with him has been appalling.
- Back in February of 2020 Mr L asked that all communication with him should be via email & they agreed. The Appendix Timeline in their recent response, demonstrated that they were still sending communications to him via the postal service in April, May & June of 2020. This covered the period of his early retirement & normal retirement dates.
- Mr L consider again that he was treated with contempt. He had made two formal complaints to mercer, one on the 14th of February & the second on the 22nd of April. On both occasions they accepted his complaint but nothing subsequently changed.

Mr L asked everyone to put themselves his position:

- (1) He was made redundant in October of 2019.
- (2) He expected a lump sum payment & start of his pension payments from the 20th of April 2020, it was stopped.
- (3) He hen expected a lump sum payment & start of his pension payment on the 12th of June 2020, it was stopped.

- (4) He spent the afternoon of his 60th birthday on the telephone trying to find out why his pension payment hadn't commenced.
- (5) He eventually had a lump sum payment reduced by 41% paid 3 days later.
- (6) He then made a formal complaint to the Trustees via their IDRPs & had to wait another 4 months to get what he was entitled to back in April of 2020. The payment of money owed to him was finally paid on the 6th of November 2020.

Mr L submitted again that the offer of £500 for distress & inconvenience sustained was derisory.

Additional information requests

Following the above exchanges I asked both the Trustee and Mercer to provide me with certain additional internal correspondence so I could establish the detailed timeline of events. I have combined this information into a timeline which I am sharing with both the Trustee, Mercer and Mr L so they can comment if they wish to. I have not included the more detailed timeline to the final version of this determination.

Legal analysis of Mr L's complaint

Mr L has complained that both the Trustee and Mercer have during the period he applied to take his pension treated him with the "utmost contempt". In order to reach a view on this I also need to consider the constituent elements of his complaint as outlined above in Mr L's original and subsequent submissions. Effectively to determine the complaint I need to reach a view on the higher level complaint where Mr L alleges that he was treated with utmost contempt (as evidenced by the individual delays and allegedly poor decisions) and also the individual elements of his complaints.

The higher level complaint and the individual elements of Mr L's complaint are essentially all allegations that Mr L has sustained injustice as a consequence of maladministration by the Trustee and/or Mercer. In addition if you analyse Mr L's submissions Mr L has also disputed that the Trustee did not have power to revoke their consent to early retirement once it was given. I am willing to vary the complaint to include this issue.

To demonstrate this contempt Mr L originally identified three main failures on behalf of the Trustee and Mercer namely:

- Mr L was given just 11 days notice that the Trustees were not allowing him early retirement on 20th April 2020 even though it had been previously agreed.
- Mr L had no notice whatsoever that the Trustees were not allowing his normal retirement on 12th June 2020 even though it had previously been agreed.
- Mr L had no information from the Trustees in advance of 12th June that his pension was being reduced, it was not until 17:52 on his 60th birthday that Mr L was given a copy of the reduced terms.

Mr L in later correspondence has identified multiple instances of alleged administrative and legal failures by Mercer and the Trustee which potentially could individually or collectively, could amount to maladministration which has resulted in him sustaining injustice

The expression “maladministration” is not defined for the purposes of my jurisdiction. It is however recognised in various UK court cases in relation to the UK Pensions Ombudsman’s jurisdiction (which would be persuasive authority if the IoM High Court were to consider the meaning of the term) that

“Maladministration” is a broad concept which goes further than a violation of legal rights. There can be maladministration even if a person’s legal rights are not infringed. I will call this pure maladministration. This kind of maladministration will include bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on: concerning the manner in which a decision is reached or discretion is exercised: but not the merits of the decision itself: *R v Local Commissioner for Administration for the North and East Area of England, ex parte Bradford Metropolitan City Council* [1979] QB 287, 311 per Lord Denning. (see *Arjo Wiggins Limited v Ralph* [2009] EWHC 3198, Lewison J.

It is also recognised in *Secretary of Health v Marshall* [2008] EWHC 909 Ch that the term maladministration can include:

“faulty or incompetent administration falling short of the breach of any legal duty or obligation”

Other UK cases have confirmed that in the absence of a statutory definition of maladministration it is for the Ombudsman to determine what amounts to maladministration subject to review on public law principles⁴.

I am satisfied that if the allegation that Mr L was treated with utter contempt is proved this can amount to maladministration as could delays in dealing with the early retirement option, changing decisions without good reason, or any neglect, delay or general incompetence by Mercer in implementing the decisions.

To reach a view however on whether the acts or omissions of the Trustee and Mercer collectively amount to contempt (a form of maladministration in my view) or any of the alleged failures amount to maladministration in their own right, it is however necessary to carry out a much more detailed analysis of why the various decisions and delays were made or occurred in relation to the commencement of Mr L’s retirement benefits.

Wider context of complaint and duties of Trustee and Mercer

I accept that Mr L’s complaint has also to be considered in the context of the wider events occurring in relation to the Scheme in the run up to and following the administration of Flybe

⁴ *Police and Crime Commissioner v Butterworth* [2017] 0001 PBLR (020) Jonathan Crow QC (sitting as a Deputy High Court Judge) at paragraph [40] and also *Metropolitan Police v Hoar* [2002] 47 PBLR Neuberger J at paragraph 19)

and the commencement of the insolvent winding up of the Scheme. Mr L would, as noted by both the Trustee and Mercer in their original IDR2 responses, only have had a partial knowledge of what was going on and why the decisions were made at the time.

In making any decisions in relation to the Scheme during this period, Trustees broadly have a fiduciary obligation to exercise these powers and discretions they have under the Scheme rules and subject to any overriding statutory requirements in the best interests of the members as a whole but also having regard to how the decision might differentially impact on different categories of members.

In the context of an insolvent wind up of the Scheme the Trustee would have a fiduciary obligation to consider where any member sat in the winding up priority order in the Scheme. This is not straightforward as the Scheme had two differently tax approved sections for UK members and IoM members and the priority order differs for both categories.

In relation to the UK category of members such as Mr L (unlike the position in relation to an IoM member) moving him from deferred to pensioner status would not in itself bump him up the wind up priority order. The date the wind up was triggered would, however, impact on the amount of tax free cash he would receive and any scaling down of pension benefits as with effect from the date the wind up is triggered the Trustee are obliged to scale down any lump sum and pension instalments paid after that date. The question of whether Mr L was granted early retirement before the wind up commencement date and moved to pensioner status was therefore important to the ultimate benefits Mr L received. The fact however that he moved to pensioner status did not affect his position in the winding up priority order as this was determined by reference to whether he was above or below normal pension age at the date of commencement of wind up. If he was above normal retirement date under the priority order broadly he would receive 100% of the pension up to certain limits (but not all increases) but if he was below normal pension age at date of commencement of wind up only 90%.

The Trustee therefore needed, when agreeing to allow any early retirements, to consider how any decision to allow early retirements or transfers might impact on the share of assets available to pay the benefits of the member compared with what it might have been if the decision had not been made. In these circumstances it would be important for the Trustee to take both actuarial and legal advice which they would appear to have taken.

The likely asset share which ultimately would be available to secure members benefits would also have been uncertain until it was established what was the likely recovery in the administration of Flybe.

Mercer's role as administrator is, however, very different. Mercer's role is to implement the decisions made by the Trustee. If the Trustee makes a decision, having taken advice, to stop permitting early retirements or to start scaling down benefits following the commencement of a winding up of the Scheme, Mercer's role is to implement this decision with the degree of care competently within the constraints they were working under.

The Mercer Scheme actuary has a different role as the scheme actuary performs certain statutory functions as actuary in relation to the scheme in a personal capacity. Mercer will also provide general actuarial services to the Trustee. The Mercer Scheme actuary also had an important role in the communication of the Trustee decisions to the Mercer administration team.

Original Decision to grant early retirement

Mr L first applied to take early retirement on 7 January at a time when the Trustee had justifiable concerns about the financial situation of Flybe but no general decision had been made not to consent to early retirement. The delay between 7 January and 22nd January in issuing an early retirement quote did not in my view amount to maladministration. Under the service delivery targets agreed with the Trustee my understanding is that there was 20 days for the issue of a response. It is unfortunate that the original early retirement quote was never received but on the balance of probabilities I consider that it was issued and must have been lost in the post. Later internal emails support the view that the quote was issued as Mr L was told.

The application to take early retirement overlapped with the decision by the Trustee (having taken advice) to “soft close” the Scheme to early retirements on 6th February. Under the rules early retirement is subject to Trustee consent. In the circumstances my view is that the decision to soft close the Scheme to early retirements and to delay transfers within the statutory time limits (which for some members could impact on their ultimate asset share used to provide benefits) was consistent with the Trustee’s fiduciary duties.

In the light of this decision Mercers were required, as administrators, to confirm with the Trustee whether early retirement should be granted in Mr L’s case. The further delay in reissuing the early retirement quote (which had been lost in the post) was therefore in my view justified and did not amount to maladministration.

The Trustee’s decision to consent to allow Mr L to take early retirement was also consistent with their fiduciary duties given the advice received. In this situation I would have expected the Trustee to take advice from the actuary on the funding implications (if any) the decision would have and in particular how this would impact on the asset share received by Mr L. The Trustee did indeed take actuarial advice and consented to Mr L taking early retirement and noted in making the decision that Mr L had applied for early retirement before information was widely in the public domain about Flybe’s financial difficulties. On receiving notification of this decision Mercer as administrators notified Mr L of the decision and told him the lump sum would come into payment on his selected early retirement date (See timeline above).

In my view there is no maladministration by Mercer or breach of law or maladministration by the Trustee in this period.

Decision to withdraw Early Retirement Option

Flybe then went into administration on 5th March. The Trustee held an emergency out of cycle meeting taking advice from their lawyers and actuary about what steps to take. At this meeting a decision was made not to consent to any further early retirements until further notice. This in my view the decision was consistent with the Trustee's fiduciary duties. The decision was a high level decision and would also have been taken in the context of the earlier legal advice received about the Trustee's duty to consider how the decision to continue to allow early retirements and other discretionary decisions could impact on other members

In my view as a matter of law having given consent to early retirement it would have been possible to withdraw consent up to the date once he had completed all necessary paperwork, Mr L had before the date of the Trustee decision completed all necessary paperwork needed to implement the early retirement option from the selected date.. The Trustee would have been aware that consent had been granted but would not have been aware that Mr L had already returned the forms applying for early retirement. The Trustee did not focus on this issue. However, even if they had they would not have able to reach a conclusion in Mr L's case at the meeting on whether consent could be withdrawn without taking further specific advice. Also I would observe that while many complaints of maladministration involve breaches of law the expressions breach of law and maladministration are not synonymous or co-terminous.⁵ It is possible to have a breach of law without it amounting to maladministration.

On balance I do also do not consider that the issue of the general instruction to Mercer to refuse all early retirements (without considering whether there should be any exceptions in Mr L's case) which was taken at the emergency meeting amounted to maladministration in the particular circumstances of the case having regard to the Trustee's duties to the membership of the Scheme as a whole.

The instruction issued by the Trustee to Mercer in its role as administrator to implement the decision was given on the same day. In my view given that the Mercer administration team would have known that Mr L had already accepted the early retirement team and was expecting the payment of the pension on 20 April it is surprising that they did not check with the Trustee specifically whether the decision applied to him (which would then have resulted in the Trustee taking legal advice and resolution of the issue much earlier).

Also I find it surprising ,that given the Mercer's administration team were told of the decision on 6th March that Mercers did not write to communicate the decision to Mr L until 1 April given that they knew that his previously agreed early retirement date was 20 April. In part the delay can be excused by the general Covid situation. Also given the letter was posted on 1 April this still left almost three weeks for the letter to arrive. However, given the previous issues with the post I would have expected Mercer to make efforts to contact Mr L by post and email sooner.

⁵ Hillsdown Holdings v the Pensions Ombudsman [1997] 1 All ER 862 & City of County Swansea v Johnson [1999] PLR 187.

A reasonably competent administrator would also in, my view, have double checked whether the decision to stop all further early retirements definitely applied to Mr L (given that the Trustee had approved this and Mr L had completed all necessary paperwork) and sought to update Mr L (to the extent they were able) and also to proactively explain that taking his pension was still possible on his normal retirement date.

On balance I consider that the failure to go back to the Trustee to confirm whether the general decision to prevent all further early retirements definitely applied to Mr L given the prior approval delays in communicating the Trustee's decision and the fact the decision was communicated by post (given the past history of the matter) amounted to maladministration.

Failure to pay Pension on Mr L's Normal Retirement Date

Following receipt of the letter sent on 1 April on 9 April Mr L contacted Mercer (not the other way round as should have been the case) and sought confirmation that the pension would still come into payment on his normal retirement date on 12 June. Under the Scheme rules Mr L had a right to take his pension on his normal retirement date and the Trustee did not have the ability to delay payment if he validly requested the pension to come into payment.

Mr L returned his form and confirmation was received from Mercer would ensure funds would be available to pay the pension on 12 June. Mercer were also asked again to ensure that future communication should be by email to prevent statements being delayed in the future.

The timing is again incredibly unfortunate as on 1 May a decision was made by the Trustee to wind up the Scheme. The decision was again in my view consistent with the Trustee's fiduciary duties given the lack of a solvent sponsor and in the absence of any other employer willing to assume responsibility for the pension scheme liabilities. The decision however meant that the Trustee was obliged to start scaling down payments under the rules including Mr L's tax free cash as the commencement date was after the winding up trigger date. The consequence of this was that the statement issued previously was no longer valid.

Mr L does appear to have been issued with the standard deferred member letter which would have notified him that his benefits were likely to have been scaled down (see above). However, he was not told that commencement of the pension or payment of the lump sum would be delayed. On the basis of the documents that I understand were sent to Mr L, I do not consider he could reasonably have concluded that the lump sum would not, as promised, be paid on his 60th birthday.

In order to work out the implications of the full decision to wind up the Scheme on members' benefits it was necessary to obtain further legal and actuarial advice. I recognise this would necessarily take time. With the benefit of hindsight it would have been better if Mr L had been told immediately that:

- (1) the commencement of his pension might be delayed while Mercer calculated the impact of the decision to wind up the Scheme would have on his benefits (i.e. the degree of scaling down of the lump sum and pension); but
- (2) when Mr L's benefits were recalculated he would be given the option to put them into payment with retrospective effect from his normal retirement date if it was not possible to complete the calculations by then.

Mercer could have told Mr L this by phone or in a very short email and any data protection issues ought not to have been insoluble.

Looking at the internal email exchanges at Mercer it would appear that members of the Mercer administration team were making genuine efforts to prepare a letter and updated statement so that the payment of the pension and lump sum could go ahead. There was quite a lot going on during this period which Mr L would not have been aware of. Mercer were definitely not treating Mr L with contempt.

I also consider that the decision by the Scheme Actuary not to go ahead and put the pension and lump sum into payment on 12 June (without giving Mr L an opportunity to revisit the earlier lump sum decision) given that his lump sum and pension would now be scaled down was the correct one. The Scheme Actuary's instruction that Mr L needed to be contacted and sent a new benefits statement issued and Mr L's consent obtained was also correct.

On balance, I do not consider that the delays between 1 May and 9 June before the new letter was issued amounted to maladministration as often a course of action is embarked on which is assumed may be completed more quickly than it is. However, I find the decision to issue the letter and benefit statement by post on 9th June given that Mercers were aware that Mr L was expecting his pension to come into payment on 12 June (3 days later) was a very poor decision given the past issues with the post and Mercer confirming that Mr L would be contacted by email.

Given the history of this case and the fact that there was an ongoing complaint failure to seek to contact Mr L between 9th and 12 June in my view amounts to maladministration by Mercer. Failure to do so demonstrates a lack of any consideration to the position Mr L was likely to be in when the lump sum did not arrive as promised on his 60th birthday. This was a "car crash" waiting happen and it duly did with the consequence it exposed Mr L to significant stress on his 60th birthday.

Events relating to reinstatement of Mr L's pension on 28th September

The decision to reinstate Mr L's early retirement pension on 28th September having taken legal advice was also in my view the correct decision.

For the reasons already mentioned I do not consider that the fact that the Trustee did not specifically consider Mr L's position at the emergency meeting to consider the implications of Flybe entering into administration in itself amounted to maladministration. The Trustee then did reconsider the issue following receipt of his further IDRPs complaint and reversed the decision on 28 September.

I also consider that the Scheme Actuary/Mercer administrative team should have checked with the Trustee following the emergency Trustee meeting that the decision definitely applied to Mr L given that the Trustee had previously approved his early retirement, Mr L had completed all the necessary paperwork and Mr L had been told his pension would be paid. If Mercer had contacted the Trustee I am satisfied they would have taken specific legal advice earlier and the issue would have been resolved before 28 September. This potentially delayed revisiting the decision by 3 months. I am satisfied that failure to check with the Trustee amounted to maladministration.

I also consider that as a matter of law the Trustee had no power to withdraw the consent to Mr L taking early retirement with effect from 20 April once he had completed the necessary paperwork. As noted previously this does not in itself amount to maladministration by the Trustee for the reasons set out previously. Mr L is however entitled in my view as a matter of law to be put in the position he would have been in if the Trustee had paid the early retirement pension from 20 April 2020.

Mr L has already been paid the difference between the amount of lump sum paid and the amount that should have been paid if early retirement had been granted. To the extent that the withdrawal of Mr L's early retirement option amounted to breach of law any loss sustained has been addressed other than the fact that there was a several month delay in the payment of these amounts. I consider that, in the circumstances, a payment of interest is appropriate.

Immediately following the Trustee decision to reinstate the early retirement pension Mercer were instructed to calculate and pay Mr L the extra lump sum and pension in the period from 20 April to the date the arrears were paid.

I have also not seen any evidence that Mercers took any steps to action this instruction given to Mercer on 28 September until Mr L contacted the Trustee Chair on 21 October (over 3 weeks later). The emails from the Trustee Chair then seem to have resulted in Mercer implementing the instruction. Mercer also confirmed to the Trustee chair that they would contact Mr L directly.

On the evidence I have Mercer would appear to have not to take any steps to implement the instruction from the Trustee on 28 September until a month later and then only after an intervention by the Trustee chair. This in my view amounted to maladministration.

Conclusion on whether Mr L been treated with utter contempt by the Trustee and Mercers?

This then brings us back to the question whether Mr L has been treated with "utter contempt" by the Trustee and Mercer. Having considered the timeline and email exchanges in detail I do not consider that Mr L has been treated with utter contempt by either the Trustee or, for that matter, Mercers.

I accept the Trustee's and Mercer's submissions that the Trustees and Mercers were having to deal with a difficult fast moving situation which necessitated revisiting a number of decisions

which due to extremely unfortunate timing impacted particularly on Mr L and necessitating revisiting and recalculating his benefits on more than one occasion.

For the reasons discussed above I do however consider that:

- (1) there were a number of instances of maladministration in implementing the Trustee's decisions during this difficult period; and
- (2) the decision not to pay Mr L's benefits on his early retirement benefit was in breach of law. However, apart from the delay in paying the arrears of lump sum and pension Mr L has been already compensated for this.

Level of Maladministration Award

There is various case law which confirms, in relation to the UK Ombudsman's jurisdiction, that the UK Ombudsman has power to make a reasonable award for non-financial injustice (a distress and inconvenience award. In 1999 the case of *City and County of Swansea v Johnson* [1999] 1 All ER 863 the judge indicated that an award of £1000 other cases was the maximum amount the Ombudsman should award other than in exceptional cases More recent cases in particular the decisions in *Baugniet v Capita (Teachers Pension Scheme)* [2017] EWHC 501 and *Smith v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 2545 (Ch) have reconsidered the upper limit of the award. In *Smith v Sheffield Hospitals* an award of £500 was increased to £2750 on appeal. The cases confirm that in determining the level of award the Pensions Ombudsman should have regard, among other things, to:

- (a) The number of instances of maladministration;
- (b) The period over which the distress and inconvenience occurred; and
- (c) the level of distress and inconvenience.

Other UK cases confirm that I should not be robbing "Peter to pay Paul" so if there are limited assets to pay a non-financial injustice award where for example, like this case, the scheme is in insolvent wind up. Also there needs to be a causal connection between the maladministration and the non-financial injustice (distress and inconvenience) – the distress and inconvenience sustained must be as a consequence of the maladministration.⁶ In the current case during a wind up members such as Mr L would have suffered a significant level of distress regardless of whether there had been administrative failures in implementing the Trustee decisions by Mercer and I need to discount this in determining any award.

Following the *Baugniet* and *Smith v Sheffield Hospitals* cases the UK Pensions Ombudsman updated his distress and inconvenience guidance and considered what non-financial injustice was. This is available on the UK Ombudsman's website. It includes the following text

“What is non-financial injustice?”

⁶ *Westminster CC v Haywood* [1996] Ch 377 at 392E and *Miller v Stapleton* [1996] 2 All ER 449 at 466

“Inconvenience” or “time and trouble” suffered by the applicant. This is the time and effort spent by the applicant in relation to the maladministration and in having to pursue the complaint. This includes needing to go through a complaints process when the maladministration was both avoidable and identifiable at an earlier stage.

“Distress” suffered by the applicant. It could for example, be concern, anxiety, anger disappointment, embarrassment or loss of expectation that the applicant may experience

Distress can vary from mild irritation to (exceptionally) anxiety that requires medical treatment. The non-financial injustice suffered must be caused directly by the maladministration. This is financial loss arising directly or indirectly from the maladministration (including legal or professional expenses incurred in pursuing the complaint because of maladministration).

The guidance goes onto consider the appropriate size of the award.

“How much might an award be?”

We always take account of the individual circumstances of the case. Similar complaints should, however, result in consistent and broadly comparable awards. Not all maladministration inevitably results in an award for non-financial injustice.

Nominal	Significant	Serious	Severe	Exceptional
None	£500	£1000	£2000	More than £2000

Nominal

If the non-financial injustice is nominal (this is not significant) then it is unlikely that any award will be made. It might be that we will simply make a recommendation that the respondent offers the applicant a formal apology. The applicant may look for vindication or a public acknowledgement that something has gone wrong for which the respondent should be sorry.

Significant

If the non-financial is significant, then in line with industry practice, our usual starting point is £500. We will not look to increase this lower limit, because it was reviewed and increased to £500 in July 2015, which took account of inflation and other factors.

Serious and Severe

Following the recent case law referred to above and a review of our current policy more generally, we have decided to increase the upper limit for non-exceptional awards (that is severe) to £2000 (so satisfactorily demarcating between serious and severe awards)

Complaints do come to us, albeit rarely, where exceptional distress or inconvenience awards have been suffered by the applicant. So for example, Lamben (74315/3) and Foster (82418/1) where awards of £5000 and £4000 respectively were made for non-financial injustice, or more recently, Mrs R (PO 18157) where £3000 was awarded.

In determining the level of an award for non-financial injustice I generally adopt a similar approach to the UK Ombudsman as the guidance effectively extracts the principles from the underlying case-law. I however must consider each case individually on its facts and as a matter of law cannot fetter my discretion about the size of any award. In practice I may take a more bespoke approach to the UK Ombudsman as I have far fewer cases to determine.

In the current case given the number of instances of maladministration and the level of distress and inconvenience sustained by Mr L during this period (in particular the fact his 60th birthday was completely ruined by the failure to warn him in advance that the lump sum would not be paid) I consider that a financial award of £1500 is appropriate. In the UK ombudsman's terminology I consider that an award between serious and severe, having regard to the relevant guidance from the UK courts which would be persuasive authority if this issue was appealed to the Manx High Court. I did consider awarding a higher award (possibly even above £2000) but I also need to recognise that a lot of distress and inconvenience was a result of the administration of Flybe and the insolvent wind up of the Scheme and not due to maladministration by Mercer.

Directions

I direct that within 21 days of issue of this determination Mercer pay Mr L £1500 for non-financial injustice; and

I also direct that within 28 days of the issue of this determination:

- (1) the Trustee procures that a calculation is carried out of the simple interest (the Interest Sum) which would be due on the arrears of lump sum and pension which were eventually paid on the assumption that the lump sum should have been paid on 20 April 2020 and the pension instalments due between 20 April 2020 and 6 November 2020 had been paid on what would have been the due dates using the applicable Bank of England base rate from time to time; and
- (2) pay an amount equal to the Interest Sum to Mr L.

Ian Greenstreet

Pensions Ombudsman for the Isle of Man

5th July 2021

Appendix Extracts from Scheme Rules

1.5 Applicable law

The law of the Isle of Man applies to this Deed and to the Scheme and its administration.

Definitions

“Applicable Legislation” means such legislation or regulatory requirements as apply to Members in respect of benefits accrued as an IOM Member or a UK Member, as the case may be, and shall include without limitation, any relevant Act of Tynwald, Act of Parliament, regulations made under such Acts, and any relevant limitations or requirements imposed by any relevant regulatory authority (including for the avoidance of doubt, any relevant revenue authority).

“IOM Member” means a Member who is resident in the Isle of Man for tax purposes and Service and benefit accrual as an IOM Member shall be construed accordingly.

“UK Member” means a Member who is resident in the UK for tax purposes and Service and benefit accrual as a UK Member shall be construed accordingly

Rule 4.3 – Calculation and payment of Deferred Benefits

4.3.1 Deferred Benefits payable to a Member shall be a pension calculated in accordance with Rule 3.1 (Pension for an Active Member at Normal Retirement Date) and a lump sum calculated in accordance with Rule 3.6 (Lump sum benefit) but based on the Member’s Pensionable Service and Final Pensionable Salary at the date of leaving Pensionable Service.

4.3.2 Subject to Rule 4.4 (Early payment of Deferred Benefits) and Rule 4.5 (Late payment of Deferred Benefits) and Appendix 2 (GMP Rules) Deferred Benefits shall come into payment when the Member reaches Normal Retirement Date.

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4.4 Early Payment of Deferred Benefits

4.4.1 A Member entitled to Deferred Benefits who has reached Minimum Pension Age may, if the Trustee agree, receive early payment of his Deferred Benefits.

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TERMINATION AND WIND UP

10.2.1 The Scheme shall be terminated on the earlier of:

(a).....;

(b).....;

(c) the decision by the Trustees to terminate the Scheme at any time during the Insolvency of the Principal Employer or if the Principal Employer ceases to be in business;

(d)...

(e)

.....

10.2.6 On termination of the Scheme and prior to the completion of the winding up, the Trustees must comply with any relevant provisions of Sections 73A to 73B of the Pensions Act 1995.

[Ombudsman Note as a consequence of the Applicable Law definition the reference to Sections 73A and 73B of the Pensions Act 1995 will apply to both the UK Pensions Acts 1995 and the Pensions Act 1995 as applied to the IoM by Tynwald. The wind up priority orders are different. Mr L is a UK member.]