

BETWEEN:

THE KING on the application of
WOMEN AGAINST STATE PENSION INEQUALITY LIMITED
Claimant

-and-

PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN
Defendant

-and-

SECRETARY OF STATE FOR WORK AND PENSIONS AND OTHERS
Interested Parties

STATEMENT OF FACTS AND GROUNDS

- *References in these grounds to the First Witness Statements of Angela Madden [CB/D/198-215], [REDACTED] [CB/D/216-233] and [REDACTED] [CB/D/234-246] take the form 'Madden, §', [REDACTED], §' and [REDACTED], §' where § denotes paragraph number.*
- *References to the Core Claim Bundle are in the form [CB/x/y] where "x" is the tab letter and "y" the page.*
- *References to the Supplementary Bundle are in the form [SB/x/y]*
- *Essential documents for advance reading by the Court are marked on the core bundle index with asterisks**

A. INTRODUCTION

1. On 19 July 2021 the Parliamentary and Health Service Ombudsman ("PHSO") published the results of an investigation into multiple complaints against the Department for Work and Pensions ("DWP") relating to the Department's delay in communicating to affected women changes to their state pension age which meant that their state pensions would not be paid when they reached 60 but at age 65 (and later, 66) [CB/B/51]. The PHSO upheld the complaints, finding that maladministration had resulted in the DWP only starting the process of informing affected women in April 2009, when the process should have begun by, at the latest, December 2006 (28 months earlier).

2. Given that the PHSO had found maladministration, the investigation then moved on to a second stage, which examined whether the maladministration had caused injustice. As part of this element of its investigation the PHSO examined the complaints of six ‘sample complainants’, including the Second and Third Interested Parties, referred to by the PHSO as Ms W and Ms E. On 8 December 2022, the PHSO sent to the Claimant a final version of its report on stage 2 (“**Stage 2 Report**”) [CB/B/89], but the Stage 2 Report has not yet been published by the PHSO. This judicial review challenges core findings of the Stage 2 Report.
3. In summary, the Stage 2 Report is unlawful for the following reasons:
 - (1) First, the analysis of injustice contained in the Stage 2 Report is irrational and infected by what appears to be a simple calculation error, albeit one with direct and serious consequences to the assessment of injustice in relation to Ms W and Ms E, other sample complainants, and a large number of other women affected by the DWP’s maladministration:
 - (a) The approach taken by the PHSO throughout the Stage 2 Report is to approach the question of whether injustice has been suffered by asking the question, “*whether an additional 28 months’ notice would have meant women avoiding the injustices they claim*” (e.g. §265 [CB/B/132]). The PHSO therefore identified when each complainant received their letter from the DWP and then counted back 28 months from that date to work out when they ought to have received their letter.
 - (b) However, this approach overlooks the fact that, as recorded in the Stage 2 Report, there were three significant pauses in DWP’s direct mailing campaign (totalling 24 months) that would have been avoided entirely if the letters had been sent out from December 2006 (or earlier) rather than April 2009. The result is that, whilst *some* women have suffered a delay of only 28 months in receiving notice of changes to their state pension age, *most* have suffered considerably longer delays, of up to 52 months.
 - (c) This error translates directly into the PSHO’s assessment of injustice suffered by Ms W, Ms E and the other sample complainants. In respect of these women, the Stage 2 Report concludes that they failed to show that the maladministration

caused them material injustice because they had taken key decisions on which they relied (e.g. in Ms W's case, leaving her employment) before the date on which they should have received letters from the DWP, so the delay in sending the letters had no effect on such decisions. However, had the DWP correctly calculated when the complainants should have received the letters, it would have concluded that the key decisions were taken a considerable period *after* they should have received letters from DWP. The assessment of the sample complaints by the PSHO is therefore irrational and flawed.

- (d) The further consequence of PHSO's irrational approach is that follow-on complaints will be decided on the same flawed basis, with women being required to show that they took key decisions within 28-month period prior to the date on which they received letters from DWP if they seek compensation for financial injustice. [REDACTED]

[REDACTED]

- (2) Secondly, the PHSO's conclusion that it is not able in general to reach findings on whether complainants would have taken different decisions had they received the letters from the DWP when they ought to have done because there is "*too much we cannot now know about what would have happened*" (§304 [CB/B/138]) is unlawful for three reasons.

- (a) First, it is infected by the same error as addressed by Ground 1.
- (b) Secondly, it is irrational for the PHSO to conclude that it is too difficult to reach conclusions on whether women would have made different decisions such that the complaints cannot be established. It will often be possible for such assessments to be made, and the PHSO has managed to find ways of addressing such issues satisfactorily in other previous investigation reports.

- (c) Thirdly, the PHSO fails properly to address, against his published policy, the complaints made by the sample complainants that they suffered loss of opportunity as a form of material, as opposed to emotional harm. The PHSO did not consider this separately from his consideration of financial harm and insofar as he did so he erroneously treated loss of opportunity as a form of emotional distress caused by the uncertainty of “*not knowing*” whether different decisions might have been made. The harm of not knowing whether different decisions might have been made is not the same as the harm or injustice of losing an opportunity, which complaint was not or not properly determined.
4. The Court is invited to quash the Stage 2 Report or the identified passages of it and/or grant an appropriate declaration.
 5. The Claimant sent a pre-action protocol letter to the PHSO on 8 February 2023, identifying the errors in the Stage 2 Report and explaining the consequences for both the Stage 2 Report and the PHSO’s Stage 3 Provisional Report (“**PAP Letter**”) [CB/C/162]. ADR was offered. By a response dated 20 February 2023, the PHSO rejected each of the proposed grounds for judicial review, refused to reconsider the Stage 2 Report and declined the ADR offer (“**PAP Response**”) [CB/C/173].

B. CLAIMANT’S STANDING

6. By its PAP Response, the PHSO refused to accept WASPI’s standing as a claimant in these proceedings, though it does not formally contest it. It is therefore addressed reasonably shortly.
7. Section 31(3) of the Senior Courts Act 1981 requires a person or body applying for judicial review to have a “*sufficient interest in the matter to which the application relates*”. The Claimant clearly has a sufficient interest.
8. The Claimant, WASPI, is a private limited company that operates as a membership organisation for women affected by the changes to the State Pension age (Madden, §8, [CB/25/201]). Its function is to educate women in pensions rights and to take appropriate action to achieve those rights, by advocating for millions of women affected by the changes to the State Pension age (Madden, §7, [CB/D/201]). It is a body composed

exclusively of the women affected by the DWP's maladministration and by PSHO's investigation and reports at Stage 1 and Stage 2 (Madden, §8-9, [CB/D/201]).

9. WASPI has long represented and campaigned for millions of affected women (including but not limited to its members), it has produced information leaflets about the changes to pension age, about DWP's maladministration and the complaints process (Madden, §7, [CB/D/201]). It has been recognised by the PSHO in the course of its investigation as a properly interested stakeholder and has been sent copies of the Stage 1 and Stage 2 reports in draft and pre-publication form. The PSHO has invited it to comment on each of those reports and it has done so (Madden, §32, [CB/D/209]). Indeed, it is only because of this that WASPI is in a position to bring this judicial review challenge, since the Stage 2 Report has not yet been published by the PSHO and so is not publicly available to the millions of women that it affects.
10. WASPI brings this claim behalf of its members as well as other affected women. It is a well-placed group able to represent elderly and vulnerable women who may not be well placed to bring the action themselves. WASPI therefore has “*associational*”, “*surrogate*”, and “*public interest*” standing for the purposes of the categorisation given in *R (Good Law Project & Runnymede Trust) v Prime Minister* [2022] EWHC 298 (Admin) at §20.
11. The Second and Third Interested Parties, Mrs W and Mrs E, are WASPI members and are two of the six sample complainants selected by the PSHO and whose circumstances are addressed in the Stage 2 Report (Madden, §55, [CB/D/215]).
12. The PSHO's reluctance to concede standing is particularly surprising in circumstances where its Reply to the PAP Letter at §8-10 refused to permit WASPI to share its PAP Letter with affected women who therefore are not presently in a position to commence proceedings themselves [CB/C/174]. Only on 24 February 2023 was a version of the PAP Letter (with redactions agreed with the PSHO) published to WASPI members [CB/C/193].

C. TIMING OF THE CHALLENGE

13. In its PAP Response, the PSHO asserts at §§21-26 that the challenge is out of time because it was not brought “*promptly*” for the purposes of the CPR r 54.5(1)(a)

[CB/C/176-177]. It is said that the challenge should have been brought, or at very least warned, within two weeks of the Claimant and the Interested Parties being sent the final Stage 2 Report (i.e. on Christmas Eve). It is said that there is no public interest reason for the claim to proceed notwithstanding the alleged lack of promptness and that the PHSO has, “*justifiably proceeded on the basis that his stage 2 Stage 2 Report was not challenged and moved on to stage 3*” (at §25 [CB/C/177]).

14. The Claimant does not accept that it has not acted promptly. It has set out in the witness statement of Angela Madden a detailed explanation of the timing of the PAP Letter sent to the PSHO which shows that they have acted reasonably and promptly since receiving the report (Madden, §33-37, [CB/D/209-211]). However, it is submitted that there is a straightforward reason why the PSHO’s position is wrong.
15. As explained above, the PHSO has not yet published the Stage 2 Report, although the Stage 1 Report was published last summer. It is not understood why the Stage 2 Report has not been published, but the PHSO’s website simply sets out a very general overview of the findings of the Stage 2 Report. This summary is reproduced at page [SB/A/97] of this bundle. As will be seen, the summary, insofar as material to the issues in this judicial review, merely states that maladministration in DWP’s communications about the state pension age and national insurance qualifying years “*did not lead to all the injustice claimed*”.
16. It is impossible from the very brief summary that the PHSO has chosen to put on his website for anybody to identify the irrationality and illegality in the Stage 2 Report that is the subject of this judicial review. This is important because the Stage 2 Report sets out the PHSO’s general findings in relation to injustice in the investigation and, whilst the PHSO has chosen to focus on the facts of six sample complainants, the findings and conclusions of the report are relevant to all of the other complaints that have been made and the situations of all affected women. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17. That means that when the Stage 2 Report is eventually published there will be a huge number of affected women who will be entitled to challenge it on the same grounds as are raised in this judicial review. It could not possibly be said that such women will be out of time, or should not have time extended, preventing them from advancing such a challenge.
18. Whether a claim is brought promptly depends upon all the circumstances. It is highly relevant in deciding what promptness requires in the present circumstances that the Stage 2 Report has not been published and therefore that most of the people affected by it are not yet in a position to bring a challenge to the report and could only do so once it is published at some point in the future. Furthermore, as explained above, the Claimant asked the PHSO if he would consent to the PAP Letter being published. The PHSO initially refused that request on the basis that the letter is confidential, therefore preventing the Claimant from informing affected women that they have a potential judicial review claim. Only on 25 February 2023 was a redacted version of the PAP Letter published to WASPI members.
19. It is therefore extremely difficult, with respect, to understand the point made in the PAP Response Letter that the PHSO has “*justifiably proceeded on the basis that his stage 2 report was not challenged*”. As just explained, the report had not yet been published to the vast majority of women affected by it and until 25 February 2023 they had no knowledge of it other than the brief summary on the PHSO’s website, and were not in a position to bring any challenge. Insofar as the PHSO has proceeded on the basis that the Stage 2 Report has not been challenged and is thus now immune from judicial review, this is not “*justified*”, on the contrary it is utterly irrational and not something deserving of any weight at all.
20. Therefore, in the circumstances in which the Stage 2 Report has not yet been published, so only a small number of people were in a position to identify the irrational reasoning that it contains before 25 February 2023, the requirements of promptness did not require the Claimant to issue a claim within two weeks, as the PHSO alleges, or any timetable other than that adopted. Furthermore, even if the Claimant had sent a PAP letter within two weeks and issued a claim in late December or early January, no claim would have been determined before the Stage 3 report is scheduled to be produced, so it would not have made any difference. Given both these factors, the PHSO is not prejudiced by the

timing of this claim, indeed it is preferable that the issues are resolved now rather than in a claim brought by others after publication of the Stage 2 Report.

21. If, despite these submissions, the Court considers that the Claimant has not acted promptly, then the Claimant requests the Court grants an extension of time for the claim pursuant to CPR 3.1.
22. There is an obviously good reason in the Court granting an extension of time if required because it is much preferable that the issues raised are resolved now, on a timetable that the PSHO considers appropriate and allowing the PSHO, if he so wishes, to delay the finalisation of the Stage 3 Report. This will allow quicker and more orderly resolution of the serious issues raised by the judicial review, than the issues being raised by one or more affected women once the Stage 2 Report is published, which must be assumed to be a real possibility. There is thus no prejudice, hardship or detriment to good administration in the claim proceeding; on the contrary, very good reasons why it should: *R (Chukurova Finance International Ltd) v HM Treasury* [2008] EWHC 2567 (Admin) at §32 (Moses LJ) [SB/D/625].

D. LEGAL AND POLICY FRAMEWORK

23. The powers of the PHSO are set out in the Parliamentary Commissioner Act 1967, section 5(1) of which permits the PHSO to investigate where “*a written complaint is duly made to a member of the House of Commons by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken . . . and . . . the complaint is referred to the Commissioner, with the consent of the person who made it, by a member of that House with a request to conduct an investigation thereon*” [SB/D/477].
24. Section 10(4) of the 1967 Act provides that: “*The Commissioner shall annually lay before each House of Parliament a general report on the performance of his functions under this Act and may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit*” [SB/D/484].
25. The Stage 1 Report has been presented to Parliament pursuant to section 10(4) of the 1967 Act/ As explained above, the Stage 2 Report has not yet been published or presented to Parliament pursuant to section 10(4) of the 1967 Act.

26. The PHSO publishes policy documents that inform its decision-making. As set out at §18 of its Stage 1 Report [CB/B/57-58].: *“To help public bodies to understand how we will approach complaints, and complainants to understand how we will consider their cases, we publish our Principles.”* The Principles comprise the PHSO’s, *“Principles of Good Administration [SB/E/713]., Principles of Good Complaint Handling [SB/E/720]. and Principles for Remedy [SB/E/727]. They underpin our assessment of performance, our views on good complaint handling and our approach to putting things right”*.
27. The PHSO sets out its approach to “putting things rights” as follows [SB/E/754]:
- “If we fully or partly uphold a complaint, we can recommend what action an organisation needs to take. This could mean acknowledging mistakes, apologising or making a payment. We can recommend the organisation makes a payment for a number of reasons, for example:*
- someone has been left out of pocket*
 - someone was distressed at seeing a loved one in pain*
 - an individual has suffered damage to their reputation.”*
28. Where the PHSO considers making a payment, it applies the principle that the public body should *“put the person affected back into a position where they would have been, had there not been a negative impact on them.”*
29. The PHSO has published *“Our guidance on financial remedy”* [SB/E/942]., which sets out a scale of payments depending on the nature and severity of the injustice caused. It refers to the PHSO’s Typology of Injustice (or “TOI”), which categorises “previous cases” where financial remedies have been recommended. The guidance states that *“we may use . . . the TOI . . . to enable a view to be taken on consistency”*.
30. The PHSO’s TOI expressly recognises four main categories of injustice within the typology and financial scale: (i) *“emotional injustice”*; (ii) *“material injustice”*; (iii) *“physiological injustice”*; and (iv) *“bereavement”* [SB/E/956-957].
31. Whilst *“emotional injustice”* may include *“uncertainty”* (part of injustice category E2) or *“financial worry”* (part of injustice category E11), *“material injustice”* includes *“loss of material opportunity”* (category M5) – which applies when the PHSO *“cannot say*

with certainty that the material gain would have arisen or what it would have been worth”. One example given in the guidance is “loss of opportunity to work”.

32. Compensation or restitution for financial loss caused by maladministration is considered separately, outside the guidance on financial remedy and TOI. The PHSO website states [SB/E/997],

“We will only use our scale [of injustice] to determine financial recommendations for non-financial loss, for example, distress. If a complaint relates to a direct financial loss such as care home fees or benefit payments, we will recommend the organisation reimburses the amount the complainant has lost, including any interest due.” (emphasis supplied)

E. SUMMARY OF FACTS

33. The facts are summarised in the attached chronology of events [CB/A/46] and set out in more detail in the witness evidence.

F. GROUNDS FOR JUDICIAL REVIEW

(1) Irrational calculation of the delay in sending letters caused by maladministration

34. In its Stage 1 Report, the PHSO found that if DWP had acted without maladministration, it would have started to issue letters to women affected by the changes to their state pension age by December 2006. This would have been 28 months before DWP actually began to send the letters. The relevant passage of the report states as follows [CB/B/84]:

“165. ... If DWP had made a reasonable Stage 2 Report about direct mail in August 2005, and over a year of planning and implementation time had not been lost between November 2006 and December 2007, it is likely letters about the effects of the 1995 Pensions Act would have been issued within 16 months of August 2005 (that is, from December 2006). That is 28 months earlier than when DWP actually started to issue them (April 2009). Had DWP issued letters from December 2006, there would have been no need to pause direct mailing pending the 2011 Pensions Act.”

35. The conclusion summarised the finding in the following terms [CB/B/85]:

“172. The maladministration led to a delay in DWP writing directly to women about changes in State Pension age. If the maladministration had not happened, DWP would have begun writing to affected women by December 2006, at the latest, 28 months earlier than it did (in April 2009).”

36. And in the final paragraph of its Stage 1 Report, the PHSO stated [CB/B/85]:

“173. It follows that affected women should have had at least 28 months’ more individual notice of the changes. For women who were not aware of the changes, the opportunity that additional notice would have given them to adjust their retirement plans was lost. The next stage of our investigation will consider the impact that injustice had.”

37. In the Stage 2 Report the PHSO builds on these findings by addressing whether the delay in commencing the direct mailing exercise caused material injustice to the sample complainants. In doing so, the PHSO framed the issue as, *“whether an additional 28 months’ notice would have meant women avoiding the injustices they claim”* (§265 [CB/B/132]).

38. The PHSO applied this approach to the facts of the six sample complainants, identifying when each complainant received their letter from the DWP and then counting back 28 months and taking that as the date at which, absent maladministration, the complainant would have received the letter.

39. [REDACTED]

40. On the PHSO’s own findings, the direct mailing campaign was conducted by DWP from April 2009 to November 2013 (a period totalling 55 months): see Stage 2 Report at §266 and §§82-83 [CB/B/132 and 104-105]. Critically, however, 24 of these 55 months were attributable to three pauses in the mailing campaign.

41. The first two pauses were between April 2010 and February 2011 and between March 2011 and January 2012, in response to proposals to further increase the State Pension age. These pauses are recorded in the Stage 2 Report at §300 [CB/B/137]:

“DWP has also explained to us it also paused the direct mailing it began in 2009 for ten months from April 2010 to in response to proposals for further increase [in] State Pension age. Letters were then issued in February 2011 and March 2011 before direct mail was paused again until January 2012. It is likely that, if a direct mail exercise had begun earlier and not been completed by April 2010, it would still have been paused

then. That too could have affected how much notice of their State Pension age women had.”

42. There was also, on the PHSO’s own findings, a third pause between January 2013 and May 2013: see Stage 2 Report at §82 [CB/B/103104].
43. It follows that, absent those pauses, the DWP’s direct mailing campaign would have lasted 31 months.
44. Given the three pauses, had DWP started sending letters 28 months before they did, the process would have been completed in July 2009, 31 months after December 2006. It would have been completed before the first pause (i.e. before April 2010) and it would thus have completed 52 months earlier than it did. Women who received their letters after one or more of the pauses therefore suffered substantially more than the 28 months of delay.
45. Therefore, an approach that asks “*whether an additional 28 months’ notice would have meant women avoiding the injustices they claim*” is irrational in the sense of being illogical and contrary to the evidence and findings of fact.
46. The correct position, is as follows:
 - (1) Women who received their letters after the first pause (and should have received them before the first pause) suffered a further 10 months of delay, on top of the 28 months found by the PHSO, bringing the total delay in their cases to 38 months;
 - (2) Women who received their letters after the second pause (and should have received them before the first pause) suffered a further 20 months of delay, on top of the 28 months found by the PHSO, bringing the total delay in their cases to 48 months.
 - (3) Women who received their letters after the third pause (and should have received them before the first pause) suffered a further 24 months of delay, on top of the 28 months found by the PHSO, bringing the total delay in their cases to 52 months.

47. The PHSO's erroneous calculation of delay in the Stage 2 Report has fundamentally prejudiced its assessment of the injustice flowing from the DWP's maladministration in the case of the individual complainants, including in Ms W and Ms E's cases. The PSHO placed considerable emphasis in deciding those complaints on the fact that key decisions were allegedly made by complainants before they would have received the letters from the DWP, had the DWP acted without maladministration. At §264 [CB/B/132], the PHSO explains that “[w]hether women lost opportunities to make different decisions depends on whether those decisions had already been made by the time DWP should have written to them.”

48. Thus, in the case of Ms W, the PHSO reasons as follows:

- (1) Although Ms W does not recall receiving a letter, the PHSO report records that women with the same birth date received letters in about October 2013. As it happened, Ms W discovered the change to her State Pension age in December 2011 through a State Pension forecast: see Stage 2 Report at §274 [CB/B/133].
- (2) Consistently with its flawed approach described above, the PHSO then concludes that but for the maladministration she would have received the letter 28 months before October 2013, in June 2011: see Stage 2 Report at §273 [CB/B/133].
- (3) Based on this finding, PHSO concludes Ms W would only have received an extra six months' notice of changes and, moreover, this would have been *after* giving up her job in November 2010¹: see Stage 2 Report at §§273-274 [CB/B/133].
- (4) The PHSO concludes that Mrs W therefore only lost 6 months between June and December 2011 and, since she would not have received her letter until after she had decided to leave her job, it could not be said that the maladministration caused her financial hardship or deprived her of an opportunity to make a different decision about her job: Stage 2 Report at §274 [CB/B/133].

49. This analysis was however entirely flawed:

- (1) On the PHSO's analysis, Ms W was sent a letter in October 2013 and was thus in one of the last batches of letters sent (letters stopped being sent in November

¹ The PHSO incorrectly thought the correct date was April 2010.

2013). That was the 30th month during which letters were sent by the DWP. If the DWP had started sending letters in December 2006, Mrs W would have received her letter in June 2009 (not June 2011).

- (2) Mrs W would have had notice of the changes to her State Pension age some 17 months before she gave up her job in November 2010.
- (3) The evidence before the PHSO was that Ms W would have stayed in her job and advanced her career if she had known about the changes to her State Pension age before deciding to leave her job: see Stage 2 Report at §272 [CB/B/133].

50. The PHSO's conclusion that,

“Ms W had given up her job around 15 months before June 2011, ...We therefore cannot say that, even if she had received a letter from DWP sent to her then, she would have had an opportunity to make a different Stage 2 Report about leaving her job” (see Stage 2 Report at §273 [CB/B/133])

was therefore irrational and without evidential foundation.

51. Furthermore, the only rational conclusion open to the PHSO, once the true period of delay of 52 months is acknowledged, is that Ms W would not have left her job in November 2010 and would have continued working. She would have received the DWP letter 30 months before the December 2011 State Pension forecast. The PHSO's Stage 2 Report to the contrary defies logic, is irrational, and is contrary to the evidence before it.

52. As for Ms E, the PHSO reasons as follows:

- (1) Ms E received her letter from the DWP in October 2012 (aged 57).
- (2) But for the maladministration she would have received the letter 28 months earlier, in June 2010 (aged 55): see Stage 2 Report at §291 [CB/B/136].
- (3) Based on this finding, the PHSO concludes that Ms E would not have known about the changes to her State Pension age until after being made redundant in February 2009 and after giving up her six-month search for alternative work: see Stage 2 Report at §§290-291 [CB/B/136]. The PHSO reasons that, as a result of the fact that Ms E would not have received the letter until June 2010 it cannot find that maladministration deprived her of a tangible opportunity to find a different job.

53. This analysis was however also entirely flawed:
- (1) If the DWP had started sending letters in December 2006, Ms E would have received her letter in October 2008 (not June 2010).
 - (2) Ms E would have had notice of the changes to her State Pension age some 4 months before she was made redundant in February 2009, she would have been aged 53.
 - (3) The evidence before the PHSO was that Ms E had worked continuously from the age of 16 and would have continued looking for work and/or claiming Job Seekers Allowance if she has known about the changes to her State Pension age at or before the time of her redundancy: see Stage 2 Report at §272 [CB/B/133].
54. PHSO's conclusion that,
- “Since we have no evidence to say whether it is likely she would have successfully found employment, or if she did find a job, how long she could have worked or how much she would have been paid, we cannot say it is more likely than not she would have avoided the need to rely on her private pension or re-mortgage her home”* (see Stage 2 Report at §291 [CB/B/136])
- was therefore irrational and without evidential foundation.
55. Furthermore, the only rational conclusion open to the PHSO, once the true period of delay of 48 months is acknowledged, is that Ms E would have either secured a new job (within a year of her redundancy) or continued to receive Job Seekers Allowance². The PHSO's Stage 2 Report defies logic, is irrational, and is contrary to the evidence before it.
56. The same essential flaw infects the PHSO's analysis of the facts of each of the other sample complainants' cases. Each complainant received their letters after two or three of the pauses. Thus, in Ms U's case the PHSO accepted that she found out about the change in October 2012 and that she received a letter in October 2013. The PHSO reasoned that, *“[h]ad a letter been sent 28 months earlier, she would have received it in June 2011. That would have given her an additional 16 months' notice”* [CB/B/135]. However, again the 28 months earlier analysis is irrational. If the maladministration had not

² Ms E would have been eligible for contribution-based Job Seekers Allowance for a period of six months, after which she would not have been eligible for income-based Job Seekers Allowance.

occurred, Ms U would have received a letter 52 months sooner, in June 2009, over three years before she in fact discovered the change to her state pension age (§288 [CB/B/135-6]).

57. In its PAP Response at §§40-42 the PHSO states that this Ground of judicial review is “*speculative and optimistic*”, as it is “*speculative*” whether the pauses would have been avoided but for the maladministration, the position is “*not clear*”, and “*we cannot clearly find that on balance, DWP would not have paused direct mailings, on the assumption that such mailings had begun in December 2006*” [CB/C/180-181].
58. However, the PHSO’s own findings record the time it took to send out the letters and the length of the pauses. The only difference to the approach required by the analysis advanced herein is that pause periods must be deducted in addition to the 28 weeks from letters were received. There is no speculation involved.
59. Indeed, contrary to what is suggested in the PAP Response, in the Stage 2 Report the PHSO *does* form a judgement on the process for sending letters that would have been adopted had the maladministration not occurred. The PHSO found that the process followed, and the order that the letters would have been sent out, would have been the same, and that “*letters would have been issued in phases based on women’s dates of birth*” (§266 [CB/B/132]). That is why the PHSO calculates when the letters would have been received by deducting 28 months from when they were actually received by complainants. It is also why in Mrs W’s case, the PHSO makes a finding about when she would likely have been sent a letter from the DWP (although she cannot recall it) and from that date works out when the letter would have been sent had there been no maladministration. To suggest that it is not possible to assess when letters would be sent is contrary to the approach that the PHSO took, and requires no different analysis (or “speculation”); it is the same analysis but with the deduction of the pause periods where a letter was received after one or more of those periods. The problem with the PHSO’s approach is that it simply overlooked the need to deduct the pause periods.
60. That the pause periods needed to be factored into the analysis is not only a logical corollary of the PHSO’s findings, but it was recognised by the PHSO himself in his Stage 1 Report. In that Report the PHSO stated at §165 that “[h]ad DWP issued letters from December 2006, there would have been no need to pause direct mailing pending the 2011

Pensions Act” [CB/B/84]. Since the PHSO at that stage had not considered in detail the process of sending letters and the time periods involved it is unsurprising that he referred only to the third pause period, as it would not have been clear at that stage that the first and second pause periods also would have been avoided.

61. At Stage 2 the PHSO adverted to this previous comment at §300 [CB/B/137]. The report identified the two further pause periods and concluded, “*It is likely that, if a direct mail exercise had begun earlier and not been completed by April 2010, it would still have been paused*” for the first two pauses. The PHSO then states, “*That too could have affected how much individual notice of their State Pension age women had.*” In these comments the PHSO accepts that the pauses are properly taken into account in assessing when letters would have been received, but takes the pause periods into account in an irrational way, stating, illogically, that they reduced the effect of the maladministration when in fact they do the opposite.
62. In an attempt to justify its irrational approach, the PAP Response raises an entirely new argument at §41 that finds no place in the Stage 2 Report [CB/C/180]. It is said that, “*it is entirely possible that the passage of the 2007 Pensions Act would have affected any direct mailing about the 1995 Pensions Act begun in December 2006, depending on any decisions DWP would have made at that time about writing to people affected by the 2007 Act*”. This is not located in any evidence in the Stage 1 Report or Stage 2 Report and is contrary to the approach taken in both, as set out above. Both reports are clear that it was maladministration not to commence direct mailing at the latest 28 months earlier that it was commenced, and the suggestion that this finding was effectively academic because the DWP in fact could not and would not have commenced sending letters at that time, or would have paused doing so almost immediately afterwards to await the passage of the Pension Act 2007 has no evidential basis, cuts across the findings and is not credible. It is, with respect, *ex post facto* reasoning which formed no part of the approach taken to calculating the effect of maladministration in the Second Report. It is of no relevance or weight.
63. In conclusion, the PHSO’s approach to calculating whether maladministration occurred by asking whether women would have made different decisions had they had 28 months more notice of the changes to their state pension is irrational. It cannot be, “*safely justified on the basis of. . . evidence*” and does it not “*follow from the evidence*”; rather

it leaves “an explained evidential gap or leap in reasoning which fails to justify the conclusion”: per Saini J in *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin) at §§32-33. Similarly, the Stage 2 Report “does not add up” because of “an error of reasoning which robs the Stage 2 Report of logic”: per Sedley J in *R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1.

Ground 2: unlawful “general approach” to assessment of injustice

64. In addition to the delay calculation error, the PHSO has adopting an irrational approach to assessing material (non-emotional) injustice more generally. The Stage 2 Report made the following findings about what assessments can be made about what would have done see, for example, the Stage 2 Report at §§16, 302 and 304 [CB/B/92 and 138]:

“We cannot second guess what would have happened if they had those opportunities . . . However, the sample complainants are left not knowing whether they could have been in a different financial position . . . We find that this not knowing is an injustice arising from the maladministration in DWP’s communication about State Pension age” (§16).

“We also cannot say whether letters sent earlier would have reached their intended recipients, or been read or remembered if they had. Half of our sample complainants told us they never received any letters DWP say were sent about their State Pension age. We noted in the report for stage one of our investigation that letters may have been lost in the post or undeliverable, could have been received but mislaid or forgotten, and that a direct mail exercise is unlikely to achieve a 100% success rate” (§302)

“There is too much we cannot now know about what would have happened if DWP had written to women about the 1995 Pensions Act sooner. We therefore cannot say it is more likely than not the financial impacts claimed would have been avoided. But we find that the sample complainants are left now knowing whether they could have been in a different financial position” (§304).

65. Explaining these findings in the PAP Response, the PHSO states at §49 [CB/C/182]:

“the report rationally recognises the difficulties in finding that on balance, affected women were in general caused financial injustice by the delay in direct mailing; and makes specific and rational findings as to the position of the sample complainants”(emphasis in original)

66. The findings were therefore intended to be generalisations and statements of the general position; albeit recognising that some complainants might be able to establish that they suffered financial detriment from the maladministration. The PAP Response letter also accepts that, “So far as the Ombudsman was able to draw general conclusions based on all the evidence, he has done so; and he has considered the specific circumstances of the

sample complaints” (§48 [CB/C/182]). In other words, it is accepted that the Ombudsman drew general conclusions from his examination of the six sample complainants.

67. These conclusions are challenged on three closely-related bases.
68. First, these findings are unsafe and must be reconsidered because they are materially premised on the assessment of the six individual complainants’ cases and, for the reasons explained above, those assessments were materially flawed. These findings are unsafe in light of the irrational approach taken by the PHSO to the calculation of delay, which has infected its whole approach to the assessment of injustice including the generalisations drawn from those assessments.
69. The PHSO was in a much stronger position to assess whether the maladministration caused injustice to those individuals than he appreciated because the date by which they ought to have received letters from the DWP was considerably earlier than the PHSO had thought. The generalisation drawn from the assessments is therefore infected with the same error that has been set out as Ground 1 of this claim. The findings should be quashed and the PHSO should reconsider the matter,
70. Secondly, the broad finding that conclusions cannot be reached about financial injustice because there is too much uncertainty is also irrational because, whilst difficult, it is plainly an exercise that can be achieved. Ombudsmen, courts and tribunals often have to make determinations about what would have occurred on little evidence, they are guided by what a reasonable person would have done in the circumstances. The PHSO however has concluded that it would not be possible in the vast majority of cases to determine whether financial injustice had been suffered by affected women because: “*We cannot second guess what would have happened*” (Stage 2 Report, at §16 [CB/B/92]) and “*there is too much we cannot now know*” (Stage 2 Report, at §304 [CB/B/138]).
71. [REDACTED]



72. This is, however, not a rational approach. It is not rational for the PHSO to draw such a conclusion from the six sample complaints, a generalisation that will potentially close off financial redress for thousands of women. Moreover, the ability for such difficult issues of causation to be accommodated by the PHSO is demonstrated by the approach taken by the PHSO in other investigations. Thus, in his predecessor’s report on State Earnings-Related Pension Schemes (SERPS), in March 2000, in which the PHSO identified maladministration arising from the Department of Social Security’s dissemination of incorrect and incomplete information about changes to SERPS in leaflets, the PHSO stated [SB/F/1013]:

“I shall therefore do no more than express the hope that any proposals will take account of what I told the Permanent Secretary about the onus of proof. They will also need to take account of the fact that most of those misled by DSS or BA are likely as a result to have decided that no action on their part was needed, because they had been led to believe that a surviving spouse was secure in an entitlement to full inheritable SERPS. In view of that, it would be wrong to exclude from redress those who took no action; and the proposals will need to recognise that it will be difficult, and in some cases impossible, for claimants to demonstrate that they would have taken a particular course of action had they been correctly advised. The scheme should also, in my view, recognise that many people will have been misled solely by reading inaccurate leaflets, and will have received no further wrong advice, written or otherwise, from DSS or BA. They will need to be catered for in any proposals.” (emphasis supplied)

73. Furthermore, in “*Trusting the Pension Promise*” the PHSO identified maladministration arising from the DWP providing inaccurate and incomplete information about the risks of occupational pension schemes, and recognising that “*any reasonable person most probably would have*” taken some different decisions to prevent or minimise financial loss, he was able to say that “*many of their financial decisions would unquestionably have been different*”, despite the fact that there would be an analogous level of uncertainty as in the present context as to precisely what those different financial decisions would have been [SB/F/1189].³

74. The third error with this part of the Stage 2 Report is that the PHSO has erroneously conflated the “*material injustice*” category of loss of opportunity with the “*emotional*

³ See also at §5.180, §5.228, §5.231, §5.236 [SB/138/1184, 1189 and 1190].

injustice” of affected women “*not knowing*” whether they could have been in a different financial position: see the Stage 2 Report at §16 and §304 [CB/B/92 and 138].

75. In the Typology of Injustice, “*material injustice*” includes “*loss of opportunity*”. Category M5 relates to loss of material opportunity, and states [SB/E/969]:

“This injustice type involves the loss of any tangible material opportunity where the loss is a consequence of maladministration ... Generally the lost opportunity will have a value which either cannot be measured directly in financial terms (for example, attending a university, or receiving IVF treatment); or where we cannot say with certainty that the material gain would have arisen or what it would have been worth (for example, loss of opportunity to work, or to secure child support maintenance.)”

76. The Typology also recognises as a form of material injustice in Category M12, called “*loss of opportunity to make an informed choice*”. This is described as follows [SB/E/974]:

“This injustice arises in any situation where a public body fails to give the aggrieved the opportunity to exercise a choice in a situation where there is an expectation or requirement that they should do so; where the information given to the aggrieved on which she or he bases a significant choice is inadequate or incorrect; or where the process followed by the public body is flawed in a way that influences the choice made. Frequently occurring examples include issues around clinical consent, and the provision of incorrect pension forecasts.”

77. At §168 of the Stage 2 Report [CB/E/119], the PHSO describes how the complainants complained of loss of opportunities as a form of material harm distinction from emotional harm:

“168 The complainants explained how the alleged maladministration had affected them, including financial loss, lost opportunities to adjust their plans and make informed choices, and the emotional impact of late notice of their State Pension age had had. They also told DWP what outcomes they were seeking, including compensation for the lost opportunities and/or the emotional impact of late notice.” (emphasis supplied, also §262-263 [CB/E/132])

78. The PHSO contends that it considered loss of opportunity and concluded that Ms W and Ms E had lost opportunities: see Response to the PAP Letter at §50. However, the PHSO has mischaracterised the injustice as the emotional harm of affected women “*not knowing*” whether they could have been in a different financial position. That is not the approach required by its policy on financial redress and by the Typology of Injustice.

79. The PHSO Report sets out to consider the complaints of lost opportunities. It states, correctly, that whether women lost opportunities to make different decisions depends upon “*whether those decisions had already been made by the time the DWP should have written to them*” (§264 [CB/B/132]). The corollary of this statement is that if the decisions were taken after the time the DWP should have written to them, then they did suffer lost opportunity as a form of material injustice. But that was not the conclusion that the PHSO reached.
80. Other passages of the Stage 2 Report also recognise loss of opportunity as a distinct category of injustice, e.g.: “*whether women lost opportunities to make different Stage 2 Report depends on whether those decisions had already been made by the time DWP should have written to them*” at §264, and see §§274, 276, 280, 289, 292 [CB/B/132 to 136].
81. However, the PHSO does not reach any conclusion on these lost opportunities as forms of material injustice separate from the conclusion that no financial harm was caused to the women by the failure to inform them of the change to their state pension, instead characterising the loss of opportunity injustice as the emotional injustice of “*not knowing*” because of “*uncertainty*” created by the maladministration (§304 [CB/B/138]). Therefore, the PHSO’s insistence that it has identified injustice in the form of lost opportunities in the case of Ms W and Ms E is not correct. Their complaint has not been fully and properly addressed and the PHSO has failed properly and rationally to address that complaint against the Typology of Injustice.
82. Finally, the consideration of lost opportunities is also infected by the same flawed reasoning as considered under Ground 1, because in respect of complainants such as Ms W and Ms E, part of the reasoning for rejecting the claim for lost opportunities as a form of material injustice is that the PSHO erroneously concludes that the key decisions that they point to were taken before they would have received a letter from the DWP. However, leaving aside that flaw in the lost opportunity analysis, there is a further error in the manner that the PHSO conflates lost opportunities with emotional distress, concluding that the complaint of lost opportunities was made out because they had suffered the emotional distress of “*not knowing*”.

G. CONCLUSION AND REMEDY

83. The PHSO's investigation is one of national importance, affecting many women. Core parts of the Stage 2 Report are, however, irrational and flawed and the error in calculating when complainants ought to have been informed of the change to their state pension permeates large parts of the report, including parts not referred to above such as impact on domestic life (§306-§308 [CB/B/138]) and health and wellbeing (§309-§313 [CB/B/139]). The Claimant submits that the assessment of the facts of each of the sample complainants' cases is infected with irrationality and the Court should quash the report as a whole and require the PHSO to reconsider it. Alternatively, the Court should quash the paragraphs identified herein and/or or make a declaration in appropriate terms reflecting the unlawfulness found.

TOM HICKMAN KC

TOM LEARY

Blackstone Chambers

JOHN HALFORD

CAROLINE ROBINSON

Bindmans LLP

1 March 2023