Ombudsman
Fairness for all

Case note

NZ Superannuation Corporation provided incorrect advice incurring loss to complainant and offered ex gratia payment

Legislation	Ombudsmen Act 1975
Ombudsman	Nadja Tollemache
Case number(s)	A3187
Date	1992

Incorrect advice—Government Superannuation Fund—Voluntary Severance

While researching private superannuation schemes the complainant sought advice from a staff clerk at the NZ Superannuation Corporation (as it was known then) about his Government Superannuation Fund (GSF). He enquired about the consequences to his contributions if he later became surplus and took voluntary severance. He was advised he would receive only his contributions but he would be better off remaining a member of GSF (after 14 years of contributing) and that the Government Superannuation Scheme was one of the best available at that time. On the basis of the information provided, the complainant withdrew his contributions from GSF the sum of $14,735.17. Much to his consternation he later learnt the advice he received was incorrect. Other people in the scheme taking voluntary severance expected to have their contributions doubled.

He wrote a letter of complaint to the Corporation who acknowledged the advice had been given, as the 'matter was then understood'. It stated: '*It was not considered that further action was needed as the question was academic ... I am sorry you took cancelling action without obtaining more detailed advice from GSF.*'

The Corporation's report to the Ombudsman after the complaint was notified stated that policy was not to advise staff of specific details until they were officially declared surplus. It went on to say that the GSF is the only organisation that can officially advise on these matters. Historical and financial information must be provided and *'An exercise of this nature is only undertaken when all the decisions have been made'*. The Ombudsman was also advised that

prior to 1987 all staff's salaries and personnel functions were dealt with at the Head Office of the Department. In late 1988, it was decided to decentralise the superannuation functions to the operating branches. Training of staff was carried out accordingly.

Among documents enclosed with the Corporation's report was an extract from the Government Superannuation Fund Manual. In sections 1.3 and 2.5 employers' responsibilities are outlined follows:

> *1.3 Employers are responsible for: … providing answers to any queries from contributor about the scheme...*
>
> *2.5 On receiving a query or queries from an employee or contributor to which an employer is unable to provide an answer, the employer shall forward the query to the Fund together with any information which the employer holds which will be required to answer the query. This information could include details of the contribution made … the fund will provide a reply to enable the employer to answer the query.*

In response to the Ombudsman's further enquiries, the Corporation advised that the staff clerk concerned had a copy of the above quoted instructions and attended the training course. The clerk's account of events conveyed her awareness that the complainant was seeking information to help him decide which scheme *'was the best and most beneficial'*. The information was understood to be necessary before a decision was made. It seemed to the Ombudsman that the Corporation had not met its responsibilities to seek advice from the Fund.

The Ombudsman then had to consider whether there was a qualifiable entitlement for any person declared surplus or was there a discretion involved? It was clear from correspondence that an *'enhanced refund of contributions'* was to be calculated by GSF for those taking redundancy payments. In this case a loss had occurred. The Ombudsman also needed to consider what, if any, liability existed for loss proved to be caused by action on wrong advice. Case law referred to included the House of Lords decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] Z All ER 575, and the Privy Council decision in *Mutual Life & Citizens Assurance Co Ltd v Evatt* [1971] All ER 150. *Hedley Byrne* appeared to establish that a duty of care would arise where:

> *… in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it.*

Of particular relevance to this aspect was the Corporation's statement that:

> *A decision was taken in late 1988 to decentralise the superannuation functions to the operating branches and training seminars were run for all Personnel Officers and Staff Clerks who were to take over this administrative function.*

However, as was made clear in *Evatt*, there may be circumstances where no duty of care arises, for example where casual advice is given by a professional person on a social or informal occasion.

Had the enquiry by the complainant been simply a casual one which was not intended to be taken as one requiring a formal answer, liability would not in the Ombudsman's opinion have attached. Certain factors needed consideration. Did the staff clerk know she was being trusted to give reliable information? Did she, if unsure whether her information was accurate, give a qualified answer? It had been established that the complainant had asked for the information not out of curiosity, but for financial planning regarding the implications on his contributions of possible redundancy.

There still remained two other points that needed consideration: was the advice causative of the loss and was the law as stated above affected by other recent developments in the law of negligence? That the information given as to what happened on severance was wrong was not disputed. However, it was said by the staff member that she also advised the complainant that he would be better off remaining in the GSF. The latter could not recollect this. He stated she agreed with the situation that if he were made redundant in a further 10 years and only received back contribution, he would be worse off because it would be too late join another scheme.

The relevant consideration seemed to be the degree to which the staff clerk knew (or should have known) that the complainant was likely to be made redundant. If she was aware, that further redundancies were likely and that the complainant was asking her advice in order to arrange his affairs, having regard to the answer she would give, then the Ombudsman believed she had a duty to ensure the advice given was accurate.

Anns v Morton Borough Council [1977] 2 All ER 492, which had provided a two stage test for liability had been recently overruled in *Murphy v Brentwood D C* [1990]2 All ER 908. As a result, any opinion formed on the legal liability of the SOE for wrong information could have been open to argument.

However, an Ombudsman is not confined to the question whether legal liability exists, but is also required to consider whether an administrative act, decision, or omission is unreasonable, unfair, based wholly or partly on a mistake of law or fact or is wrong. If so, then consideration must be given to appropriate remedy. The Ombudsman was in no doubt that the incorrect advice the complainant was given on behalf of his employer was based on a mistake. Nor did she doubt that the complainant was entitled to expect either at the time of his enquiry, or when he notified his decision to withdraw from the Fund, he would be properly advised by his employer. The complaint was therefore sustained.

The Ombudsman recommended that the Corporation make an ex gratia payment, of at least half the loss. While the Corporation did not accept any fault in the matter, it accepted that it was unreasonable to expect the complainant 'to suffer a personal loss due to the problems with the administrative systems between GSF and its 'agent'.' An ex gratia payment of $5,000 was accepted by the complainant and the file closed on the basis that the complaint had been resolved.

This case note is published under the authority of the Ombudsmen Rules 1989. It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.