

PO-7038, PO-9123, PO-7035, PO-7036,
PO-7037, PO-11989, PO-11998 & PO-12029



The
Pensions
Ombudsman

Ombudsman's Determination

Applicants	Mr R and Mr EY, Mr L, Mr EL, Mr E, Mr M, Mr S, Mr K and (together the Additional Applicants)
Scheme	Police Pension Scheme (the Scheme)
Respondents	Avon and Somerset Police and Crime Commissioner (A&SPCC) and The Chief Constable of Avon and Somerset Police (The Chief Constable) and The Chief Constable of Essex Police, Essex Police, Essex and Kent Support Services (together the Additional Respondents)

Complaint Summary

1. Mr R's complaint against A&SPCC and the Chief Constable relates to their alleged failure to inform him of the tax penalties on his retirement benefits as a consequence of his re-employment within a month of his retirement.
2. We have four other complaints (in addition to Mr R's) on identical issues against A&SPCC and The Chief Constable.
3. We also have an additional three complaints on identical issues, but against the Additional Respondents.
4. The Additional Applicants' complaints set out above have been associated with Mr R's complaint by my office and my Determination will apply equally to those complaints.

Summary of the Ombudsman's Determination and reasons

The complaint is not upheld against A&SPCC and The Chief Constable because they were not under a duty to inform Mr R, prior to his employment in his police civilian staff role, of the tax consequences for his scheme pension of his employment with A&SPCC within one month of his retirement as a police officer. For the avoidance of doubt, the same outcome applies in respect of the complaints by the Additional Applicants against A&SPCC and The Chief Constable, and also the Additional Respondents.

Detailed Determination

Relevant Documents

5. Home Office Circular 007/2006: "A-day and changes to Police Pensions Regulation 1987" (the Circular) -

It was published on 6 April 2006, and said as follows:

"The purpose of this circular is:

- a) To explain the changes which are being made to the Police Pensions Regulations 1987...
- b) To instruct police pensions administrators on the action they need to take before 6 April ("A-day") to comply with the changes to tax legislation which came into force on the day.

...General information about A-day

2.2 Annex D gives information about the new allowances & limits and related changes that will come in from A-day. This is based on information from HM Revenue and Customs (HMRC). The HMRC on line guide can be found at... www.hmrc.gov.uk/manuals/rpsmmanual/index.htm.

Technical pages Protecting Members Rights

<http://www.hmrc.gov.uk/manuals/rpsmmanual/RPSM03100000.htm>.

....Technical Pages: protecting pension rights from tax charge: taking benefits before normal minimum pension age:

A break in employment of at least six months

If the individual is not employed by any of the employers mentioned in ...within the six months after becoming entitled to benefits the individual will not lose their protected pension age.

A break in employment of at least one month and the employment is materially different

An individual who after one month following becoming entitled to benefits, becomes employed by any of the employers mentioned ... will not lose their protected pension age if the new employment is materially different.

A simple change in hours will not be a material different employment. To be a material different employment the duties and/or the level of responsibility in the new employment must be different from the old employment.

2.5 In common with schemes such as the Local Government Pension Scheme and the Firefighters' Pension Scheme, the PPS is administered by the relevant employers, namely Police Authorities.

2.8 In keeping with previous guidance on IDRPs the Treasurer to the Police Authority is the official responsible to the Police Authority for the administration of the Police Pension."

The Circular says on its opening page that copies of it were sent to "Chief Officers of Police (England and Wales), Clerks to the Police Authorities".

6. Pension Schemes Newsletter 38, 16 December 2009, issued by HMRC (the Newsletter)

"Change in normal minimum pension age from 6 April 2010"

Outline of change

The normal minimum pension age (NMPA) marks the earliest age at which pensions and lump sums may normally be taken as authorised payments under a registered pension scheme. The current NMPA of 50 rises to 55 from 6 April 2010.

From 6 April 2010, benefits in payment to a member under the NMPA of 55 are likely to be unauthorised payments, unless the member has a protected pension age, (see RPSM03106000)"

This then gave a link to RPSM03106064 – "Technical Pages: Protecting pension rights from tax charges: Taking benefits before normal minimum pension age: Employment after taking benefits – 2010". This states:

"Loss of protection due to employment after taking benefits: protected pension ages 50 to 54".

Protection will be lost if after becoming entitled to benefits the individual is employed by one of the following employers and one of the four re-employment conditions listed below is not met.

The four re-employment conditions are set out in more detail in RPSM03106065 but broadly are

2. a break in employment of at least six months.

...

4. a break in employment of at least one month and the re-employment is materially different".

7. The "30+ PLUS Police Retention Administrative Guidance for Forces". It was issued by the National Policing Improvement Agency and said:

"1.5 The purpose of this guidance is to ensure that forces are able to administer 30 + PLUS effectively with minimal need to refer to the National Policing Improvement Agency which took over responsibility for administration of these retention arrangements on 1st April 2007.

1.6... forces should use this guidance as a statement of good practice which should be applied at all times...

1.7 This guidance is valid from 1 April 2010 ...

2.2 Each officer who wishes to participate has to apply for selection, which is at the discretion of management.

Participants must stay in retirement for at least one month before being re-engaged as a shorter period of retirement will result in tax charges for both the officer and the retaining Force.

3.1 Joining 30+Plus is by application only. It is not an automatic right for officers approaching 30 years' pensionable service.

Tax Codes

There must be a gap of a month between the officer's retirement/pension coming into payment and his or her re-employment by the force on 30+PLUS. Under tax rules in force from April 2010, onwards, this is particularly important where the officer retires before age 55. If this does not happen in such cases, both the officer and the force will be liable for large tax charges payable on any pension benefit paid before age 55..."

Material facts

8. Mr R was a police officer with Avon and Somerset Constabulary. He was entitled to retire with full pension benefits having attained 30 years service from 6 April 2011, aged 54.
9. Brief factual histories in respect of the Additional Applicants can be found at Appendix 1. Their complaints are, in essence, identical to Mr R's.
10. Mr R received a retirement benefits quotation on 24 October 2011, from A&SPCC. He opted to take the maximum lump sum incurring a tax liability of £671.88. He returned an authorisation mandate for the deduction of tax dated 7 November 2011. The mandate said:

"The excess is termed an unauthorised payment by HMRC... Unauthorised payments are taxed at the rate of 40% and I hereby authorise you to deduct the tax due. You will pay this on my behalf to HMRC and I

understand that by giving you this authority I do not need to report the unauthorised payment to them..."

11. A&SPCC wrote to Mr R on 31 October 2011 saying:

"I am pleased to ...offer you the appointment of District Crime Officer...you will commence duty on Thursday 1 December 2011..."

12. Mr R was re-employed by Avon and Somerset Constabulary as a District Crime Support Officer in December 2011.

13. The Police Federation of England and Wales issued a circular to all branch boards on 8 December 2011, headed, "Protected Pension Age - Retirement and Re-employment". It said:

"We have recently become aware of a potential tax issue for members of the 1987...Scheme...who retire and take a pension under the age of 55 and then take up employment as police staff or are re-engaged as police officers.

Our understanding of the issue is, in summary, as follows:

1. From 6 April 2010, the Minimum Pension Age rose to age 55. The rights of members of the PPS to retire in certain circumstances before that age were protected and those members have a Protected Pension Age.
2. However, that protection can be lost in certain circumstances, meaning that payments become unauthorised and taxable.
3. The particular concern is on re-employment by certain employers, including...a police force ... one of the four conditions must be satisfied in order for a member aged between 50 and 54 to remain protected.
4. These conditions are broadly:

- A break in employment of at least six months.

- A break in employment of at least one month and the re-employment is materially different.

6. In relation to re-employment being "materially different", HMRC guidance states:

'A simple change in hours will not be a materially different employment. To be a materially different employment the duties and/or the level of responsibility in the new employment must be different from the old employment.'

We are writing to the Home Office and making, amongst others, the following points:

- expressing our concern that this issue does not appear to have been flagged to police forces and police authorities;
- asking the Home Office to issue guidance, preferably with HMRC approval, in relation to abatement and that employment as a member of police staff will, in itself, be regarded as "materially different" from service as a police officer.

Branch Boards should avoid giving advice on tax on financial matters or from giving the impression that they are doing so. Members should be encouraged to seek assurances in the circumstances of their case from the Force or Police Authority or HMRC and to consider taking their own independent tax advice.

Branch Boards should also contact their pension administrator and HR department and seek assurances that:

- the tax implications are understood and appropriate steps taken to minimise the risk of any adverse impact on retired members; and
- those implications will be explained to any retired member before re-employment starts."

14. Prior to being re-employed Mr R attended a presentation regarding his retirement options. The presentation was not given by A&SPCC, but a copy of it has been provided to my adjudicator. While the presentation did touch on retirement prior to age 55/60, in a slide entitled 'When to go?', Mr R has confirmed that during the presentation of that slide there was no suggestion raised that individuals should take independent financial advice if retiring prior to age 55; and, specifically, there was no advice relating to a potential loss of protected pension age if retiring before that age and being re-employed.

15. A&SPCC wrote to Mr R on 27 January 2012, saying:

"As you might expect the Constabulary is trying, along with the Police Federation, to get clarity for each one of you over any liability you might have or whether you are not affected. We are working together to try and resolve the issues that have arisen.

The advice we are getting and which has been circulated to you by the Police Federation today gives more information but is still not definitive to the point that we can absolutely rely on the outcome.

In part of the advice sent by the Police Federation there is reference to discussions with the "Pension Scheme Administrators". You can be sure that we will be in discussion with them about "what is materially different employment" might mean."

16. A&SPCC wrote to Mr R again on 18 March 2013, saying:

"As you know with effect from April 6 2010, the Police Pension Scheme became a registered pension scheme for the purposes of tax legislation and the member concerned will normally suffer adverse tax consequences if retirement benefits are put into payment before age 55. In specific circumstances, however, at an earlier age (a "protected pension age") will be permitted.

Since that time Police Forces around the country have realised that many of their retiring members have been caught by this legislation...

After considerable discussion with the HMRC they have offered a concession around the treatment of the lump sum payment. Where a force pays by BACS and as long as processing commenced prior to the member leaving previous employment, the lump sum payment will not be treated as unauthorised and therefore will not attract additional tax penalties.

...regrettably this does not apply to pension payments themselves. The absence of a sufficient break between finishing your role as a police officer and commencing your new role is treated by the HMRC as an unauthorised payment. This means you are liable to have to pay 40% tax on those payments in each tax year until you reached the age of 55..."

17. Mr R has received a demand from HMRC and paid it. I understand that not all of the Additional Applicants have received a demand or if they have, have agreed to pay it.

Summary of Mr R's position

18. It was an informal policy of A&SPCC to retain retiring police officers in civilian roles. It should not have pursued a policy that had a significant and punitive tax charge for all staff retiring under the age of 55 without warning them that they should take independent financial advice in respect of the possible consequences.
19. It is not the case, as suggested by A&SPCC, that the tax penalty was a personal matter and had nothing to do with the Scheme.
20. A responsibility to advise as to the the tax implications of the Finance Act 2004 was assumed by A&SPCC. A&SPCC's authorisation mandate in connection with the payment of his retirement benefits purported to give him advice about tax that would be payable on his pension benefits, in order to allow him to make an informed choice. In giving this advice A&SPCC were assuming responsibility for advising on the tax consequences of the position in general.
21. It was reasonable to expect A&SPCC, as the employer and in its capacity as administrator, to acquaint itself with overriding legislation relating to protected pension ages and to then inform Scheme members. Indeed, HMRC's note RPSM08400050 supports that conclusion, stating as follows: 'The Scheme Administrator should tell the member if their right to take benefits has been protected, although there is no requirement for the member to register the protection themselves with HMRC'.

22. A&SPCC should have known about the possibility of such a tax liability. It received the Circular. This directed it to Annex D which gave a link to the HMRC guide which warned it of its duty regarding unauthorised payments. The HMRC on-line guide which gave a link to the registered pension scheme manual provided information on re-employment and the loss of pension protection if benefits were taken before age 55.
23. The Circular alerted A&SPCC in respect of changes to pension rules and tax legislation.
24. The Newsletter, sent by HMRC to pensions administrators on 16 December 2009, provided details on re-employment and the loss of pension protection if benefits were taken before age 55.
25. The circumstances of this case are not on all fours with *Scally v Southern Health and Social Services Board & Anor* [1992] 1 AC 294 (*Scally*), but the situation is closely analogous.
26. There is a specific (not general) duty arising on the analysis of the particular facts and relationship and dealings with the Respondents.
27. There is no authority for the proposition that the *Scally* principles cannot be extended to closely analogous cases where the merits of the case require, and they should be here. It is, in any event, arguable that the three-limbed test established by the House of Lords in *Scally* is met. This is because:-
28. Firstly, there was a quasi-contractual relationship with the Chief Constable, who was named as a respondent on the complaint application. At the time of Mr R's complaint, Avon and Somerset Police Authority were responsible for the Avon and Somerset Constabulary and was replaced by A&SPCC in November 2012. Avon and Somerset Police Authority was in a position of control over the Chief Constable and a quasi-contractual relationship arose by virtue of this.
29. The terms of the "quasi-contract" between Mr R and the Chief Constable were not negotiated with Mr R but were imposed by statute.
30. Mr R's re-employment was a mutual act to the parties' mutual benefit. Also, A&SPCC had requested that Mr R recommence employment within a month of him taking his Scheme benefits.
31. A particular term of the contract, the Scheme regulations, gave Mr R a valuable right, namely a protected pension age of 50. This was contingent upon Mr R not taking up re-employment within one month of retirement. A change in the unconditional right to retire post 50 was a very significant change to his benefits. A&SPCC failed to inform Mr R or enable him to inform himself of a valuable right, i.e the protected pension age.
32. Mr R could not reasonably have been expected to be aware of the potential for loss of this term unless it was drawn to his attention.

33. A&SPCC's conclusion, that no tortious duty of care arises where there is no express contractual term to that effect, does not correctly reflect the legal position as stated in Scally; in particular the absence of a contract of employment does not preclude a tortious duty of care from arising in this situation and, further, there was no need for an express contractual term to be found conferring liability for pure economic loss.
34. With respect to the former, Mr R cites Scally at 302H to 302F, explaining that Lord Bridge's discussion of the *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] AC 80, reflects the position that where a contract exists between the parties it was correct in principle and necessary for the avoidance of confusion to adhere to a contractual analysis of the relationship between the parties rather than by the identification of a duty arising from the proximity and character of the relationship between the parties. So the decision in Scally (and in *Tai Hing Cotton Mill*) does not preclude a finding of a duty of care in tort between the parties, it simply means that in cases where there is no contractual relationship the court should go straight to the question of whether the proximity and character of the relationship is sufficient to found a duty of care in tort.
35. Indeed, Mr R argues that the reasoning in Scally is strongly supportive of such a duty of care. Further, he submits the post-Scally case of *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, is authority for the proposition that a concurrent duty of care would run alongside a contractual obligation to take care. So where a Scally duty arises under contract the employee will also have a cause of action in tort; there is no basis for the argument that there should not be a cause of action in tort because there is no cause of action in contract. Finally, the case of *Secretary of State for Health v Marshall* [2008] EWHC 909 (an appeal of a Pensions Ombudsman determination), has already moved beyond the situation in which a contract of employment is necessary for a Scally duty to be imposed on a body with responsibility for the management of pension rights even in the absence of any contractual relationship with that party.
36. There was no circumstance in which Mr R could be re-employed by A&SPCC the day after he had left service as a police officer and maintain his protected pension age. Accordingly, this was not a matter of HMRC interpretation.
37. Other forces have settled the tax liability on behalf of its members.
38. Since A&SPCC became aware of the tax issue in question it has taken steps to inform members concerned of the need to take independent financial advice. They should have done this for him.
39. Had he been informed by A&SPCC to take independent financial advice on the issue prior to re-employment, he would have been advised that unless more than a month had passed between his service as a police officer and his new civilian employment he would be exposed to punitive tax charges. He would therefore have delayed his re-employment to more than one month after the end of his service as a police officer.

40. HMRC has indicated that if A&SPCC are liable for the tax liability incurred by Mr R they should also be liable for penalties and interest payable to HMRC attributable to the delay in resolving the issue. Accordingly, any such penalties and interest should be borne by A&SPCC.
41. Mr E has made similar submissions to Mr R's. In addition he says:-
42. The nub of his complaint was not about tax consequences but concerns not being informed that a protected pension age existed at the time of his retirement. It is not about rights he could have accessed but rather that he was not made aware that the law had impacted on his pension rights in respect to retirement age, and in particular the granting of a right re protected pension age, which impacted on the original conditions of the Scheme.
43. A&SPCC did provide the requisite information to Police Pensioners who they re-employed as Police officers on the 30+plus scheme, abiding by the National Police Improvement Agency (College of Policing) guidance.
44. The change in options to retire which brought about the term *Protected Pension Age*, was never communicated to the officers.
45. He received a form that was returned to the pension administrator in 2006. It was a form to either stay with the 1987 Pension Scheme or move to the new 2006 scheme. It is evidence that key issues in respect to Police Pension were being managed/administered by Avon and Somerset Constabulary.
46. The Chief Constabulary offers pre-retirement courses for retiring officers and employees. The financial sessions are provided by Affinity Connect who describe themselves as 'a leading provider of financial education in the workplace for the public sector'. Affinity Connect provide within the workshop manual an appointment request form which allows delegates to request an appointment with an Independent Financial Adviser and during 2009/2010/2011, when these officers would have attended, all delegates also received a copy of the presentation itself which had links to organisations such as the Financial Conduct Authority and Unbiased.Com. Affinity say they take it very seriously that they should point delegates in the right direction and signpost quite a few times during the course that Independent Financial Advice should be sought, and how to do so.
47. Mr M, Mr K and Mr S add:-
 - They have each named the Chief Constable as a co-respondent to their complaints. While they make no concession as to the legal status of their (employment) relationship with A&SPCC, their relationship with the Chief Constable is directly relevant to the question of whether or not there was a contractual duty owed.

- There was a quasi-contractual relationship with the Chief Constable. Further, the factual reality was that they were dealing with the same Force and the same entities both before and after their re-employment as civilian employees.
- Even if it were the case that there was no contractual or quasi-contractual employment relationship, that would not necessarily be fatal to the existence of a tortious duty of care.
- A particular duty of care arose in these particular circumstances, as opposed to a general duty of care. They were re-employed with the positive involvement and encouragement of the Force collectively. Having had their attention drawn to the new role and/or been encouraged to apply, for roles which were only advertised internally, they were each expected or requested to start very shortly after retirement (Mr S just one day later, Mr M after two weeks), despite the fact they personally preferred to delay re-employment. This problem would not have arisen had their preferred delay and start date been permitted.
- Their circumstances allow the Ombudsman to adopt an incremental approach to the duty of care by analogy with existing cases and through application of the test in Scally.
- Essentially: they were taking action positively solicited by their employer, as opposed to their employer being a passive participant in their actions;
- in doing so, with the knowledge of their employer and in accordance with their mutual intentions, they were seeking to take advantage of valuable benefits (i.e. the ability to retire and receive his lump sum and pension whilst also being re-employed in a civilian role);
- their employer had access to information which affected their ability to take full advantage of those valuable benefits, of which they could not reasonably be expected to be aware unless their employer drew it to their attention;
- all of this took place within the context of what was, as a matter of practical reality, an on-going employment relationship in which they were, in practice, simply changing from one role to another for the same employer; and
- the pension reforms of 2004 (in the Finance Act) introduced layers of complexity to defined benefit schemes and took the matters of which employees could reasonably expect to be informed by their employers (or the risks to which they could reasonably expect to be alerted) well beyond those identified in Scally.
- The circumstances, therefore, make it just and reasonable to impose a duty on the employer to draw to their attention the relevant provision, which would have avoided the tax charges.

Summary of A&SPCC's position

48. It does not believe that an employer has a duty of care to consider an individual's personal tax liability when offering employment as a police staff member and this is a matter only for the individual and their own tax advisors.
49. It is not suitably qualified to offer tax advice to employees or prospective employees and considers this an onerous duty to impose on police employers who hire several hundred people each year.
50. It has a duty to consider how tax changes affect the Scheme but not an individual's tax liability.
51. This issue concerns personal tax liabilities rather than entitlement to benefits under the Scheme. Mr R is being paid his full benefit entitlement and the only issue is how much tax he has to pay on those benefits. If the Ombudsman seeks to apply a duty of care similar to that in Scally, attention is drawn to the more restrictive case law since that case such as *University of Nottingham v Eyett* [1999] IRLR 87. In that case it was held that the implied duty to maintain trust and confidence did not extend to imposing a positive obligation to warn an employee, when proposing to exercise important pension-related rights, that the way he was proposing to exercise them might not be the most financially advantageous to him.
52. In any event the duty imposed in Scally concerned information about pension entitlements, here the issue is a person's tax liability. The pension entitlement is unaffected. That positive obligation in Scally rested in contract, the House of Lords having rejected the imposition of a tortious duty of care to prevent pure economic loss as inappropriate where there was no express contractual term to that effect. Subsequent case law has gone only so far as to impose a duty where the employer has voluntarily assumed a duty of care. The simple failure of an employer to pass on information they are aware of or should be aware of would not give rise to a tortious duty of care and it suggests therefore that in an earlier Preliminary Decision the Pensions Ombudsman sought to impose a duty of care which does not currently exist in law and no rationale is given for such imposition. In those circumstances whether A&SPCC was aware or should have been aware of the position is irrelevant.
53. A&SPCC was not made aware of the changes in advance of the Police Federation's circular of 8 December 2011. The Circular that it received on 11 April 2006 does not refer to tax liabilities. So A&SPCC cannot be held responsible for failing to advise on a matter of which it was unaware. The Home Office did not alert pension administrators about the HMRC changes until 23 January 2012.
54. The Constabulary HR cannot find any reference to Annex D on the Circular and the HMRC guides in the paperwork they hold. They have checked the website and in Annex D there is no link. The link appears to be in the Circular itself and when they tried to access this information via the link it proved unsuccessful.

55. The pensions department were made aware of the change in the normal minimum pension age effective from 6 April 2010, via a police officer who forwarded an email from the Police Superintendent Association. This was received on 1 December 2011, and the pensions manager confirmed on 6 December 2011 that this was the first time she had seen this. A&SPCC can find no record of receipt prior to this.

Conclusions

Introduction

56. During the course of this investigation we received detailed and substantive submissions. These have been abbreviated substantially here, however they have been thoroughly and very carefully considered.
57. The conclusions made below in respect of Mr R's complaint concerning A&SPCC and The Chief Constable apply equally to The Additional Applicants and the Additional Respondents.
58. The question I have been asked to consider in this case is whether A&SPCC and The Chief Constable were under a duty to inform Mr R, prior to his employment in his police civilian staff role, of the tax consequences for his Scheme pension of his employment with A&SPCC within one month of his retirement as a police officer. I must therefore consider whether a duty to inform Mr R arises, either in the law of tort or contract (or in both).
59. Case law authorities suggest that there cannot be a standalone tortious duty¹, i.e. for there to be a duty in tort to provide information there must be a duty in contract.

Contractual duty

60. Mr R says A&SPCC is both an employer and an administrator within the Scheme. There is a contractual relationship between Mr R and A&SPCC, after his retirement, in his new employment as a civilian. However, as Mr R had retired, and had already incurred the tax charges, before his new employment commenced, there can be no claim concerning tax charges arising out of that contract.
61. So, was there a contractual duty owed by A&SPCC to Mr R when he was a police officer? For that duty to arise the relationship between a police officer and a Police and Crime Commissioner needs to be considered analogous to an employment relationship. Legislative provisions creating the Police and Crime Commissioners provides that a police force is under the control of the Chief Constable and caselaw suggests they could be regarded as the "quasi-employer" of police officers. So, there is no quasi-contractual relationship between Mr R and A&SPCC at the material time. But, the stronger argument is that there was a quasi-contractual relationship between Mr R and The Chief Constable.

¹ See *Outram v Academy Plastics* [2000] PLR 283 per Tuckey LJ at [21] and Chadwick LJ at [33], and, also, *Lennon v Commissioner of Police of the Metropolis* [2004] 1 WLR 2594 at [29] per Mummery LJ.

62. However, I do not consider that it results in owing a duty to Mr R to inform him of the potential tax consequences on his pension benefits arising because he took up employment with A&SPCC within one month of retirement as a police officer.
63. In Scally, the complaint was that the member should have been given more information by his employer about valuable rights that he could have accessed in his statutory pension arrangement. The Court recognised that a valuable right is not so valuable if an employee is not aware of it and so the employer was obliged to take reasonable steps to bring the relevant provision to the notice of the employees so that they could benefit from the opportunity with which they had been provided. Accordingly, a term could be implied into a contract to bring the pension rights to the attention of the employee.
64. However, the Court avoided a general principle that employers should bring unknown pension rights to the attention of their members or protect their overall economic wellbeing. The duty only applied where:
- the terms of the contract have not been negotiated with the individual employee;
 - a particular term of the contract provides a valuable right contingent upon action being taken by the employee; and
 - the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his or her attention.
65. Taking each requirement in turn, firstly: the terms of the contract have not been negotiated with the individual employee. I have found that the contractual duty cannot derive from Mr R's current employment as civilian police staff, because the damage had already been done.
66. Mr R's original police officer contract was not negotiated individually with him. Any 'quasi-contract' between him and the A&SPCC or The Chief Constable would also not have been negotiated individually. Police officers are appointed as officers of the crown and their terms and conditions of service, including pension rights, are conferred upon them by statute.
67. However, in Scally, the requirement assumed an actual (not a quasi) contractual relationship. So, at its highest, if Mr R could establish a quasi-contract between himself and The Chief Constable, it is still doubtful whether this would be sufficient to meet the first Scally requirement. For the purposes of completing this analysis, I will assume hypothetically for the time being that it did.
68. Secondly: a particular term of the contract provides a valuable right contingent upon action being taken by the employee. The Respondents *have not failed to inform Mr R of a valuable pension right which he could have chosen to exercise*. The Respondents did not inform Mr R as to the adverse tax consequences to his existing pension benefits of his employment within one month of retirement. This

has nothing to do with the options available to Mr R under the Scheme; it relates to tax considerations which operate outside the terms of the Scheme.

69. This distinction is significant in terms of the purpose of the Scally duty, which is to give meaning to the valuable pension benefit conferred upon the employee, as that benefit is of no effect unless he is made aware of it. The duty is therefore restricted to informing employees of their options under the Scheme, so as to enable them to make the choice which is in their best financial interests. The relevant failure in this case, by contrast, does not relate to the terms of the Scheme, but to the tax consequences of Scheme benefits by reason of the employee's own acts which were unrelated to the Scheme (i.e. employment by A&SPCC).
70. A finding of a duty in these circumstances would widen considerably the scope of the Scally duty, as it would extend the requirement that the employer be aware of the terms of its own pension scheme, to a requirement that the employer be aware of extraneous matters such as the tax regime which relates to the scheme. I consider this is beyond the scope of the Scally duty, and falls within the general duty to protect the financial interests of the employees which was rejected in the cases². If additional layers of complexity have been added to defined benefit schemes through the provisions of the Finance Act 2004, they could have been mirrored in provisions imposing further statutory obligations on employers, but no additional obligations have been imposed.
71. Thirdly: the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his or her attention. The true matter of which Mr R was not aware was the tax consequences of the employment. But that is not the type of valuable right envisaged in Scally; in Scally it was a pension right under the scheme; in Mr R's case it is an extraneous matter (i.e. the tax regime). The tax consequences arise out of the valuable right to retire at protected pension age, but the member is well aware of his pension age, and that pension age is not affected by his retirement and employment, the valuable right is therefore not lost in those circumstances.
72. Instead, that right is made subject to a tax liability which arises outside the terms of the pension scheme, and does not fall within the scope of the employer's duty to inform the employee of his valuable pension rights. Given that conclusion, in my view the requirement under this limb falls away.
73. In accordance with the analysis set out above, I consider that the Scally requirements are not met in this case, so that, even if there was a relevant (quasi-) contractual relationship or analogous relationship, the Respondents do not owe a duty to Mr R to inform him about the potential tax consequences for his pension benefits of taking up employment with A&SPCC within one month of retirement.

² See for example, *University of Nottingham v Eyett* [1999] 2 All ER 437, *Crossley v Faithful & Gould Holdings* [2004] ICR 1615 and *Greenway v Johnson Matthey plc* [2016] 1 WLR 4487

Tortious duty

74. Given my finding that there is no contractual duty, for the reason set out in the introductory paragraph to these conclusions no tortious duty can arise. However, for completeness, and if I have erred in my conclusions on the contractual duty, I have set out below my reasons as to why no tortious duty arises.
75. A&SPCC are not administrators of the Scheme in the sense of managing and operating the Scheme and providing benefits to members: that function is undertaken by the relevant local authority, either directly or through outsourced arrangements. Neither do A&SPCC have any decision-making powers under the relevant Scheme legislation.
76. Nor is A&SPCC a scheme administrator or a sub scheme administrator under the Finance Act 2004. Under the Act, the scheme administrator's duties include:
- registering the scheme with HMRC;
 - operating tax relief on contributions under the relief at source system;
 - reporting events relating to the scheme and the scheme administrator to HMRC;
 - making returns of information to HMRC;
 - providing information to scheme members, and others, regarding the lifetime allowance, benefits and transfers;
 - acting as the point of contact for communications with HMRC; and
 - paying certain tax charges in respect of the scheme.
77. The scheme administrator owes a tortious duty to the members of the scheme to act with reasonable care and skill *in the performance of those functions set out above*. But there is no reason in principle why a scheme administrator would assume the responsibility for any functions outside of those which it is required by legislation to perform, and there is no evidence to suggest that any such responsibility was in fact undertaken by A&SPCC in this case.
78. Without such an assumption of responsibility, the law does not impose a liability in negligence in respect of pure economic loss where the alleged negligence consists of an omission to act. To impose liability by reason of an obligation to perform functions which did not cause the loss claimed (i.e. those arising under s.270 of the Finance Act 2004, as listed above) has no substance.
79. So, there is no basis for imposing a duty on A&SPCC, as scheme administrator, to provide information to Mr R.
80. If a quasi-contract was established between Mr R and The Chief Constable, then in principle it might be possible to demonstrate a connected breach of tortious duty. However, I have considered the evidence to see if a duty arises from the particular facts and circumstances of Mr R's case. I find that the evidence does not support the assumption of such a duty by the Chief Constable here. Even if Mr R's re-employment in a civilian role was to the benefit of both, that is not the same as an

undertaking having been given to ensure that his financial or pension benefits were maximised or would not be negatively impacted by changes in the tax regime from time to time. The evidence does not support Mr R's contention on this point as to the existence of such an undertaking.

81. I have also had regard to the Additional Applicants' submissions but they too have not satisfied, on the evidence of the facts and circumstances, the burden of establishing that the Chief Constable took on such a responsibility, either voluntarily or otherwise.
82. Given the finding above, my conclusion is that no tortious duty to provide information has arisen in the particular circumstances of Mr R's case.

Summary of conclusions

83. I do not uphold Mr R's complaint or those of the Additional Applicants.
84. While the application of the relevant legal principles means that I am unable to uphold the complaints, I do have a great deal of sympathy for the unenviable position that Mr R and the Additional Applicants have found themselves in and I can certainly understand why they feel aggrieved. They have chosen to continue working, following their retirement as police officers. Utilising a person with their rich experience and extensive knowledge of policing in a civilian police staff role is clearly to the benefit of both the Avon & Somerset Police and also the Essex Police. Indeed, our investigations in this case suggest that the practice of employing former officers in civilian police staff roles post-retirement is widespread across forces in England and Wales, presumably for that very reason.
85. Given the clear benefit both services derive from employing former officers in civilian police staff roles, A&SPCC and the Additional Respondents could be said to have a moral duty to ensure that Mr R and the Additional Applicants were made aware of any potential adverse financial consequences of their employment with them post-retirement. Indeed, I think the commendable actions of the Police and Crime Commissioner of South Wales, a respondent in a previous Determination, demonstrate that a view may be held that such a moral duty does arise (even if A&SPCC and the Additional Respondents do not hold that view).
86. Nevertheless, because I must follow the position at law and the complaints are beyond the scope of a finding in maladministration, I am unable to reach that conclusion.



Anthony Arter

Pensions Ombudsman
21 August 2018

Appendix 1

- Mr EY worked as a police officer with Avon and Somerset Constabulary from 27 July 1981. He retired with full pension benefits on 16 October 2011, having attained 30 years service on 26 July 2011, aged 52. Mr EY was employed by Avon and Somerset Constabulary in a civilian role on 17 October 2011.
- Mr L worked as a police officer with Avon and Somerset Constabulary from 27 July 1981. He retired with full pension benefits on 31 October 2011, having attained 30 years service on 26 July 2011, aged 52. Mr L was employed by Avon and Somerset Constabulary in a civilian role on 1 November 2011.
- Mr EL worked as a police officer with Avon and Somerset Constabulary from 1 September 1981. He retired with full pension benefits on 5 September 2011, having attained 30 years service, aged 51. Mr EL was employed by Avon and Somerset Constabulary in a support staff capacity on 6 September 2011.
- Mr E retired as a police officer with Avon & Somerset Constabulary on 27 July 2010 having attained 30 years of service. Mr E was employed by Avon and Somerset Constabulary in a civilian role in August 2010.
- Mr M retired as a police officer with Essex Police on 31 July 2011. He was then employed by Essex Police as a police staff employee on 15 August 2011.
- Mr S retired as a police officer with Essex Police on 14 November 2010. He was then employed by Essex Police as a police staff employee on 15 November 2010.
- Mr K retired as a police officer with Essex Police on 26 August 2011. He was then employed by Essex Police as a police staff employee on 12 September 2011.

Determination by the Ombudsman

A final and binding Determination has been issued by the Ombudsman. In this factsheet we explain about:

- Publication of the Determination
- Complying with the directions in the Determination
- Payment of interest
- What you can do if the Ombudsman has not decided in your favour
- Appealing the Determination

Publication of the Determination

Ombudsman Determinations are published on our website and are generally anonymised and have the name of the person making the complaint as well as any other identifying personal data removed – unless such data is essential for understanding the decision or there is another reason why we consider it is appropriate to publish it.

If we are considering not anonymising a decision, or we are asked to do so by a party, we will ask you and the other parties involved in the case for their comments. However, ultimately, it will be a matter for the Ombudsman to decide on a case-by-case basis.

If you have any issues with this please contact the Adjudicator assigned to your case.

Complying with directions

If the Ombudsman has upheld the complaint the Determination will probably include directions against one or more parties, saying what steps they must take to put matters right. They now have to comply with those directions unless they:

- successfully appeal against the Determination; or
- pending an appeal hearing, apply for the Determination to be stayed by the Court (in Scotland the equivalent term is *sisted*), which effectively means that it is put on hold.

If there is an appeal by another party you will know because you will be served with Notice of Appeal.

Directions made by the Ombudsman can be enforced against a person who has failed to comply with them. Where to take enforcement action is generally as follows:

- in England and Wales, in a County Court - the appropriate one being the nearest to the party that has not complied;
- in Northern Ireland, through either the Enforcement of Judgments Office or the County Court depending on the nature of the Ombudsman's directions to be enforced;
- in Scotland, through the Sheriff Officer.

If you think enforcement action is necessary you will need to take the necessary steps yourself. You should contact the investigator in the Ombudsman's office who handled your case for more information.

Directions that include payment of interest

These will refer to "the base rate for the time being quoted by the reference banks". This is published monthly on the Bank of England's website under 'Statistics - Interest & Exchange Rates Data, Wholesale Interest and Discount Rates'. Select 'Average of UK banks' base rates', then 'End of the Month' and then select 'Show Data'. The base rate is defined under regulation 6 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (No 2475).

If the Ombudsman has not decided in your favour

Because the Determination is final and binding the Ombudsman cannot change it, except for minor errors (such as typing mistakes). There is no point in writing to the Ombudsman further at this stage to ask for the decision to be changed. If you want it changed you must appeal to the appropriate court. You can only appeal on a point of law. If you propose to appeal you may want to consult a solicitor or talk to your local Citizens' Advice Bureau or law centre.

About Appeals

Appeals are to the Chancery Division of the High Court in England and Wales, the Court of Session in Scotland or the Court of Appeal in Northern Ireland.

The Ombudsman has directed for England and Wales that the person wishing to appeal must lodge the appeal within 28 days after the date of an Ombudsman determination. Different time limits apply in Scotland and in Northern Ireland and local advice should be taken.

In England and Wales, appeals require the permission of the High Court. This means that an appellant will need to satisfy the Court that the appeal has a real prospect of success or that there is some other compelling reason why it should be heard. The Appellant's Notice Form (N161) contains a section which deals with permission to appeal. There is no similar requirement at present for appeals in Scotland or Northern Ireland.

If you appeal the Ombudsman should not be listed as a respondent in the Notice of Appeal¹. The respondent to an appeal should be the party or parties on the "other side" of the matter determined by the Ombudsman². However, you **must** send the Ombudsman a copy of the Notice of Appeal³. Failure to send the Ombudsman a copy of the Notice of Appeal may have adverse financial implications for you. The High Court suggests that where the appellant is an unrepresented individual, the respondent should also take it upon themselves to confirm that the Ombudsman has been served with the Notice of Appeal. Occasionally the Ombudsman may decide to be represented at the appeal (although the Ombudsman will only take this decision after receipt of the Notice of Appeal). For example if, in the Ombudsman's opinion, being represented would assist the Court to come to the right decision, or if the outcome of the appeal might affect how the Ombudsman's powers can be exercised. If the Ombudsman is represented, it will be for this purpose, not to support either side.

If you appeal and the Court decides that the Ombudsman's decision should be upheld then it is expected that the normal principle will apply, which is that you, as the unsuccessful party, should pay the costs of the successful party.

If an appeal is lodged against you, you will be served with Notice of Appeal. You will then have to decide whether you wish to be represented (or appear in person) at the appeal. If you are represented (or appear), and the Court decides that the Ombudsman's decision should be changed, then you may have to pay some or all of the costs of the appeal. If you decide

¹ Unless appeal lodged in Scotland or Northern Ireland and by way of case stated

² Moore's (Wallisdown) Ltd v Pensions Ombudsman and others [2001] All ER 299 at paras 71-82; [2002] Pensions LR 73 at paras 75-77

³ Practice Direction 52D, paragraph 3.4 (which relates to Civil Procedure Rule 52.4(3))

not to be represented (or appear) it is not expected that you would be required to pay any of the costs.

It may also be possible for you to apply to the court to have costs recovery limited in the appeal.⁴

Further Information

Further useful information can be found as follows:

- The Handbook for Litigants in Person. This is produced by the Judiciary and can be found at www.judiciary.gov.uk.
- The Community Legal Service Directory which can be found at www.clsdirect.org.uk
- www.justice.gov.uk/about/hmcourts
- www.gov.uk/government/organisations/hm-courts-and-tribunals-service
- <http://scotland-judiciary.org.uk/16/0/Court-Structure>
- www.courtsni.gov.uk

⁴ Under 52.9A of the Civil Procedure Rules (orders to limit the recoverable costs of an appeal)

