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**IT IS NOT NECESSARY FOR ANY PARTY TO ATTEND THE HANDING DOWN OF JUDGMENT ON 15 APRIL 2010**

Neutral Citation Number: Double-click to add NC number

Case No: Double-click to add case number

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

**Before :**

**MR JUSTICE MORGAN**

**Between :**

**NIKE SWALLOW**

**Claimant**

**- and -**

**(1) HM REVENUE AND CUSTOMS**

**Defendants**

**(2) CABINET OFFICE**

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**The Claimant** did not appear and was not represented  
**Ms Elisa Holmes** (instructed by **the Treasury Solicitor**) for the **Defendants**

Hearing date: 25 February 2010  
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**DRAFT JUDGMENT**

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## MR JUSTICE MORGAN:

### Introduction

1. This is an appeal by Mrs Nike Swallow pursuant to section 151(4) of the Pension Schemes Act 1993 against the decision dated 20<sup>th</sup> March 2009 of the Pensions Ombudsman. An appeal under section 151(4) is restricted to an appeal on a point of law. The pension scheme involved in this case is the Principal Civil Service Pension Scheme.

### The facts

2. This being an appeal on a point of law only, I will take the facts from the decision of the ombudsman. At paragraphs 1 to 20 of his decision, he set out his findings of fact. I will reproduce his findings verbatim.

#### *Material Facts*

1. *Mrs Swallow was born on 18 May 1965. She was employed as an Executive Officer by what is now HMRC from 6 August 1990.*
2. *On 5 June 1992 Mrs Swallow went on sick leave suffering with 'Anxiety Neurosis' (panic attacks). She was referred to the Occupational Health Service, the occupational health advisers to HMRC, by her line manager who had been concerned about her behaviour at work. He asked whether she was likely to give full and effective service in the future and whether it would be appropriate to refer her to a psychiatrist for assessment. Her doctor's certificate expired on 19 June 1992 but because of allegations of harassment made against her colleagues she was told to remain off work until further notice.*
3. *A number of psychiatrist's appointments were made for Mrs Swallow between August 1992 and March 1993, but she failed to attend on each occasion and was subsequently dismissed on 30 April 1993 on grounds of gross misconduct arising from her continued failure to act on reasonable management instructions.*

4. *On 18 November 1993, HMRC wrote to Mrs Swallow with details of her deferred pension benefits and information regarding how she could apply for immediate payment if she suffered a breakdown in health that was likely to be permanent.*

5. *Rule 1.12 of rules to the Scheme (the **Rules**) defines retirement from service on medical grounds as:*

*“...retirement from the Civil Service with a medical certificate acceptable to the Minister which states that the person concerned is prevented by ill health from discharging his duties, and his ill health is likely to be permanent.”*

6. *Rule 3.14 of the Rules defines early payment of preserved benefits on grounds of ill health as:*

*“Where a person:*

*(i) has been awarded a preserved pension and lump sum,*

*(ii) has left the service, and*

*(iii) falls ill before attaining the age of 60*

*- the pension and lump sum may be brought into immediate payment if it is established that the illness would have led to his retirement on medical grounds had he remained in the Civil Service.”*

7. *Mrs Swallow initially made enquiries about the early release of her deferred benefits on grounds of ill health on 13 May 1994. She was asked to complete a Medical Consent form which she did on 1 July [1994]. On the Medical Consent form she completed, she made no mention that she was under specialist care. Her case was referred to the Occupational Health Service on 15 July 1994 who reported back on 17 October 1994 saying that Mrs Swallow’s GP had not confirmed any long standing illness which would require her retirement on medical grounds had she remained in service, and therefore early payment of preserved benefits would not be appropriate. Mrs Swallow was advised of HMRC’s decision on 24 October 1994 and also told that her case would be reviewed if she provided evidence of a significant worsening of her medical condition.*

8. *Mrs Swallow wrote to HMRC on 10 February 1995 regarding the possibility of reinstatement, but she was advised that it was not prepared to consider re-employment due to the circumstances of her dismissal. She made a further application for reinstatement in October 1999, but no record of HMRC’s response has been traced.*

9. *In March 2002 Mrs Swallow made a further application for early release of her preserved benefits through her MP. She was asked again to complete a Medical Consent form which she did, and once again she made no mention that she was under specialist care. Her application was forwarded to BMI Health Services, the name by which Occupational Health Services later became to be known, who sought a report from her GP. Her GP stated that she*

*had not discussed any difficulties that might be considered an 'irretrievable breakdown in health' and said that he did not support the early release of her preserved benefits.*

10. *On the basis of this report, Dr M J Charlson, an Occupational Physician at BMI Health Services, signed a 'Premature Payment of Preserved Award – Notification of Refusal' form on 14 August 2002. HMRC advised Mrs Swallow that her application had been refused on 22 August 2002. She was also sent her a copy of the 'Notes on Medical Appeals Procedure'.*

11. *On 21 October 2002 Mrs Swallow appealed against the decision. She once again completed a Medical Consent form, this time giving details of her psychiatrist. Her case was again referred to BMI Health Service who arranged a consultation with her on 31 March 2003, which she attended with her Mental Health Social Worker. At this meeting it became apparent to Dr N S Hadley, an Occupational Physician at BMI Health service, who saw her, that she had a significant mental health problem.*

12. *In his report Dr Hadley related the history as given by Mrs Swallow:*

*“Around 1992, she was apparently becoming aggressive at home and was taken to her family doctor and a diagnosis of Anxiety was made. At about that time, it appears that Mrs Swallow was experiencing auditory hallucinations. She has been under specialist care since October last year and is also cared for in the Community and is on anti-psychotic medication. There are no other medical conditions...*

*The medical information on file would appear to contain no details of her impaired mental well-being...”*

13. *Dr J Bonsall, the Area Director at BMI Health Services, signed a 'Premature Payment of Preserved Award' certificate dated 24 July 2003 stating that in his opinion, if Mrs Swallows had still been employed in the grade described, she would have been prevented by ill health from discharging her duties and the ill health is likely to be permanent.*

14. *Mrs Swallow's benefits were put into payment and backdated to 22 May 2002. However, on 21 November 2003, Mrs Swallow wrote to her MP complaining about the commencement date of her pension which she believed should have been backdated to 1992 when HMRC first recognised her illness. She also asked about enhancement to her reckonable service.*

15. *On 16 May 2005 Mrs Swallows wrote to HMRC about backdating her pension to 1993 because, although she had refused to see a psychiatrist at that time, she had met their requirements in 2002. She wrote to HMRC again in June 2005 about backdating her pension and overdue arrears.*

16. *On 5 May 2006 Mrs Swallow wrote to Civil Service Pensions about backdating her pension. She said that:*

- *HMRC had chosen to ask her to stay off work in 1992 when it recognised that she was seriously ill, and took this action rather than grant her an enhanced ill health pension.*

- *She had been too ill in 1992 to objectively consider her options and should not be penalised for this.*

17. *In a further letter dated 24 October 2006, Mrs Swallow says that she ignored her health problems in 1992/93 hoping that it would be a temporary illness but had eventually sought help in 2002. This had resulted in early payment of her benefit being made and this should now be backdated to the date that HMRC first asked her to attend a psychiatrist.*

18. *Mrs Swallow again contacted HMRC in June 2007. She said that when her application was refused in 2002, she had been given a copy of the Medical Retirement Certificate (MRC) with details of her appeal rights. HMRC did not follow the same procedure in 1994. Since HMRC did not give her the option to appeal, effectively her 1994 application was never resolved and her 2002 request should have been a continuation of that earlier application.*

19. *Mrs Swallow instigated the internal dispute resolution procedure (IDRP) and a first stage decision letter was issued on 10 September 2007. This stated that her application was refused in 1994 because there was insufficient medical evidence to satisfy the criteria for ill health retirement. Her GP had given no reason to suspect that there was any long standing illness that would have required her retirement on medical grounds. Based on the fact that initially her 2002 application had been unsuccessful, it was likely that any appeal 1994 would have been similarly unsuccessful. Seven years was an unreasonable period over which to continue with an earlier application and it was therefore correct for the 2002 application to be considered a fresh one.*

20. *At the second stage of IDRP the decision maker stated:*

- *Prior to Mrs Swallow's dismissal, HMRC had arranged for her to see a psychiatrist but she did not feel that this was necessary as her problems related to her complaints of harassment.*
- *Neither HMRC nor BMI Health Service could properly consider Mrs Swallow's eligibility for medical retirement at that stage without a specialist's view. Mrs Swallow was ultimately responsible for this lack of information. Her absence from work [from June 1992] was not certified by her GP, and she was not under the care of a specialist.*
- *There is no evidence to suggest that she would have met the criteria for ill health retirement at the time of her dismissal.*
- *In the months prior to May 1994 when Mrs Swallow made an application for the early release of her pension, she was actively seeking employment. She was not under the care of a specialist and her GP offered no evidence to suggest that ill health retirement was appropriate.*

- *On the basis of the information available, rejecting Mrs Swallow’s application was the only decision that could have been reached. Although Mrs Swallow did not demonstrate that she met the criteria for the early release of her pension until the Occupational Physician obtained appropriate medical evidence in July 2003, payment was backdated to the date of her application on 28 May 2002. There was no justification why commencement should be backdated further.*

## **The scheme**

3. The relevant scheme is a public service pension scheme as defined in the Pension Schemes Act 1993 (“the 1993 Act”).
4. The statutory basis for the scheme is the Superannuation Act 1972 (“the 1972 Act”). Under section 1 of the 1972 Act, the Minister for the Civil Service “may make, maintain and administer” pension schemes for civil servants. Under section 1(2) the Minister may also delegate his functions under section 1 to “any other Minister or officer of the Crown”. HMRC’s Pension Service Unit administered the scheme in relation to Mrs Swallow pursuant to a section 1(2) delegation. HMRC in this case is the pension administrator (as well as, by reason of a different function, the employer). There are no trustees of civil service pension arrangements.
5. The Cabinet Office, Civil Service Pensions Division, is the scheme manager. The manager’s responsibilities include giving advice in cases involving novel or contentious issues, taking some decisions on behalf of the relevant Minister and investigating complaints made pursuant to the second stage of the internal dispute resolution procedures.

6. The rules of the scheme (“the rules”), as amended from time to time, govern the payment of benefit. No payment can be made except as provided for by the rules. The rules are laid before Parliament and are made pursuant to section 1 of the Superannuation Act 1972.
7. For the purposes of this case, the rules which are relevant are the rules which were current in 1994. The rules which applied in 1994 were the rules which had been made in 1990. Although the Ombudsman referred to rules 1.12 and 3.14 in the part of his decision which I have quoted above, I will repeat those rules again and place them in context.
8. Rule 3.1 provided for the payments due following ordinary retirement and Rule 3.4 provided for retirement on medical grounds. Neither of these rules were applicable to the Claimant. Rule 3.1 did not apply because Mrs Swallow had not retired; she had been dismissed. Rule 3.4 did not apply because Mrs Swallow did not retire on medical grounds; she had been dismissed.
9. Rule 3.14 provided for entitlement to early payment of a preserved pension and lump sum. It provided:

*“Where a person who has been awarded a preserved pension and lump sum falls ill before attaining the age of 60, then in either of the two following cases the pension and lump sum may be brought into immediate payment:*

*(i) If, having opted out of the scheme while remaining in the civil service, he is retired on medical grounds because of that illness;*

*(ii) If he has left the civil service, and it is established that the illness would have led to his retirement on medical grounds had he remained in the service.”*

10. Paragraph 3.14(ii) was potentially applicable to Mrs Swallow. She had left the civil service and she had been awarded a preserved pension and lump sum. Further, she had applied for the pension and lump sum to be brought into immediate payment.

11. Rule 1.12 defines “retirement on medical grounds” as:

*“retirement from the civil service with a medical certificate acceptable to the Treasury which states that the person concerned is prevented by ill health from discharging his duties, and that his ill health is likely to be permanent.”*

12. In order to be eligible for early payment, therefore, the Claimant had to establish that she would have been eligible for retirement on medical grounds, if she had been still employed in the civil service.

### **The reference to the pensions ombudsman**

13. Following the decisions which are referred to in the ombudsman’s findings of fact, Mrs Swallow referred the matter to the ombudsman. On 19<sup>th</sup> February 2008, the ombudsman wrote to Mrs Swallow asking her to confirm that her application was based on her disagreement with the decision not to back date the payment of ill health early retirement benefits to 1994. On 25<sup>th</sup> February 2008, Mrs Swallow confirmed that was indeed the basis of the reference.

14. The Defendants have not challenged the jurisdiction of the ombudsman to deal with the reference to him. At the hearing, counsel for the Defendants took me with care and in detail to the relevant provisions of the Pension Schemes Act 1993 and to the earlier statutory provisions in section 59C of the Social Security Pensions Act 1975, as amended. In particular, I was referred to the

definitions of “pension scheme” and “occupational pension scheme” in the 1993 Act, both before and after amendments by the Pensions Act 2004. I was also referred to the Pensions Schemes (Categories) Regulations 2005. It is clear that this pension scheme was and is an occupational pension scheme. I was also taken to the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1991 and 1996 and shown the exclusionary provision in reg. 3(b) of the 1991 Regulations which was not repeated in the 1996 Regulations.

15. As Mrs Swallow’s complaint does not include an assertion that she should have been advised of the right to complain to the ombudsman in 1994 and as there is no challenge to the jurisdiction of the ombudsman in 2008 and 2009, it is not necessary for me to set out in this judgment, or to go into the detail of, these statutory and regulatory provisions.
16. It can be seen that the ombudsman was asked by Mrs Swallow in 2008 to investigate matters as far back as 1994, or even earlier. In view of the three year time limit in reg. 5 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, the ombudsman considered whether it was appropriate for him to consider the reference to him. By his letter of 25<sup>th</sup> February 2008 to Mrs Swallow, the ombudsman ruled that pursuant to reg. 5(3), he would investigate the matters referred to him. There is no challenge by the Defendants to this ruling.

### **The ombudsman’s decision**

17. Having set out his findings of fact (as repeated by me earlier in this judgment), the ombudsman summarised the submissions made to him by both sides to the dispute and then expressed his conclusion, which I will now set out verbatim.

### **Conclusions**

21. *Mrs Swallow's complaint is that she should have been granted an ill health early retirement pension at the time her employment was terminated in April 1993.*
22. *In effect Mrs Swallow is claiming a pension under Rule 1.12. There is no basis under the Rules of the Scheme under which Mrs Swallow can be awarded a pension backdated to her dismissal in the absence of fault by HMRC.*
23. *Civil Service Pensions says that Mrs Swallow's absence from 20 June 1992 was not certified by her GP. In addition, she was not under the care of a specialist nor was there any evidence to show that she met the criteria for an ill health pension at that time.*
24. *Mrs Swallow argues that her GP did not understand her mental health condition because he is not a psychiatrist. Consequently, her GP had not provided her with a certificate which would have allowed her to be absent from work over the longer period.*
25. *Given that Mrs Swallow was asked to stay away from work after her GP's certificate had expired, the fact that her absence from work was not certified by her GP at the time of her dismissal does not necessarily mean that she did not meet the criteria for an ill health pension at the time. Rule 1.12 set out the eligibility condition for an ill health pension to be payable from the Scheme, which is that a member needs to retire from service with a medical certificate acceptable to the Minister which states that he/she is prevented from ill health from carry out his/her duties and his/she ill health is likely to be permanent.*
26. *It is clear that at around the time of her dismissal HMRC did a great deal to establish whether Mrs Swallow was ill. Unfortunately she did not take up appointments made for her. It may be that it was partly a result of her illness that she did not do so. But I do not consider that HMTC were at fault.*
27. *Mrs Swallow's service with HMRC was terminated on grounds of gross misconduct. There was no medical certificate to show that she was unable to carry out her duties due to ill health and that her condition was such that it was likely to be permanent. In the absence of a medical certificate, under the Rules Mrs Swallow did not meet the criteria for payment of an ill health early retirement pension at the time her employment was terminated in April 1993.*
28. *I therefore do not uphold the complaint against HMRC or Civil Service Pensions.*

### **The appeal**

18. Mrs Swallow now appeals against the decision of the ombudsman. There is a little procedural history relevant to this appeal.
19. Initially, Mrs Swallow named the ombudsman as the only respondent to the appeal. As a result of communications to the court from the ombudsman and from the present Defendants, I directed on 7<sup>th</sup> July 2009 that the appeal should proceed as if the only Defendants were (1) HM Revenue and Customs and (2) the Cabinet Office. The parties appear to be agreed that the right persons have now been made respondents to this appeal.
20. The appeal was not brought in time but Mrs Swallow explained how that had come about and on 7<sup>th</sup> July 2009, I granted an extension of time to allow Mrs Swallow to rely on the Appellant's Notice which she had served.
21. This appeal was initially due to be heard at an oral hearing on a date which had been fixed by the court. Before that date, Mrs Swallow informed the court that she was not well enough to attend an oral hearing of her appeal. The Respondents informed the court that they did not intend to be represented at any oral hearing, although if the court so wished they would provide the court with a copy of the relevant rules of the pension scheme which was the subject of this appeal. In view of the position being taken by the parties, I directed that the appeal would be decided on consideration of the papers and without an oral hearing.
22. I then proceeded to consider the appeal on the basis of the material with which I had been provided. I found that I was unable to deal with the appeal satisfactorily on that basis. In particular, I was unable on the materials provided to answer all of the questions which seemed to me to arise.

Accordingly, I revised my earlier directions and instead directed that the appeal should after all be listed for an oral hearing. I accepted that Mrs Swallow might feel unable to attend that hearing. I also indicated that I could not order the Defendants to attend and be represented but I requested them to attend through counsel for the purpose of assisting the court. I also indicated some 11 questions on which I would welcome further assistance.

23. I am happy to say that the Defendants responded favourably to my request that they instruct counsel to attend the oral hearing of this appeal. They instructed Ms Elisa Holmes of counsel. She prepared detailed written submissions and supplied a bundle of documents and other legal materials which I needed to deal with the many questions which might arise. She provided considerable assistance to the court. In the best traditions of the Bar, in view of the fact that Mrs Swallow did not have legal assistance, Ms Holmes dealt fairly with all the matters arising. I am grateful to the Defendants' solicitors and to counsel for all of the assistance they gave me.

## **Discussion**

24. The points which Mrs Swallow wishes the court to consider on this appeal are set out in her grounds of appeal and in a one-page statement of the arguments on which she relies.
25. Mrs Swallow's challenge to the ombudsman's decision is based on her contention that the ombudsman did not properly consider some of the points which she had made to him. Her complaints about what happened in the period up to 1994 concentrate upon the statements made to her about her rights, in particular, her right of appeal against the adverse decision made in

1994 that she did not qualify under rule 3.14. Mrs Swallow refers to the letter dated 24<sup>th</sup> October 1994 from HM Customs and Excise. That letter informed her that her request for early payment under rule 3.14 had been unsuccessful.

The letter included this sentence:

“Should there be a significant change for the worse in your medical condition, I would of course be prepared to review the situation in the light of any new evidence.”

26. Mrs Swallow’s principal complaint about that letter is that she was not told by it, or at any other time in 1994, that she had a right of appeal against the decision contained in the letter. She says that if she had been told that she had a right of appeal, then she would have exercised that right. She says that in order to put forward her appeal, she would have sought appropriate medical help and that would have led to her demonstrating that her mental health was such that she was indeed entitled to early payment of her pension under rule 3.14.
27. Mrs Swallow’s other complaint about the letter of 24<sup>th</sup> October 1994 is that it did not set a time limit for a review of the position. It is true that the letter did not set a time limit. Indeed, Mrs Swallow subsequently did ask for her situation to be looked at again and when it was, she ultimately succeeded in showing her case was within rule 3.14. It may be that the complaint which Mrs Swallow wishes to make is that the letter should have spelt out that if the matter was reviewed then the review would relate to the circumstances at the date of the review and would not have retrospective effect to 1994.

28. In my judgment, the principal point which needs attention on this appeal is Mrs Swallow's complaint that she was not advised in 1994 of her right of appeal against the adverse decision in relation to rule 3.14 and her contention that the ombudsman's decision did not really deal with that complaint.
29. In paragraph 18 of his decision, the ombudsman records a contention from Mrs Swallow that she was not given a right of appeal in 1994. When he later set out the submissions made by Mrs Swallow, he again recorded her case as being that she was denied a right of appeal in 1994 and that if she had been informed of a right of appeal, she would have exercised it, sought medical help and have been able to establish her case under rule 3.14. When the ombudsman set out the submissions made to him by the Defendants, he did not record any submission from them that there was no relevant right of appeal available to Mrs Swallow in 1994.
30. When I considered this matter on the papers, before the oral hearing, I was concerned that the ombudsman did not in his reasons for his decision (at paragraphs 23 to 30) refer to Mrs Swallow's case that she had not been given the proper information and advice in 1994 and that, if she had been, the outcome would have been different. It seemed to me arguable on Mrs Swallow's behalf that the matter would have to be remitted to the ombudsman for him to deal with her arguments on that point.
31. At the oral hearing, counsel for the Defendants addressed in detail the question as to what right of appeal, if any, Mrs Swallow might have had in 1994 as compared with the situation in 2002 and onwards when Mrs Swallow was told that she had a right of appeal, which she exercised, ultimately successfully.

32. It is now necessary to set out the position at the various dates as regards any relevant right of appeal.
33. In 1994, the possibility of any relevant appeal was dealt with by paragraphs 8.3.10 to 8.3.15 of the 1993 version of the Civil Service Management Code. These paragraphs provided for appeals in relation to applications for retirement on medical grounds. Thus, if the relevant department insisted on retiring an employee on medical grounds, the employee had a right of appeal. Further, if the relevant department refused an employee's request for retirement on medical grounds, the employee had a right of appeal. Conversely, there was no such appeal available in relation to a decision not to allow early payment of preserved pensions and lump sums. Thus there was no appeal available to Mrs Swallow in relation to the 1994 decision.
34. Although there was no appeal available to Mrs Swallow following the 1994 decision, she was explicitly informed that she could make a new application at any time on the basis of evidence that she would have been eligible for early retirement on medical grounds if she were still in employment.
35. In 2002, the position as regards appeals was different. Section 50 of the Pensions Act 1995 required that complaint procedures should be provided for "*the resolution of disagreements between prescribed persons about matters in relation to the scheme*". Section 50(3) enabled relevant regulations to be made. The Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996 ("the 1996 Regulations") were made pursuant to section 50, and other powers. The 1996 Regulations provided for resolution of disagreements, including disagreements between trustees or managers of

the scheme on the one hand and a pensioner member on the other – see regs. 2-7. The 1996 Regulations provided, first, for an application for a decision (reg. 4), and then for the referral of a disagreement in respect of a decision, to the trustees or managers of a scheme (reg. 6). A notification of a decision resulting from a reg. 6 referral must include a statement that the ombudsman may investigate and determine any complaint or dispute of fact or law in relation to a scheme (Regulation 7(2)(e)). These Regulations came into force on 6 April 1997 and did not apply at the time of the 1994 decision. They did, however, apply at the time of the 2002 decision. At that later time, the Internal Dispute Resolution procedures, which applied to relevant decisions in relation to this pension scheme, provided for two distinct levels for dealing with complaints. The first was the right to receive a written explanation of a decision taken by the scheme administrator, normally the employing or former employing department or agency (in this case HMRC). The second was a right of appeal to the Cabinet Office against the scheme administrator's decision.

36. As I have explained, the absence of any relevant right of appeal in 1994 was not drawn to the ombudsman's attention when he was asked to deal with this matter. Now that this matter has been explained to me, it is obvious to me that Mrs Swallow's criticism that she was not advised of a right of appeal in 1994 cannot prevail. If there was no right of appeal in 1994, the Defendants cannot be criticised for not referring to a right of appeal. If there was no right of appeal in 1994, then Mrs Swallow could not have exercised a right of appeal and she cannot show that the position in 1994 would have been altered by the alleged successful exercise of a right of appeal.

37. Although I was concerned at an earlier stage at the way in which the ombudsman dealt with, or arguably failed to deal with, Mrs Swallow's complaint about inadequate advice being given to her in 1994 and although Mrs Swallow's principal ground of appeal is her contention that the ombudsman did not properly consider this point, it now emerges that there is only one possible answer to Mrs Swallow's original criticism of the advice she was given in 1994. That answer is that Mrs Swallow has no arguable case for criticising the Defendants on this ground.
38. In these circumstances, even if I felt that the ombudsman had not dealt adequately with Mrs Swallow's criticism about the advice in 1994, I would not remit the matter to him for him to make a determination in relation to this criticism and/or to give further reasons. In my judgment, the right course for me to take is to affirm the decision of the ombudsman that the Defendants were not at fault in this respect, having explained in this judgment the reasoning which has led me to this conclusion.
39. Mrs Swallow's second ground of appeal is, as I have already described, based on her criticism of the way that the letter of 24<sup>th</sup> October 1994 referred to a possible review of the situation. In my judgment, there is no proper basis for criticising the letter in this respect. The meaning of the letter is quite clear and not liable to mislead. I do not see how the letter could be read as holding out the promise that if there were to be a later change of circumstances which justified the early payment of pension under rule 3.14, that the payment would have effect from a date earlier than the change of circumstances relied upon.

40. It is not completely clear to me that Mrs Swallow put forward to the ombudsman the argument contained in her second ground of appeal. The ombudsman held that the Defendants were not at fault in any relevant way in their handling of matters in the period up to 1994. In view of the fact that I can see no basis for criticism based on the contents of the letter of 24<sup>th</sup> October 1994, I can similarly see no need to remit the matter to the ombudsman in this respect.
41. In so far as Mrs Swallow makes other criticisms of the Defendants or of the ombudsman in her grounds of appeal, any such criticisms would appear to be as to matters of fact which do not involve any point of law and do not provide Mrs Swallow with any possible ground of appeal against the ombudsman's decision.

## **Conclusion**

42. For the reasons given above, I affirm the decision of the ombudsman and dismiss this appeal.