Final Determination – Deputy Pensions Ombudsman Isle of Man

Applicant – Mr R

Respondent – Public Sector Pensions Authority (**PSPA**)

Isle of Man Government Unified Scheme 2011 (Unified Scheme)

Final Determination – Mr R complaint against PSPA Re Unified Scheme – Firefighters' Section

1. Complaint Summary

1.1 Mr R has complained (the "**Complaint**") that he is entitled to a refund of contributions (with interest) he paid to the Isle of Man Fireman's Pension Scheme 1980 (the **1980 Scheme**) and the Unified Scheme (Firefighters' Section) after he completed 30 years of pensionable service on 6 December 2010 in the same manner as the refunds of contributions which have been paid to UK firefighters with more than 30 years' service in the analogous UK firefighters' scheme (defined as the **UK 1992 Scheme** at 3.3.3 below). The complaint is made against the PSPA in its capacity as manager and administrator of the Unified Scheme.

1.2 Mr R has asked me to investigate and determine the following issues which are all connected to his primary Complaint:

1.2.1 Is it correct as a matter of law, as alleged by the PSPA, that the Unified Scheme is not required to reimburse the contributions Mr R paid once he had 30 years of benefit accrual in the 1980 Scheme and Unified Scheme following a change in the provisions of the analogous UK firefighters' scheme to comply with UK age discrimination laws;

1.2.2 Whether there was any breach of age discrimination requirements in the Isle of Man or other legal requirement by the PSPA by requiring contributions to continue once the 30 year accrual limit was reached; and

1.2.3 Whether there has been, as Mr R alleges, a lack of consultation in respect of the transfer to the Unified Scheme from the 1980 Scheme pursuant to the Miscellaneous Public Sector Pension Schemes Bulk Transfer Regulations 2012 in that he was not told about the impact of the break in the analogous link in the '30 year claim' (**18-20 Claim**) and his ability to recover the past contributions if the UK legal claim succeeded.

1.3 During the complaints process the additional issue was raised of whether at the time of the creation of the Unified Scheme the PSPA should have under general public law principles had regard to the existence of the 18-20 Claim (if any) as a relevant factor when considering the value of the benefits to be granted in the Unified Scheme and, if it had considered this issue, it would have come to a different decision on the benefits to be granted.

1.4 The PSPA have argued in their submissions that the Pensions Ombudsman does not have jurisdiction to consider:

1.4.1 the complaint referred to at paragraph 1.2.3 on the basis that the consultations were not conducted by the PSPA in its capacity as manager or administrator of the Unified Scheme but pursuant to its wider statutory obligations; and

1.4.2 The complaint referred to at paragraph 1.3 on the basis it relates to events

which are more than 3 years after the events which are the subject of the complaint and that it would not be reasonable for the Pensions Ombudsman/Deputy Pensions Ombudsman to exercise his residual discretion to extend the period in the circumstances.

2. Summary of Determination on the above issues

2.1 In relation to:

2.1.1 issue 1.2.1, I find as a matter of law there is no requirement under the Unified Scheme (or the 1980 Scheme while it still existed) to reimburse the contributions Mr R paid once he had 30 years pensionable service and reached the 2/3rds maximum pension limit. This is as a legal consequence of the "by analogy link" being broken on 1 April 2012 before the analogous provisions requiring repayment of the contributions were brought into force in the relevant order in the UK.

2.1.2 issue 1.2.2, I find as a matter of law that there is no breach of age discrimination or other legal requirement by the PSPA by requiring contributions to continue once the 30 year accrual limit was reached – the rules of the 1980 Scheme and the Unified Scheme both required contributions to continue during the relevant period of membership of those schemes;

2.1.3 issues 1.2.3 and 1.4.1, I have no jurisdiction to make a determination on whether the 18-20 Claim should have been dealt with in the consultation process. The consultation was not issued by the PSPA as manager but pursuant to its wider statutory functions;

2.1.4 issues 1.4.2 and 1.3, I find as a matter of law that the complaint is out of time and it is not reasonable to use my powers to extend the normal 3 year limitation period.

2.2 Accordingly, I do not uphold Mr R's Complaint.

3. Background

3.1 Mr R was a member of the 1980 Scheme and reached 30 years' service on 6 December 2010. Mr R continued to make 11% employee contributions under the 1980 Scheme until he was bulk transferred to the Unified Scheme on 1 April 2012. Mr R then continued to make 11% employee contributions under the Unified Scheme until his retirement on 16 February 2013.

3.2 To understand the Complaint, it is necessary to first consider what was going on in the analogous UK firefighters' scheme and then to consider the complicated interaction between the IoM and UK firefighters' pension schemes.

3.3 Looking first at the UK:

3.3.1 The 1980 Scheme gave the IoM firefighters the same benefits as UK firefighters and did so by a mechanism of analogous benefits. In particular the 1980 Scheme provided that "members of the [IoM] Fire Brigades shall be pensionable by analogy with the provisions of the "Firemen's Pension Schemes Orders". The "Firemen's Pension Scheme Orders" included "Firemen's Pension Scheme Orders of Parliament mentioned in the Schedule and any Orders of Parliament amending or consolidating those Orders."

3.3.2 Although the 1980 Scheme applies Firemen Pension Scheme Orders with retrospective effect as from 1 April 1965, the main UK Order to which the

1980 Scheme relates for the purposes of the Complaint is The Firemen's Pension Scheme Order 1973 (the **UK 1973 Order**) that established The Firemen's Pension Scheme 1973 (the **UK 1973 Scheme**).

3.3.3 The UK 1973 Scheme was then consolidated and replaced by The Firemen's Pension Scheme 1992 (the **UK 1992 Order**) under the Firemen's Pension Scheme 1992 (the **UK 1992 Scheme**). Therefore, IoM firemen were pensionable as per the UK 1992 Scheme (by analogy). Accordingly while this analogous link existed any changes to the benefits in the UK 1992 Scheme would be applied in the 1980 Scheme by reference to any UK orders amending the UK 1992 Scheme. It is therefore necessary to consider developments relating to the UK 1992 Scheme.

3.3.4 In 2006, the UK closed the UK 1992 Scheme to new joiners and set up a new separate scheme. The New Firemen's Pension Scheme (England) (the **UK 2006 Scheme**), under the Firefighters' Pension Scheme (England) Order 2006 (the **UK 2006 Order**). The PSPA have noted that the UK 2006 Scheme did not apply by analogy in the IoM as it was a distinct new scheme and did not amend or consolidate the UK 1992 Scheme. While this may well be correct as a matter of law nothing turns on it in relation to the Complaint.

3.3.5 There had been complaints by the UK firefighters following the introduction of the age discrimination requirements in the UK with effect from 1 December 2006 that having a 30 year accrual cap on pensionable service **and** continuing to require employee contributions after the 30 years cap was reached was in breach of UK age discrimination requirements (the "**18-20 Claim**"). UK age discrimination requirements came into force with effect from 1 December 2006 to give effect to an EU directive introducing age discrimination requirements for EU member states (the IoM is not part of the EU). UK age discrimination requirements do have various detailed exceptions (which the EU directive permits if they can be objectively justified on the grounds that they are a proportionate means of achieving a legitimate aim) including one permitting a maximum period of accrual of benefits or a cap on total levels of benefits. So it was not the existence of the cap as such which was potentially in breach of age discrimination requirements (as caps are permitted) but the fact that there was a cap **and** a requirement to continue employee contributions once the 30 year pensionable service was reached. If, however, the UK Government had been able to successfully argue that the continued contributions could be objectively justified (i.e. it was a proportionate means of achieving a legitimate aim) once the cap was reached, the requirement to continue contributions would not have been a breach). As the UK Government did not originally accept the validity of the 18-20 Claim, I assume that this is likely to have been the basis on which the claim was contested but have no direct knowledge of the detail of the original defence. The Firebrigades 2011 Circular 2011/18 (26 June 2011) that Mr R has kindly supplied does seem to indicate that as early as 2011 the UK Government may have effectively recognised that the 30 year rule was potentially in breach of age discrimination and was considering whether to amend the employee contribution rule. However, it does then seem to have taken the UK Government almost 5 years to amend the relevant regulations.

3.3.6 In 2016, following complaints by firefighters in the UK, the UK government eventually accepted, without a court ruling on this issue that capping pensionable service at 30 years but continuing to require UK members to contribute beyond 30 years pensionable service was in breach of UK age

discrimination requirements. Up to 2016 however the rules of the UK 1992 Scheme still required employee contributions to be made at 11% after reaching 30 years' pensionable service.

3.3.7 The UK Government eventually passed The Firefighter's Pension Scheme (Amendment and Transitional Provisions) (England) Order 2016 (2016/876) (the **UK 2016 Regulations**) to amend the rules of the UK 1992 Scheme with effect from 1 December 2006. The Regulation was made on 6 September 2016, laid 8 September 2016 and came into force 30 September 2016. The Order provided that:

3.3.7.1 Rule G2 of the UK 1992 Scheme be amended so that UK firefighters are no longer obliged to pay contributions where a firefighter has accrued 30 years' service and is below the age of 50 (article 2(2)); and

3.3.7.2 Where such contributions have been paid between 1 December 2006 and the date the UK 2016 Regulations come into effect (30 September 2016), such contributions shall be repaid taking account of both interest and an uplift reflecting applicable tax charges (article 2(3)).

3.3.8 As the UK 2016 Regulations are an amendment to the UK 1992 Scheme then, in the absence of any amendment to or revocation of the 1980 Scheme by analogy link, such UK 1992 Scheme amendment would have applied by analogy to the 1980 Scheme.

3.4 Meanwhile in the IoM the following events occurred:

3.4.1 The Isle of Man Government began a consultation (through a steering committee on behalf of the Council of Ministers) about the future of the various IoM public sector schemes in 2011. Many of these schemes operated by analogy with the equivalent UK public sector schemes. As the UK Government was considering some quite radical changes to the analogous UK Government public sector schemes the IoM Government needed to consider whether it was still appropriate for these changes to feed through automatically to the equivalent IoM public sector schemes. The Isle of Man Government, I understand, wanted to have a financially sustainable scheme going forward that was suitable for Isle of Man public servants and benefits that were no longer linked to UK public servants' benefits so that any changes to UK public sector schemes would not automatically feed through the IoM public sector employees.

3.4.2 The original consultation on the proposals for the creation of a new Isle of Man Unified Scheme was issued in January 2011 which was to replace a number of public sector schemes with a new single Unified Scheme most of the members of which had a common benefit structure although there were separate sections with differences. At this stage the 1980 Scheme was not included in the former schemes whose members were to be transferred to the Unified Scheme.

3.4.3 The Unified Scheme was established under the Public Sector Pensions Act 2011.

The scheme was approved by Tynwald in June 2011. The Public Sector Pensions Act 2011 also established the PSPA by an appointed day order on 17 January 2012.

3.4.4 The Isle of Man Government Unified Scheme (Amendment) Scheme 2012

(which included the 1980 firemen's scheme for the first time) was approved by Tynwald on 17 April 2012 and came into force with effect from 1 April 2012. The inclusion of the 1980 Scheme into the Unified Scheme was not I understand popular amongst the firefighters and Mr R considers that the consultation about the changes was not well conducted as he alleges firefighters first found out about it as a result of an announcement in the press.

3.4.5 The members of the 1980 Scheme then stopped building up benefits in the 1980 Scheme with effect from 31 March 2012 and started building up benefits under the new Unified Scheme with effect from 1 April 2012. There was a special higher accrual rate for firemen in the Firefighters Section (2.23%) going forward but the overall benefit structure no longer corresponded to or was analogous to that of the 1980 Scheme. That said the firefighters were granted a more favourable treatment in certain areas than certain other categories of members. There is no provision in the Unified Scheme, like the 1980 Scheme, requiring analogous benefits. The Firefighters Section of the Unified Scheme, however, still provided for employee contributions of 11% to continue (like the 1980 Scheme) while the member is in pensionable service and for a maximum pension of 2/3rds pensionable salary to be payable (this is equivalent to a maximum benefit limit of 30 years (i.e. 40/60ths or 2/3rds)). Former members of the 1980 Scheme were granted a past service credit in the Unified Scheme in respect of the past service benefits transferred which was individually notified to them. Former members of the Firefighters scheme, such as Mr R, I understand still retained the right to take their pension unreduced at the age of 50 which is a very valuable benefit the capital value of which is very significant. Under the Unified Scheme rules Mr R could, however, have opted out of active membership once he had reached the 2/3rds maximum pension limit. In these circumstances he would then only be entitled to a deferred pension calculated by reference to his pensionable service and pensionable salary at the date of opting out and then revalued until it came into payment. However the deferred pension would not have come into payment without reduction until age 60 and if he had taken it earlier would have been reduced for early payment. If Mr R had opted out in order to stop paying the employee contributions the value of his pension would therefore have been significantly less than remaining an active member and paying the contributions to age 50. It therefore made financial sense to continue to pay the employee contributions and remain an active member of the Unified Scheme.

3.4.6 The past service benefits of the 1980 Scheme were transferred to the Unified Scheme pursuant to the Miscellaneous Public Sector Pension Schemes Bulk Transfer Regulations 2012 (the **Bulk Transfer Regulations 2012**) with effect from 31 March 2012. There was a bulk transfer without consent of past member benefits although members could opt out and become deferred members. An actuarial certificate was obtained confirming that the past service benefits granted in the Unified Scheme were broadly equivalent in value to the benefits in the 1980 Scheme. Given that certain members, like Mr R, would potentially be caught by the 2/3ds pension cap the former 1980 Scheme members were given the right to take a higher proportion of their pension as tax free lump sum to ensure that the value equivalence test could be met in terms of benefits granted in the Unified Scheme. I will consider the legal effect of the Bulk Transfer Regulations 2012 further below.

3.4.7 The Public Sector Pension Schemes (Revocation) Scheme 2011 approved by Tynwald on 8 March 2014 then revoked the various Isle of Man schemes including the 1980 Scheme with effect from 31 March 2013. There was however a saving provision under article 4(2) of the Revocation Scheme which provided as follows:

> "*The Schemes listed in paragraph (1) shall continue to have effect for former pensioner members to the extent necessary for the purposes of administration of any matter falling under those schemes which occurred prior to the Scheme being revoked*"

4. Was there a breach of Age Discrimination Requirements in IoM?

4.1 Mr R has argued that the failure to refund the contributions made by him once he had built up 30 years pensionable service (a 2/3ds pension) was in breach of age discrimination requirements or otherwise in breach of non-discrimination law in the IoM.

4.2 There were no age discrimination requirements in the relevant period in the Isle of Man. Age discrimination requirements are now being introduced in the IoM but are not yet in force.

4.3 I therefore do not uphold Mr R's complaint that requiring him to continue to pay contributions after he reached the 2/3rds maximum pension cap was unlawful in the IoM by virtue of age discrimination legislation (as there was none at the time) or to my knowledge any other applicable statutory provision.

4.4 Both the provisions of the 1980 Scheme and the Unified Scheme did require these contributions to be made during the relevant period and failure to deduct them would have been in breach of the rules. There was therefore no breach of the provisions of the 1980 Scheme or the Unified Scheme by requiring the contributions to be paid.

5. Did the creation of the Unified Scheme and the transfer of Mr R's past service benefits break the by analogy link?

5.1 The next issue I need to consider to determine the complaint is whether the creation of the Unified Scheme and the transfer of Mr R's past service benefits broke the 'by analogy' link. It is helpful to break down this issue into three sub-issues:

5.1.1 First, was the by analogy link broken in respect of future benefit accrual once Mr R started building up benefits in the Unified Scheme?;

5.1.2 Second, was the by analogy link broken in respect of past service benefits, following the transfer of his benefits in the 1980 Scheme to the Unified Scheme?; and

5.1.3 Third, do the Revocation Scheme saving provisions preserve Mr R's claim to be entitled to a refund of contributions?

5.2 The by analogy link must have been broken in respect of future service benefit accrual and future contributions with effect from 1 April 2012. This is the consequence of the fact that with effect from 1 April 2012 former members of the 1980 Scheme started accruing future service benefits in the Unified Scheme (on a different benefit structure) and, unlike the 1980 Scheme, there is no requirement under the Unified Scheme Rules for a by analogy link to apply. Mr R's claim for a refund of any employee contributions on and after 1 April 2012 on the basis of a

continuing by analogy link must necessarily fail.

5.3 The by analogy link must (subject to a consideration of the impact of the Revocation Scheme) also have been broken in respect of Mr R's past service benefits when they were transferred to the Unified Scheme and a past service credit was granted in relation to the transferred benefits from the 1980 Scheme (identical benefits were not granted to actives preserving the by analogy link). No mention was made in the documentation issued to members at the time of any preservation of the 18-20 Claim.

5.4 The legal basis by which the transfer was achieved and the discharge granted is as follows:

5.4.1 Under the terms of the Bulk Transfer Regulations 2012 a bulk transfer power was inserted into each of the Transferring Schemes immediately before the transfer took place enabling the PSPA to make a bulk transfer in respect of a Transferring Beneficiary or Beneficiaries of all of the Transferring Scheme benefits to the Unified Scheme by way of bulk transfer without the consent of the Transferring Scheme Beneficiaries.

5.4.2 The bulk transfer rule inserted into each of the Transferring Schemes provided that :

"*Bulk Transfer Rule*

The PSPA may in respect of a Transferring Beneficiary or Group of Transferring Beneficiaries transfer all of the Transferring Scheme Benefits from these Regulations to the [Unified Scheme] by way of a bulk transfer ("Bulk Transfer")

The consent of a Transferring Beneficiary shall not be required for the [PSPA] to exercise its powers under this Rule.

Where a Bulk Transfer is made to the [Unified Scheme] under this Rule

(a) The Transferring Beneficiary in relation to whom the Bulk Transfer relates shall immediately:

(i) cease to be entitled to any benefits (whether actual or contingent) under this Scheme; and

(ii) cease to be a member or beneficiary of this Scheme; and

(b) *To the extent applicable the Employers, managers and Public Sector Pensions Authority shall be discharged from any and all liability in respect of any Transferring Beneficiary relating to this Scheme*."

5.4.3 Accordingly, following the bulk transfer a Transferring Beneficiary (including Mr R) ceases to be entitled to any benefits under the 1980 Scheme and the PSPA is discharged from any liability in respect of any Transferring Beneficiary relating to the 1980 Scheme. The by analogy link in the 1980 Scheme therefore has nothing to bite upon once the bulk transfer has occurred – the 1980 Scheme is effectively an empty legal shell.

5.4.4 The Bulk Transfer Regulations then went on to provide that:

"(2) Pursuant to the amendment of each Transferring Scheme under Schedule to these Regulations (which for the avoidance of doubt shall be

deemed to take effect immediately prior to this provision) , the PSPA then exercises its respective powers under the "Bulk Transfer Rule" of each amended Transferring Schemes (as therein defined) to the [Unified Scheme] to accept, a bulk transfer of all the liabilities owed in respect of the Transferring Beneficiaries from the Transferring Schemes to the [Unified Scheme]. The exercise of these powers and resultant bulk transfer shall take effect 1 April 2012.

(3) In accordance with the respective provisions of the Bulk Transfer Rules of the Transferring Schemes and Rule 64.5 of the Isle of Man Government Unified Scheme 2011, the bulk transfer under (2) shall effect a discharge of any and all the liabilities owed to or in respect of the Transferring Beneficiaries under the Transferring Schemes.

(4) In giving effect to the bulk transfer under (2) and subject to the discharge of liabilities under (3), the PSPA shall:

(a) Use its powers under Rule 64 of [Unified Scheme] to provide benefits under the [Unified Scheme] in respect of the liabilities of the Transferring Beneficiaries so transferred]; and

(b) The benefits so provided in the [Unified Scheme] are as determined as appropriate by the Public Sector Pensions Authority in accordance with Rule 64.6 of the Unified Scheme [in consultation with the Scheme Actuary] and as notified in accordance with Rule 64.7 thereof.

(5) …;

(6) Following a bulk transfer the PSPA may, at any time [using its powers under the PSPA 2011] issue a notice in writing to formally revoke and withdraw any or all of the Transferring Schemes, and all associated governing documentation, including the orders referred to in Schedule 3 establishing the Schemes."

5.4.5 The Bulk Transfer Regulations do not set out the benefits to be provided in the Unified Scheme but just provide for them to be determined in accordance with Rule 64.6 and notified to the member in accordance with Rule 64.7 The Unified Scheme Rules 64 (as amended up to the date of transfer) provide as follows:

"64.1 Subject to Rule 64.4, the Public Sector Pensions Authority may accept a transfer of all superannuation benefits accrued under another scheme made or deemed to be made by the Public Sector Pensions Authority under the Public Sector Pensions Act 2011 (the "Transferring Scheme") and transferred under the rules of that scheme. Where the Public Sector Pensions Authority accepts such a transfer it shall be on terms that the Member shall then be entitled to such superannuation benefits under the Scheme calculated on a basis as to be determined by the Public Sector Pensions Authority after taking the advice of the Scheme Actuary.

64.2 In these Rules, "Transfer Member" means a member or a beneficiary of a Transfer Scheme affected by a Bulk Transfer.

64.3 In these Rules, "Bulk Transfer" means the exercise of Rule 64.1 to transfer the superannuation benefits of the Transfer Members

of a Transferring Scheme from the Transferring Scheme to this Scheme.

64.4 *The PSPA may, with the consent of Tynwald, give effect to a Bulk Transfer.*

64.5 *As from the effective date of a Bulk Transfer, liabilities accrued in respect of a Transfer Member under a Transferring Scheme cease to be due under that scheme and the Transfer Member shall be superannuated in accordance with the terms of this Scheme.*

64.6 *The superannuation benefits each Transfer Member is to be entitled to under this Scheme pursuant to a Bulk Transfer are to be determined by the PSPA in accordance with guidance, tables and*

other relevant factors as determined by the Scheme Actuary for the purpose.

64.7 *The PSPA must notify each Transfer Member of the superannuation benefits the Transfer Member is to be entitled to under this Scheme. The notice must include relevant details as to the nature of the Transferring Member's participation in the Scheme and the Section of this Scheme to which the Transferring Member is to participate.*

64.8 *A Bulk Transfer does not require:*

(a) *The consent of the Transfer Members affected by the Bulk Transfer; nor*

(b) *A transfer value payment to be paid by the Transferring Scheme.*

64.9 *On a Bulk Transfer, this Scheme shall take effect in respect of Transfer Members, subject to such modifications as the PSPA considers necessary to give effect to the Bulk Transfer.*

64.10 *Following a Bulk Transfer the provisions set out in the Schedule to these Rules shall apply in respect of the Transfer Members affected by the Bulk Transfer who become Active Members of the Scheme and to the extent that a provision of the Schedule to these Rules is inconsistent with a provision of these Rules the provision of the Schedule applies."*

5.4.6 The combined effect of the bulk transfers made under the Bulk Transfer Regulations and the Unified Scheme Rules was therefore to:

5.4.6.1 Transfer all the liabilities owed in respect of Transferring Beneficiaries (including any liabilities in respect of Mr R under the 1980 Scheme) to the Unified Scheme;

5.4.6.2 To give the PSPA power under the Unified Scheme (which they are required to exercise) to grant superannuation benefits under the Unified Scheme to the Transferring Scheme beneficiaries (including Mr R) who transferred in the place of the transferred liabilities as determined by the PSPA after taking the advice of

the Scheme Actuary; and

5.4.6.3 To discharge the Transferring Schemes and the PSPA from any further liability in relation to the Transferring Beneficiaries under those Schemes.

5.4.7 The materials issued to Mr R in respect of the past service benefits granted in the Unified Scheme made no mention of the treatment of any claim to be entitled to a repayment of contributions if the UK firefighters' 18-20 Claim was successful. In other words the grant of the benefits payable to Mr R under the Unified Scheme did not include anything to reflect the possibility that the 18-20 Claim was successful or the value (if any) of such a claim or contingent claim.

5.5 The PSPA did not consider the effect of the Bulk Transfer provisions on the by analogous link in its original submission in response to Mr R's complaint but argued instead that the effect of the later Revocation Scheme was to break the by analogy link in the 1980 Scheme as from the effective date of the Revocation Scheme the 1980 Scheme ceased to exist. For the reason set out above in my view the by analogy link has already been broken by the date the Revocation Scheme took effect by virtue of the provisions included in the Bulk Transfer Regulations 2012 (see above) which meant that to the extent that the by analogy link still existed in the 1980 Scheme it had nothing to bite upon as all the liabilities of the members had transferred.

5.6 The saving provisions included in the Revocation Scheme accordingly have no relevance to Mr R's ability to reclaim the employee contributions. They are in any event of very limited scope and only relate to administration of any matter relating to former pensioner members (as defined in the Revocation Scheme).

5.7 Mr R also did not fall within the definition of "former pensioner member" under the Revocation Scheme as Mr R was not a pensioner under the 1980 Scheme on 31 March 2013 but had joined the Unified Scheme as an active member with effect from 1 April 2012 and no longer had any benefits in the 1980 Scheme.

6 Was there a pre-existing liability in the 1980 Scheme to refund the contributions in relation to members paid once they had built up 30 years pensionable service?

6.1. A further difficult legal issue was identified during submissions from both parties of whether the 18-20 Claim as already a pre-existing liability at the date of the transfer in 2012 or merely a contingent claim. This necessitates some quite detailed legal analysis.

6.2 The way the age discrimination requirements were introduced in the UK under the original Employment Equality (Age) Regulations 2006 (Age Regulations) was to insert a "non- discrimination" rule into all UK occupational pension schemes (including potentially public sector schemes established by statute). These provisions were later repealed and replaced by the more general non-discrimination requirements in the UK Equality Act 2010 sections 61. The Equality Act (Age Exceptions for Pension Schemes) Order 2010 were then passed in the UK which contain similar exceptions to the earlier Age Regulations.

6.3 Under section 61 of the UK Equality Act 2010 an occupational pension scheme must be taken to include a non-discrimination rule to which managers are subject. The definition of occupational pension scheme in the UK is capable of including a public

service schemes set up under statute. The general exemption under Part 14 of the UK Equality Act 2010 which applies to many protected characteristics under the Equality Act where the act or omission is in compliance with statute (as set out in Schedule 22 to the Equality Act 2010 and which includes subordinate legislation) has never been applied to the protected characteristic of age (see article 14(14) of The Equality Act 2010 (Commencement No 4, Savings, Consequential and Incidental Provisions and Revocation) Order 2010. It therefore follows (perhaps surprisingly) that a non-discrimination rule could apply directly to a statutory UK Scheme in relation to discrimination on the grounds of age before a rule amendment was made by statutory instrument.

6.4 Under section 62 of the Equality Act there is a further provision enabling trustee or managers of an occupational pension scheme to make non-discrimination alterations to the scheme which applies where the trustees have power to make alterations but the procedure for making them is unduly complex or protracted or involves obtaining consents which cannot be obtained or which can only be obtained with undue difficulty or delay. At first sight it is difficult to reconcile sections 61 and 62 as if the rules are overridden already by a non- discrimination rule there would be no need to amend. It is however possible to reconcile sections 61 and 62 if section 62 is designed to record on the face of the trust deed or scheme rules the manner in which it needs to be administered to comply with age discrimination requirements to reflect the underlying non-discrimination rule.

6.5 It is therefore arguable that, as rules of the UK 1992 Scheme were overridden by the non- discrimination rule to which the UK 1992 Scheme was subject under the Equality Act 2010 (albeit there was a dispute with the UK Government about whether there was such a breach at the time) the provisions in the UK 1992 Scheme provisions had already been amended and the 1980 Scheme should also have been changed at the time under the by analogy provision to remove the requirement to make contributions. The complication is of course that the breach of the by analogy requirement was not apparent to the PSPA (or the members) on the face of the UK 1992 Rules and there was no apparent breach of the by analogy link in the 1980 Scheme.

6.6 The PSPA have submitted that the above legal analysis is not correct on a number of grounds including advancing an argument that where "ambulatory measures" are adopted by Tynwald

(i.e. where Isle of Man laws are framed to keep step with specified orders of UK Parliament),

these will be interpreted by the Isle of Man courts in a literal and limited fashion because in this situation Tynwald will seek to protect its own sovereignty. Tynwald does not readily give up its own statutory autonomy and/or seek to impose upon the laws of the Isle of Man the laws of another jurisdiction unless very clear and considered direction is given in that regard (and such direction is founded in clear statutory powers). The PSPA argues that it would not be the intention of Tynwald to bind itself, in an extremely open ended way, by any and all of the laws of another jurisdiction. To do so would relinquish Tynwald's sovereignty in a manner that potentially fetters its discretion and removes the parliamentary scrutiny that Tynwald (and/or a statutory body undertaking functions on its behalf) should be applying to the law making process.

6.7 The PSPA also argues that the basis for the 1980 Scheme is of dubious authority as where Tynwald relinquishes autonomy and control over the law making process there should be a clear vires set out in the primary scheme and this vires was not set out in the 1980 Scheme. In effect what one has is a Government Circular that documents an

agreement between the Fire Service Committee of the IOM Local Government Board and the then Finance Board. It was signed by the Chairman of the Civil Service Commission and a signature of the Government Secretary noting the approval of the arrangement by simple resolution of Tynwald. The PSPA notes that as far as Manx law goes the absence of a clear vires under primary legislation to give effect to the analogous link that the 1980 Scheme seeks to establish is troubling.

6.8 I do accept the arguments about the possible invalidity of the 1980 Scheme but agree, however, that if the Isle of Man courts were to consider the scope of the by analogy provision they would interpret the "by analogy" wording narrowly and literally and would not seek to read into it any extra wording to extend its scope.

6.8 As noted by the PSPA under the 1980 Scheme, the Order reads:

"*From the date on which this Scheme comes into operation, members of the Fire Brigades shall be pensionable by analogy with the provisions of the Fireman's Pension Scheme Orders and in relation to persons who become members of the Fire Brigades before that date, such orders shall, subject to an earliest date of 1 April 1965, be deemed to have effect from the dates on which they came into force in England Scotland and Wales*."

6.9 So the basis by which the members of the Fire Brigades should be pensionable in the Isle of Man should be by analogy with the provisions of the Fireman's Pension Scheme Orders, such orders shall be deemed to have effect from the dates on which they came into force in England Scotland and Wales. This would mean that it is the express wording of the orders which determine the by analogy provisions by which the members benefits are pensionable and it is the date that the order came into force in England which is key. The Firefighters' Pension Scheme (Amendment and Transitional Provisions) (England) Order 2016 came into force on 30 September 2016 albeit with retrospective effect from an earlier effective date. On a literal interpretation of the 1980 Scheme the by analogy wording would not apply in the IoM to the 1980 Scheme by virtue of the UK age discrimination override to the rules of the UK 92 Scheme until the order came into force making an express amendment in the UK in 2016 by which stage the by analogy link was broken. The non-discrimination rule override in the UK is therefore not relevant to this issue.

6.10 Accordingly the above analysis does not impact on my earlier conclusion in section 5 of the determination and as at 31 March 2012 there was no obligation in the 1980 Scheme to repay the contributions. As such it did not have any existing capital value on 31 March 2012 as a benefit which the 1980 Scheme was required to provide immediately before the bulk transfer.

7. Consultation– should the PSPA have covered the issue of the 18-20 Claim in its consultation?

7.1 Mr R has argued that the PSPA should as part of the consultation process have raised the issue of what would happen to his entitlement to back employee contributions if the UK litigation in the UK 1992 Scheme succeeded. The PSPA has submitted that I do not have jurisdiction to consider complaints about the consultation process on various grounds including the fact that the consultations were not issued by the PSPA in its capacity as manager but pursuant to its wider functions and in any event the claims were out of time.

7.2 I would agree with the PSPA that the consultation issued by the PSPA in relation to:

7.2.1 the Isle of Man Government Unified Scheme (Amendment) Scheme 2012 (under which the Firefighters' Scheme was added to the schemes to be

transferred to the Unified Scheme with effect from 1 April 2012):

7.2.2 the terms of 2012 Transfer Scheme; and

7.2.3 the terms of the Revocation Scheme;

were all issued pursuant to the PSPA's wider statutory functions and not in its role as manager or administrator of the 1980 or Unified Scheme. It must therefore be correct that I cannot determine whether the PSPA should have consulted on the 18-20 Claim as part of these consultations.

7.3 For other reasons I will however need to consider whether the PSPA had notice of the 18-20 Claim as part of the consultation process or otherwise as this may be relevant to the further issue of whether any claim by Mr R that the PSPA should have considered the existence of the 18-20 Claim in 2012 when determining the value of the benefits granted is out of time (see below).

8. Should the PSPA have had regard to the existence of the 18-20 Claim as a relevant factor when considering the value of the benefits to be granted in the Unified Scheme on the transfer with effect from 1 April 2012? If so is the complaint time barred?

8.1 A further issue which arose during the complaint was whether under public law principles the existence of the 18-20 Claim could potentially be a relevant factor that arguably the PSPA/Actuary should have had regard to (if they had been aware of its existence) when determining the benefits to be granted to Mr R on the bulk transfer taking place under Rule 64 of the Unified Scheme. If the existence of the 18-20 Claim was a relevant factor to which the PSPA should have had regard to and the PSPA would have acted differently if it had taken into account the 18-20 Claim it may (subject to any limitation defence) be open to me under general public law principles to quash the original decision and direct that the PSPA should reconsider afresh the benefits to be granted in respect of Mr R having regard to the existence of the 18-20 Claim.

8.2 Given my conclusion in section 5 of the determination, in 2012 the PSPA was under no obligation to amend the rules of the 1980 Scheme to reflect the existence of the claim at this stage at best as far as the PSPA was concerned there was just a possibility that the UK 92 Scheme Orders would be amended. Accordingly, it does not follow that the existence of the contingent 18-20 Claim would have necessarily had any impact on the benefits granted to Mr R under the Scheme on the transfer taking place under Rule 64 as it had no value at the time. Also if it was too remote it might have been disregarded as a relevant factor. In this connection I note that the PSPA has contacted the Scheme actuary who has confirmed that under the methodology used to calculate the transfer credit granted in respect of Mr R the existence of an actual or contingent 18-20 Claim would not have affected the amount of the pension credit granted. The possibility of the 18-20 Claim succeeding would have to be taken into account in some other way e.g. under Clause 64.9 of the Unified Scheme which might have allowed the PSPA to modify the benefits granted. It is therefore far from clear that if the PSPA/Actuary had been aware of the existence of the contingent 18-20 Claim it would have made any difference to the benefits that would have been granted to Mr R on the transfer taking place. I am not going to have to make a determination of this issue as I have concluded that for other reasons this potential claim is already out of time (see below).

8.3 The PSPA has submitted evidence that the 18-20 Claim was not brought to its attention as part of the consultation process or in any of the employer forums or by Mr

R at the time of the transfer. The PSPA noted in particular that:

8.3.1 Mr R (despite being aware of the existence of the 18-20 Claim in the UK from the sight of various Firebrigade circulars) did not bring the existence of the 18-20 Claim to the attention of the Personnel Officer (prior to 2012) nor the PSPA (on or after 2012) until January 2016;

8.3.2 The 18-20 Claim does not feature in any of the responses to the consultation from the Fire Service, the Airport Fire Service or Unite (or more generally);

8.3.3 The 18-20 Claim was not raised in the employer forums that the Fire Service and Airport Fire Service participated in. The PSPA note that Mr R, as Chief Fire Officer, would have been aware of the conduct of the employer forums and his Deputy participated in them directly;

8.3.4 No evidence of the 18-20 Claim can be found in respect of informal communications between the Personnel/PSPA and the relevant DHA, Fire Service, Airport Fire Service or Unite representatives;

8.3.5 Mr R had at least 4 opportunities to raise his concerns re the 18-20 Claim (a) in December 2010 on attaining 30 years' service (b) in June 2011 following receipt of the Firebrigades 2011 circular (c) in February 2012 upon signing consent to continue employee contributions at 11% under the Unified Scheme and (d) in February 2013 on taking his pension. Mr R was aware of the progress of the claim during this period from Firebrigade circulars.

8.4 The PSPA also notes that Mr R did not flag the 18-20 Claim for the PSPA's attention until his letter of 28 January 2016. The second paragraph of this letter starts: "As you may be aware…" and then goes on to describe the issues being raised by the FBU and APFO with the UK Government with an explanation of how this impacts on Mr R. This implies that Mr R was aware that the PSPA may not be aware of the existence of the 18-20 Claim.

8.5 The PSPA also notes that, Ms K Brondon's response to this letter (dated 1 February 2016) starts "The PSPA were not aware of this challenge [being the challenge of the FBU and APFO]..." and goes on to state the PSPA will need to investigate the matter further and revert back to Mr R.

8.6 I agree with the PSPA that both these letters and subsequent correspondence between the parties suggest that the PSPA's lack of awareness of the 18-20 Claim was not contested by Mr R until recently.

8.7 Mr R alleges that he disclosed the same to officers of the PSPA verbally. The PSPA confirms that none of the three key officers concerned have any recollection of Mr R notifying them or other officers of the PSPA in respect of the 18-20 Claim prior to his 28 January 2016 letter. Furthermore, having spent considerable time going through relevant files, the PSPA state that they have found no record of the 18-20 Claim being flagged in correspondence. It is possible that the evidence of both Mr R and the PSPA is correct. It may well have been that Mr R may have mentioned the existence of the claim verbally in conversation with one of the relevant officers (I am not in a position to form a definitive view on this point either way). However, if this was only done verbally and not followed up in writing I do not consider this to be sufficient notice to the PSPA (as manager) to put them on notice of the issue when determining the past service benefits to be granted on the transfer.

8.8 Mr R has argued that the PSPA would have known by virtue of disclosures that were made to it by the Department of Home Affairs (the DHA) and/or other sources. The

PSPA notes in this regard that:

8.8.1 prior to becoming the scheme manager of the Unified Scheme (i.e. pre-January 2012), it was the DHA that was the scheme manager of the 1980 Scheme;

8.8.2 the PSPA (and, prior to that, the Personnel Office) acted merely as an administrator in respect of the 1980 Scheme and acted upon the DHA's instructions;

8.8.3 the pattern of disclosure (re UK Fire Service circulars and FBU information): the UK Fire Service disclosed information to the IOM Fire Service who disclosed information to the DHA who, as appropriate, disclosed information to the PSPA/Personnel Office. However, the disclosure by the DHA to the PSPA/ Personnel Office was intermittent and turned on whether specific information was relevant to a particular administrative task that the DHA required the PSPA/Personnel Office to address/consider. The PSPA have confirmed that they can find no evidence of any information pertaining to the

18-20 Claim being passed to the PSPA by the DHA or by any other party (Mr R included). While the DHA clearly were sent copies certain of the circulars I do not regard this as sufficient to fix the PSPA with notice of the existence of the 18-20 Claim for the purposes of determining benefits on the transfer in 2012.

8.9 Having regard to all the above evidence I consider that on the balance of probabilities the PSPA (as manager) was not aware (or did not have sufficient notice of) the existence of the 18- 20 claim at the time to put it on notice as manager and administrator of its existence.

8.10 In relation to the limitation point, the limitation period for Ombudsman complaints under regulation 5 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 2006 is generally 3 years from the act or omission which is the subject of the complaint but is extended if in the Ombudsman/Deputy Pensions Ombudsman's opinion the complainant was unaware of the act or omission which is the subject of the complaint or dispute until the earliest date on which the complainant became aware of the act or omission or ought in my opinion reasonably to have been aware of the act or omission which is the subject of the complaint or dispute. The Ombudsman/Deputy Pensions Ombudsman also has the ability to extend the period still further if I consider it reasonable to do so.

8.11 The act or omission which is the subject of the complaint or dispute for the purposes of the limitation period would have been the granting of the past and future benefits in the Unified Scheme on 1 April 2012 (as this is what on the above analysis deprived Mr R of the by analogy link). I recognise that Mr R did not understand or appreciate the effect of the creation of the Unified Scheme and transfer to the Unified Scheme on the 18-20 Claim until much later when he first raised the issue with the PSPA. Mr R was however aware that he was being granted different benefits in the Unified Scheme and that a bulk transfer of his past service benefits was being made to the Unified Scheme in the place of his existing benefits. Mr R was also far better placed to raise the issue of the possible impact of the age discrimination claim in the UK than the PSPA. Mr R could also, I understand, have opted out of the transfer and become entitled to the deferred benefits he would have been entitled to in the 1980 Scheme but this would not have been in his interest as he would no longer have been able to take benefits unreduced at 50. Given that:

8.11.1 Mr R was far better placed than the PSPA to raise this issue of the 18-20 claim

earlier and did have opportunities to do so; and

8.11.2 on the balance of probabilities on the evidence I have seen, the PSPA had no formal notice in writing of the 18-20 Claim as manager and administrator until Mr R's complaint was made:

I do not consider it reasonable to exercise my discretion to extend the limitation period in relation to this element of Mr R's complaint.

Ian Greenstreet

Deputy Pensions Ombudsman 4 January 2019