Pensions Ombudsman Update - January 2019

Welcome to our latest quarterly CMS Pensions Ombudsman Update, designed to help you get to grips with the Ombudsman's thinking, keep track of decisions on individual topics and identify underlying trends. This month, we focus on a new consultation on the Ombudsman's powers, and a suite of the latest Ombudsman determinations.

Change is in the air (again)

Just before Christmas, The Pensions Ombudsman (TPO) and DWP issued a joint consultation on the Ombudsman's powers and jurisdiction, which focuses on two areas.

Early resolution: The Government is consulting on how to best make provision for Ombudsman early dispute resolution, following the transfer of resolution work from TPAS to TPO in spring 2018. It asks whether TPO should have power to make legally binding awards or directions at the end of any early resolution process (at present, only determinations made after investigation are final and binding). It also asks whether TPO should be allowed to close cases early, with all parties' agreement: and whether parties should have a right to proceed to a full TPO investigation or determination where they do not agree with the outcome of the early resolution process. DWP seeks views, too, on how any early resolution process should interact with a scheme's IDR procedure.

Extension of jurisdiction: The Government asks whether it should allow an employer to bring a complaint, or refer a dispute, to TPO in relation to any group personal pension arrangement which it provides for its employees. At present, an employer cannot bring a claim against the provider or administrator on its own behalf, for example in respect of maladministration of a GPP. However, with the advent of universal automatic enrolment there needs to be an accessible forum for such claims.

The Ombudsman has issued a press release welcoming the consultation as supporting the actions TPO is already taking to improve the customer journey.

> *Comment:* The Ombudsman should probably be congratulated for having persuaded DWP to float these proposals, given the considerable rival pressures on Government time.

Overpayments: is the Ombudsman a "competent court"?

Last year, in Burgess & Ors v BIC UK Ltd [2018] EWHC 785 (Ch), the High Court examined the recovery of overpayments by recouping them from future instalments of pension. In the course of his judgment, Arnold J considered section 91(6) of the Pensions Act 1995, which prevents trustees from doing so where there is a dispute as to the amount owed, except where this has been resolved by order of "*a competent court*".

The judge commented, without going into detail, that an Ombudsman determination would not satisfy this test, *"because the Ombudsman is not a court."* However, he accepted that an order by the County Court under section 151 of the Pension Schemes Act 1993 (which makes any direction of the Ombudsman enforceable in the County Court as if it were an order of that court) would suffice.

The Ombudsman disagrees with the judge's assessment. In a subsequent overpayments case, PO-16856 Dr E (25 October 2018) he made it clear that he does consider himself a 'competent court' for s91 purposes, declaring that he was not bound to follow the non-binding comments of Arnold J to the contrary and that *"Tribunals, including the Pensions Ombudsman… clearly fall within the definition of a competent court".*

> *Comment:* An appeal in the BIC case is due to be heard early next month, and it would be helpful if the Court of Appeal could provide clarity on the point. In the meantime, the Ombudsman is not backing down.

Divorce: benefits wrongly transferred out should be reinstated in scheme

In PO-19073 Mr A (23 November 2018) the member agreed a pension sharing order over his benefits in a hybrid scheme, but the order sent to the trustees was unclear as to whether it applied to all benefits under the transferring arrangement. The scheme administrators queried this and asked the ex-spouse's lawyers to confirm whether the order applied to both the DB and DC pension: they stated that it did, and the transfer was made accordingly.

The member later discovered and disputed this, and it was established that he had only intended to transfer a share of his DB (and not DC) rights. Indeed, he eventually obtained a declaration from the court that it had "*neither ordered nor intended to order*" any pension sharing of his DC benefits. The member complained to the trustees that they had implemented the original order incorrectly. The administrators asked the ex-spouse to return the monies relating to the DC pot, but when she refused the member asked for his DC pot to be reinstated in the transferring scheme.

The Ombudsman said that although the administrators were not party to the divorce discussions, they were responsible for complying with the order as worded. Although its drafting was *"highly unsatisfactory",* the administrators when querying it should not have relied on the word of the ex-spouse's lawyer: they should have taken their own legal advice or referred the matter back to the trustees.

The failure to take proper advice, on identifying that the wording was ambiguous, amounted to maladministration: having made an incorrect transfer without authority to do so, the administrators were responsible for putting things right. The Ombudsman ordered the full reinstatement of the member's DC fund in the transferring scheme (including the investment return which would have arisen).

The administrators should also compensate him for his legal costs in going back to the divorce court. Although TPO did not habitually make awards for legal costs, the member would not have had to incur these costs had the administrators taken independent legal advice at the time, and there was "*a sufficient causal link between [the administrators'] errors and Mr A's legal expenses to justify me finding that [the administrators] should reimburse Mr A for those costs.*"

For good measure, the member was awarded an additional £500 for distress.

Comment: It is far from unusual for the pensions aspects of divorce orders to be poorly drafted or to fail to reflect the parties' intentions. This often puts trustees and administrators in a tight spot when seeking to implement them. The moral of the story is that - if in doubt - further advice must be taken.

Transfers-out: transferring schemes can't be too stringent

In PO–19383 Mr S (26 September 2018) the member claimed financial loss caused by his SIPP provider's delays in transferring his fund to a large and well-known occupational pension scheme. The provider had insisted on seeing full receiving scheme documentation, including scheme deeds and a live signature on a certified copy of the receiving scheme's bank account. This all contributed to due diligence on the transfer taking over four months.

The Deputy Pensions Ombudsman found that the provider was guilty of maladministration in having insisted on enhanced due diligence which was disproportionate to the risk presented by the member's request to transfer to the scheme in question (especially as he was already a member of it by virtue of his previous employment). Once the provider had confirmed the receiving scheme's identity through its HMRC registration, it was difficult to see any reason for doubting its legitimacy. Had the provider taken a proportionate approach, it would have concluded that there was minimal risk of pension liberation. It was liable for investment loss incurred by the member as a consequence of the delays it caused.

Comment: The provider's error was in taking an inflexible, "one size fits all" approach to due diligence. The determination shows that there are risks to transferring schemes in being over-cautious about transfers out, just as there are in being too 'gung-ho' in allowing them!

Transfers-in: receiving scheme could apply 'one size fits all' approach

On the other hand, in PO-23928 Mr R (2 October 2018) the Ombudsman's office supported a provider's right to impose a standard approach, this time in respect of transfers-in. The member was looking to aggregate various small pensions into a flexible personal pension product operated by the respondent provider. However, the provider would not accept a transfer from his former occupational DB scheme, saying that its policy was only to accept such transfers if the member obtained independent financial advice. This was the case even where, as here, the transfer value was less than £30,000 and so there was no statutory requirement on the transferring trustees to ensure that financial advice was received.

The Ombudsman, agreeing with his Adjudicator, held that there was no statutory obligation on any pension scheme to receive a transfer. The provider had not breached any regulatory guidance or legal requirements, and was free to set the terms on which it chose to accept business. Its policy was a commercial decision.

In particular, there was no breach of the FCA's Treating Customers Fairly framework, which provided that customers should not "*face unreasonable post-sales barriers imposed by firms to change product, switch provider, submit a claim or make a complaint*". The transfer-in was not a post-sale event for these purposes, and all members transferring in to the product from DB schemes were subject to the same restrictions.

Comment: Like PO-18707 Mr I (5 June 2018) - a decision about the use of online platforms - this determination emphasises that the Ombudsman does not see it as his role to interfere in providers' commercial policy.

No luck for last-minute plea

PO-17532 Ms S (18 September 2018) is a useful reminder that members should not leave it until the eleventh hour before raising points before the Ombudsman.

The complaint concerned whether the member had lost "special class status" (SCS) under the NHS scheme, which would have allowed her to take unreduced benefits from age 55. Only when the member appealed the Adjudicator's initial decision to the Deputy Pensions Ombudsman did she try to introduce an additional point based on the fact that, had she known about the rules for retaining SCS at the time, she would have taken active steps to follow them. The Deputy Ombudsman noted that this new argument was not part of the original complaint, had not been the subject of IDRP, and had not been investigated. She held that it had been raised too late to be considered.

Comment: The determination provides some comfort for trustees that complaints should not be hijacked en route by members raising new or additional arguments.

Pensions Ombudsman reappointed

The Government has announced that the Secretary of State for Work and Pensions has reappointed Anthony Arter as Pensions Ombudsman for a further two years, until 31 July 2021.

Comment: Mr Arter may no longer be a "new broom", but the Government are plainly happy for him to continue sweeping. And December's consultation on his powers, mentioned above, shows that DWP is content to provide ongoing legislative support in seeking to reform the Ombudsman's role.

CMS and the Pensions Ombudsman

CMS has had a market-leading Pensions Ombudsman Unit for many years, led by Mark Grant. Mark wrote the only text book on the Ombudsman's role and established and chairs the Pensions Ombudsman Liaison Group, an industry body that meets with the Ombudsman and seeks to improve understanding, relationships and communications between his office and key stakeholders. CMS is also a stakeholder in the Pensions Ombudsman's Legal Forum.