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Parliamentary and Health Service Ombudsman
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Our Ref: 263651/5. JHAL.CARR

Date: 8 February 2023

By email only to:

Dear [REDACTED]

Proposed claim for judicial review by Women Against State Pension Inequality

A. Introduction

1. We write on behalf of our client, Women Against State Pension Inequality Ltd (“**WASPI**”).
2. As you will know, this firm was instructed by WASPI some years ago and in correspondence with your office on its behalf, but Deighton Pierce Glynn (“**DPG**”) took over responsibility for the case. We were reinstructed just before Christmas 2022 to advise on WASPI’s response to the draft Stage 3 report on remedies for the maladministration you have identified (“**the draft Stage 3 report**”) and on the responses of two of the sample complainants, Ms W and Ms E. We have only received DPG’s complete files recently. Given this, your colleagues helpfully agreed an extension of the deadline for those responses to this coming Friday, 10 February 2022 and we will write to you again by then.
3. We write now for different, though related, reasons. This letter concerns your Stage 2 Final report dated 8 December 2022 on the injustice caused by the DWP’s maladministration in failing to timeously send letters communicating the changes to the State Pension age for affected women (“**the Stage 2 report**”). On scrutinising that report [REDACTED], it became apparent that the Stage 2 report may have contained material errors in approach. Because of our concerns about these potential errors, Counsel was instructed to advise. We now consider that the Stage 2 report does indeed contain serious errors which render significant parts of it unlawful. The unlawfulness is not technical, but fundamental to key reasoning in the report and the approach to be taken to the assessment of injustice, with consequences for the type and levels of compensation. [REDACTED]
4. This letter is written in line with the Pre Action Protocol for Judicial Review (“**the Protocol**”). It concisely explains our concerns about the Stage 2 Report and asks you to withdraw it [REDACTED]. If you are unwilling to take those steps, please reply

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explaining your position and providing the information and documents sought, as anticipated by the Protocol. That will enable the claim WASPI intends to bring to be pleaded in a focussed way, saving time and costs.

5. The remainder of this letter is structured as follows: Part B (paragraphs 6 to 23) deals with other information required by the Protocol; Part C sets out the factual background (paragraphs 24 to 29); Part D (paragraphs 30 to 53) explains the proposed grounds of claim; Part E contains our requests for relevant information and documents (paragraphs 54 to 55); and Part F (paragraph 56 to 57) concludes the letter.

B. Other information required by the Protocol

The challenged decision

6. As noted above, the proposed claim challenges the Stage 2 Report.

The intended Claimant

7. WASPI is the appropriate claimant in this judicial review for three main reasons.
8. First, WASPI is a private limited company that operates as a membership organisation. Its functions are “*educating women in pensions rights and taking appropriate action to achieve those rights*” including by advocating for millions of women affected by the changes to the State Pension age. It is therefore a body composed of the very women affected by the DWP’s maladministration and your decision and created for the express purpose of representing their interests.
9. Secondly, two of the six sample complainants discussed in the Stage 2 report, specifically our clients Ms W and Ms E, are WASPI members. WASPI has supported Ms W throughout and has funded the advice that Ms W and Ms E have had from DPG and ourselves. It has asked for the representations it has made to be taken into account when determining their complaints, along with those others have made.
10. Thirdly, you have been communicating with and consulting WASPI throughout your investigation, wholly appropriately (including in relation to the individual complainants Ms W and Ms E).
11. There are also practical considerations. The alternative to WASPI bringing this claim would be judicial review claims by affected individual women. There would need to be a number of them to ensure a reasonable range of circumstances were before the Court. Every other similarly affected woman may need to be served with (and may seek to participate in) the judicial review as an interested party, either as litigants in person or by instructing this firm or other firms of solicitors. Many women might be advised to participate to protect their positions if other individuals were bringing the claim. This would create considerable logistical challenges for all parties and drive up costs exponentially as well as delaying the resolution of the issues.
12. Given the nature of the legal grounds that we set out below, we consider that these are wholly appropriately advanced by WASPI as a suitable representative claimant. We trust

you will confirm in your response that you accept WASPI is the appropriate claimant for the issues it intends to advance and that you accept it has sufficient interest to do so.

The details of the Claimant's legal advisers, if any, dealing with this claim

13. This matter is being handled by John Halford, Caroline Robinson and India Cooper at Bindmans. Our address for service and reference are above.
14. Counsel are Tom Hickman KC and Tom Leary of Blackstone Chambers.

The Defendant's reference details

15. The intended Defendant is yourself, the Parliamentary and Health Service Ombudsman ("PHSO"). Your reference is 'WASPI campaign'.

Interested parties

16. We consider the Secretary of State for Work and Pensions, is an interested party and have copied this letter to him.
17. The women directly affected by the Stage 2 report are also interested parties. WASPI does not intend to seek to identify and serve them for the logistical and costs reasons already mentioned, and indeed it would simply be impossible in relation to most affected women whose identities are unknown, but considers this letter should be sent to the other sample complainants now and published by WASPI, as others may wish to take legal advice on their positions.
18. However, this proposed course gives rise to a difficulty. It is that the Stage 2 report, though finalised, has yet to be published and was provided to WASPI and the sample complaints in confidence. We would be grateful for your comments on whether the letter should be sent to the other sample complainants and published in such circumstances, bearing in mind paragraph 17 of the Protocol.
19. Further, bearing in mind CPR 54.7(b), WASPI would like to publish the Claim Form and Grounds in the event the Stage 2 report is not withdrawn and the claim is issued (though it would seek a direction from the Court relieving it of the requirement to serve interested parties other than the Secretary of State). Please let us have your comments in your reply.
20. If you consider there are other interested parties, or have other proposals as to how their interests should be protected, please let us know.

Steps the Defendant is asked to take and proposed reply date

21. You are asked to take the following steps to avoid legal action:
 - (1) Accept that the Stage 2 report is unlawful for the reasons set out below.
 - (2) Withdraw and reconsider that report.

- (3) Agree that it will be necessary, so that affected persons, and others (e.g. Work and Pensions Select Committee) can understand what has occurred, for the current Stage 2 report to be published in a suitable form accompanied by an explanation for withdrawing and reconsidering the report and the changes made to the report.

22. We require a response within 14 days of this letter.

ADR

23. Provided steps can be agreed to ensure its position in the proposed litigation is not compromised (for example, an agreement the claim should be issued protectively and stayed for a short period), WASPI is willing to attempt ADR, initially in the form of a 'round table' discussion involving solicitors and potentially Counsel. Please let us have your comments on this proposal.

C. Factual Background

24. The factual background is well known to you and will not be repeated here, save for the following.

Stage 1

25. Your Stage 1 Final Report dated 20 July 2021 considered complaints that the DWP had, since 1995, failed to provide timely information about changes to the State Pension age for affected women. The DWP ultimately commenced its direct mailing campaign to inform them in April 2009. You concluded at §§171-172 of that report that the DWP committed maladministration in not writing to affected women sooner: "*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*". The introduction of the report puts the point slightly differently at §5: "*We consider that, if DWP had made a reasonable decision in August 2005 and then acted promptly, it would have written to affected women to tell them about changes to their State Pension age by, at the latest, December 2006.*" We seek clarification about the substitution of "*begun*" with "*by, at the latest*" in our questions at Part E below.

Stage 2

26. The Stage 2 report addressed "*the impact of any failing by DWP... including the injustice arising from the maladministration*" (§3). In assessing the impact of the maladministration, you were required to assess the delay suffered by the affected women and the injustice caused. Note, the Stage 2 report also addressed injustice arising from matters such as complaints handling, which are not the subject of this letter.
27. In addressing the injustice caused by the delay in writing to affected women, the Stage 2 report framed the issue as, "*whether an additional 28 months' notice would have meant women avoiding the injustices they claim*" (§265), and what would have been the position, "*if DWP had written to complainants at least 28 months earlier than it did*" (§16).

You then applied this approach to the facts of the six sample complainants, by identifying when each complainant received the relevant 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.

28. You reached three key conclusions:

- (1) That the six sample complainants had relied upon key decisions that they had taken which could not be said to have been affected by the delay, as each of the decisions was taken before they would have received a letter from the DWP.
- (2) *“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”*: (§304).
- (3) The relevant injustice in these circumstances was not financial loss but merely the emotional harm to the women of *“not knowing whether they could have been in a different financial position”*: (§16).

29. These findings are flawed for the reasons explained below.

D. Proposed Grounds of Claim

Ground 1: irrational approach to delay in sending letters to affected women

30. In addressing financial injustice in the Stage 2 report, you recognised, rightly, that *“whether women lost opportunities to make different decision depends on whether those decisions had already been made by the time DWP should have written to them”* (§265).
31. The report also recorded that *“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”* (§§171-172)
32. In seeking to determine when each affected woman would have been written to, it was necessary to count forwards from December 2006 when assessing when the affected women would have received their letters (assuming that §§171-172 of the First Report correctly reflects your conclusions, rather than §5).
33. Instead, you wrongly counted backwards from the date the women in fact received their letters (or should have, in the case of Ms W), assuming they would have received them 28 months earlier than they did: see the Stage 2 Report at §265 (*“because we know direct mail should have begun by December 2006 at the latest . . . we consider . . . whether an additional 28 months’ notice would have meant women avoiding the injustices they claim”*).
34. The error in this approach to calculating the delay is material because direct mailings were “paused” by DWP between April 2010 and February 2011 and again between March 2011 and January 2012 (§300). There was also a third pause between January 2013 and May 2013: see the Stage 2 Report (§82). Had direct mailings commenced in December 2006, these pauses (totalling 24 months) would have been avoided, and the letters would have been sent out over a period of just 31 months, had the same volume of letters been sent out in the same staggered way. That period would have ended in

July 2009. Women who received their letters after one or more of the pauses therefore plainly suffered substantially more than the 28 months of delay.

35. However, had the DWP acted promptly and without maladministration, the direct mailing process would almost certainly have been completed in a shorter timeframe than 31 months because a significantly smaller volume of letters needed to be sent. That is because the letters' sole focus would have been the Pensions Act 1995 changes and their impact on affected women. The direct mailing that in fact took place had a broader target audience as it was also concerned with the Pensions Act 2011. Inevitably, more letters had to be sent and so the process took longer.
36. These errors infected your assessment of injustice. This can be seen clearly from the approach taken to both Ms W's and Ms E's cases. Thus, in the case of Ms W, you reasoned that women with the same birth date received letters in about October 2013. Consistently with your flawed approach described above, you then concluded that but for the maladministration Ms W would have received a letter 28 months earlier, in June 2011: see Stage 2 report at §273. Based on this finding, you concluded Ms W would only have received notice of changes after deciding to give up her job in November 2010¹: see Stage 2 report at §§273-274. This was critical in your conclusion that the delay in sending the letter to Ms W consequent on the DWP's maladministration did not cause her injustice in the form of financial detriment.
37. This analysis was however flawed. On your 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 2013). That was the 30th month during which letters were sent by the DWP. If the DWP had started sending letters in December 2006, Ms W would have received her letter at the latest by June 2009 (not March 2011). (In fact, for the reasons set out at paragraph 35 above, it is highly likely she would have received it far earlier even than this).
38. Ms W would therefore have had notice of the changes to her State Pension age at least 9 months before left her job in November 2010. The evidence before you 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. Your 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 decision about leaving her job*" (see Stage 2 report at §273) was therefore irrational and without evidential foundation.
39. Furthermore, the only rational conclusion open to you, once the true period of delay of 52 months is acknowledged, is that Ms W would not have decided to leave her job in November 2010. She would have received the DWP letter at least 30 months before the December 2011 State Pension forecast and almost certainly far earlier. Your decision to the contrary defies logic, is irrational, and is contrary to the evidence before you.
40. As for Ms E, your reasoning was as follows. Ms E received her letter from the DWP in October 2012 when she was aged 57. Consistently with the flawed approach described above, you concluded that but for the maladministration she would have received the

¹NB this date is erroneously recorded in the Stage 2 report as April 2010

letter 28 months earlier, in June 2010 when she was aged 55: see the Stage 2 report at §291. Based on this finding, you concluded 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 the Stage 2 report at §§290-291. You reason that, as a result of the fact that Ms E would not have received the letter until June 2010, you cannot find that maladministration deprived her of a tangible opportunity to find a different job.

41. It should now be apparent that this analysis was also fundamentally flawed. If the DWP had started sending letters in December 2006 and had taken 31 months to send one to Ms E, she would have received her letter in October 2008 when she was aged 53 (not in June 2010). But again, for the reasons set out at paragraph 35 above, it is highly likely her letter would have been sent out far earlier. Critically, Ms E would have had notice of the changes to her State Pension age before she was made redundant in February 2009 and when she was significantly younger. The evidence before you was that Ms E had worked continuously from the age of 16 and would have continued looking for work if she had known about the changes to her State Pension age at or before the time of her redundancy: see Stage 2 report at §290.
42. Your conclusion that, “[s]ince 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 the Stage 2 report at §291) was therefore irrational and without a proper foundation. Adopting a correct approach, the only rational conclusion open to you, once the true period of delay of at least 48 months is acknowledged, is that Ms E would have secured a new job. The decision to the contrary defies logic, is irrational, and is contrary to the evidence before you.
43. There is one more important point to note under this heading. Had both women been informed of their position under the 1995 Act in a timely way, without maladministration, the DWP would also have had to inform them subsequently about the impact of the 2011 Act.

Ground 2: irrational approach to injustice

44. In addition to the errors above, you also appear to have concluded that you cannot know or assess what would have happened but for DWP’s maladministration: see, for example, the Stage 2 Report at §§16, 302 and 304:
 - (1) “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).
 - (2) “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)

- (3) *“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).*

45. If the report was simply saying that it was not possible to reach a generic finding that all affected women suffered financial injustice, then that finding would be unexceptional. However, on its face, the Stage 2 Report goes further although the scope of the finding is extremely unclear. It suggests that (i) it is not possible to reach a finding in any case, or alternatively, (ii) it is not possible generally or in the vast majority of cases whether financial injustice was caused; and/or (ii) that financial injustice would not have been capable of being established by the sample complainants even if they could show they had received the letters before they made key decisions or before key events took place. We ask for clarification about the scope of these findings below but on its face the report is irrational and unlawful because none of conclusions (i), (ii) or (iii) could lawfully be reached.
46. If the conclusion of the report is intended to be that the Ombudsman cannot reach a proper counter-factual conclusion in this type of case, or that he cannot generally reach such conclusions about whether individual women would have suffered financial injustice, then that is irrational and flawed. There is no basis for generalising beyond the facts of the individual cases. This appears to be reflected in the comment in the provisional report at paragraph 10 that, *“it is possible that some women among the millions affected by the 1995 Pensions Act may be able to demonstrate they suffered financial loss because the DWP did not write to them about the State Pension age 28 months earlier.”* This is a concerning comment which is likely to result in an unbalanced and inappropriate approach by the DWP. This is because it represents a clear steer to the DWP that generally – indeed in the vast majority if not all cases — women will not be able to establish financial injustice because *“there is too much we cannot know”*. This is likely influence the approach taken by the DWP and be recited by them as supporting decisions refusing claims to financial injustice. It is also likely to deter affected women from seeking such redress from the DWP. However, there is no proper evidential basis for laying this as the foundation for the compensation scheme you go on to recommend because it is based on a generalisation that is not properly supported by evidence and that is irrational.
47. Indeed, this position is contrary to the approach taken in previous reports, where it has been recognised that Ombudsmen can and must assess whether people would have taken different financial decisions had they received prompt and accurate information from the DWP. The Parliamentary Ombudsman report on State earnings-related pension scheme (SERPS) inheritance provisions, March 2000 and *Trusting in the Pensions Promise*, 14 March 2006 are examples. No explanation has been given for the different approach here.
48. Secondly, you have either ignored loss of opportunity as a category of injustice altogether or else conflated it with the emotional harm of women *“not knowing”* whether

they could have been in a different financial position: see the Stage 2 Report at §16 and §304. That is irrational and inconsistent with:

- (1) The three categories of injustice raised by the complainants – “*financial loss*”, “*lost opportunities*”, and “*emotional impacts*”: see the Stage 2 Report at §168.
 - (2) The PHSO ‘Typology of Injustice’, which recognises loss of opportunity as distinct from emotional harm at M12 and M13.
 - (3) Passages of the Stage 2 Report that recognise loss of opportunity as a distinct category of injustice, including (at §264) that: “*whether women lost opportunities to make different decision depends on whether those decisions had already been made by the time DWP should have written to them*”; and
 - (4) Passages of the Stage 2 report indicating that the complainants lost tangible (and potentially valuable) opportunities: see Stage 2 report at §§274, 276, 280, 289, 292.
49. Thirdly, the broad finding that conclusions cannot be reached about financial injustice because there is too much uncertainty (and thus also the assessments made in respect of each the test complainants at Stage 2 report, §§267-298) need to be reconsidered in light of Ground 1. That fundamentally alters the premise of the counterfactual analysis in Ms W and Ms E’s cases, as well as other test complainants, and makes the PHSO’s generalisation that it is generally not possible to assess whether financial injustice was suffered unsafe and unsound—as we have said, it is clear that the PHSO can reach conclusions of this nature in at least Ms W and Ms E’s case, and these represent 1/3 of the test complainant cases (and we consider correcting the error identified in ground 1 would also lead to different conclusions in other of the test complainant cases). In these circumstances, there is obviously no possible basis for the PHSO’s comment that it is not possible to conclude that financial injustice has been caused because there is too much uncertainty.
50. Moreover, there is also a broader point. The fact that the Stage 2 Report reflects a fundamental miscalculation as to when women would have received a letter had the maladministration not occurred, and that in fact many would have received notice much sooner than the PHSO has appreciated, makes it far more likely that affected women will be able to show that they would have made different financial decisions as there will have been a much longer period in which their decision-making will have been affected by the maladministration. This renders the PHSO’s conclusions that there is too much uncertainty unsound and irrational as it is premised on a very significant misunderstanding of the factual context.

Ground 3: failure to take into account material considerations

51. The PHSO was required to take into account obviously material considerations, going to its assessment of injustice: *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at §117-120. It failed to do so in the Stage 2 Report by ignoring the differing impacts on women depending on how close they were to their anticipated retirement age when they received their DWP letters. Some women received their letters very close to anticipated retirement, limiting their opportunities and causing greater distress than in

the case of women who received their letters several years before anticipated retirement. For example, Ms W would have received her letter approximately 6 years before her anticipated retirement, whereas Ms E received her letter around 2 years before her anticipated retirement. The first cohort of affected women appear to have been sent their letters with even less notice, on average just 1 year and 4 months before their anticipated retirement. These differences are entirely overlooked in the Stage 2 Report, there is no inquiry into when the women received their letters relative to their anticipated retirement age, and no consideration of the differing injustices they suffered.

[REDACTED]

[REDACTED]

[REDACTED]

E. Details of information and documents sought

54. With your duty of candour firmly in mind, we ask that you address the following requests using the enumeration below. If you are unable or unwilling to do so, please state why, giving full reasons.
55. Please:
 - (1) explain the differences in the conclusions expressed at §§171-172 and §5 of your Stage 1 Final Report dated 20 July 2021;
 - (2) confirm whether the Stage 2 Report concludes that financial injustice would not have been capable of being established by the sample complainants even if they could show they had received the letters before they made key decisions or before key events took place and, if it does, explain that conclusion;
 - (3) explain what standard of evidence you would expect a complainant to produce to show financial injustice arising from the loss of an opportunity to make a different decision or decisions than those they made and show the basis of this in published guidance and past reports; and
 - (4) provide the primary documents and DWP representations taken into account when you reached your conclusions in the Stage 1 and Stage 2 Reports about when letters ought to have been sent out had there been no maladministration and that explain the thinking, evidence and intent behind conclusions impugned by ground 2 set out above.

F. Conclusion

56. Please confirm receipt of this letter by return and let us have your substantive response by the reply date given above, 22 February 2023.

57. We look forward to hearing from you.

Yours faithfully,

A handwritten signature in black ink that reads "Bindmans LLP". The signature is written in a cursive, slightly slanted style.

Bindmans LLP