

Leaders in Pensions

Pensions Ombudsman Update - October 2018

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. Since issuing his Annual Report (see our [July Update](#)) the Ombudsman has remained busy, issuing long-awaited distress awards guidance, a new approach to signposting, a three-year Corporate Plan and the important determinations discussed below.

Ombudsman orders reinstatement of member into pension scheme

In PO-12763 [Mr N](#) (11 July 2018) the member had asked to transfer his benefits to the London Quantum scheme, an alleged liberation arrangement that would later attract Pensions Regulator intervention. The transfer request was made in November 2013, nine months after the Regulator launched a major pension scams initiative (which the Ombudsman has previously held to be the point at which trustees should have revisited their transfer procedures).

The member eventually transferred in August 2014 but, once he realised the high-risk nature of the investments he had signed up to, brought a complaint against the respondent (Northumbria Police Authority, his employer and a scheme manager) for allowing the transfer in the first place.

The Ombudsman found that the Authority had failed to conduct adequate checks and enquiries of the receiving scheme. In particular, it had ignored a number of 'red flags' (including that the scheme had a dormant employer, not located near the member; and that both the receiving scheme and employer were only recently registered). Put simply, said the Ombudsman, there should also have been some direct engagement from the Authority with the member before it finalised a "life-changing" request.

On the balance of the evidence (which included the rare step of holding an oral hearing) the Ombudsman was satisfied that the member would not have proceeded with the transfer but for the Authority's failings. It was ordered either to reinstate the member's accrued benefits in the Police Pension Scheme, adjusting for any post-transfer revaluation, or to provide equivalent benefits outside the scheme. To avoid 'double counting', the Authority would be entitled to set off any transferred pension funds that might be retrieved from the Quantum scheme in due course.

The Ombudsman also held that the Authority could not rely on the statutory transfer discharge available where a member has exercised a statutory transfer right and the trustees or scheme managers have done "*what is needed to carry out what the member requires*". The Ombudsman said that by failing to carry out reasonable checks, the Authority had not met this criterion. To rely on the discharge, trustees had to review the transfer application appropriately, taking into account law and regulatory guidance; carry out appropriate due diligence; identify any concerns and bring them to the member's attention; and ensure that the member went ahead with the transfer "*on a fully informed basis*".

Comment: Although the interesting comments on the statutory discharge issue should be noted, the broad principles followed by the Ombudsman reflect his consistent position from earlier liberation cases. The key aspect here was that the member could satisfy the Ombudsman (on this occasion in person) that he would not have transferred had he been adequately warned.

Serious ill-health: be proactive!

Two recent cases consider the sensitive and difficult issues where members are diagnosed with terminal illness.

In PO-13540 [The Estate of Mr Y](#) (26 July 2018) the member was retired on ill-health grounds in May 2013, with his notice period to start straightaway and to expire in mid-August. In late July, doctors told the member that his condition was now incurable. The member's wife telephoned the employer the same day, asking whether the member could access funds early and (according to her, although the employer disputed this) informing the employer's representative that the member's condition was terminal. The member died three days before the notice period ended, meaning that his widow was entitled to a lower death-in-service lump sum than would have been available had he died in retirement.

The Deputy Pensions Ombudsman found that the member and his wife had only become aware that his illness was terminal on the day that she telephoned his employer, and that she had passed this information on. The Deputy Ombudsman also considered that the wife had been given the impression on the call that it was not possible to accelerate the notice period to allow the member to access his pension earlier.

In the Deputy Ombudsman's view, the employer received sufficient information during the call to appreciate the circumstances of the wife's request. Waiving the notice period would have met the member's needs and the employer "*ought reasonably to have enquired*" as to whether the member wished this to happen. Had the member been given this option, he would have agreed to it and died as a pensioner rather than an active member. The employer was ordered to pay the difference between the death benefits paid to the member's widow and those she would have received had the member's service been terminated shortly after the July phone call.

Determination PO-17639, [The Estate of the late Mr R](#) (29 June 2018) saw the scheme administrator write to a deferred member with terminal cancer, to provide his available pension and lump sum options. However, the member died four months later without having responded. Only then did his widow discover that, because the member had died in deferment, her entitlement was significantly lower than that set out in the correspondence, which showed a widow's pension payable on the death of a pensioner.

The Ombudsman upheld her subsequent complaint. As there was a significant difference between the benefits available on death in deferment, and those set out in the option letter, it was incumbent on the trustees to tell the member that the options in that letter would be lost on his death. The trustees were on notice that the member's condition was terminal, and had to take this into account when providing information. In the circumstances, they should also have taken steps to check that the member had received and understood the options. This did not impose an unrealistic or unreasonable burden on them.

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Had the trustees taken such steps, the member would have applied for, and been accepted for, one of the original options (providing a much higher lump sum). The trustees were ordered to compensate his widow accordingly.

Comment: The immediate lesson of these cases is the need for great care when dealing with seriously ill members. However, they also reflect wider themes from determinations that parties should act quickly when they are aware of a need for urgency; and, if in any doubt, should seek clarification of relevant facts.

New rules on non-financial injustice

In September, the Ombudsman [announced](#) a revised [factsheet](#) reflecting a new tapered structure for awards for non-financial injustice. Under the new system, these awards (which used to be termed 'distress and inconvenience') will now usually fall into one of five categories: nominal (no award), significant (£500), serious (£1,000), severe (£2,000) or exceptional (above £2,000). A helpful table in the factsheet outlines the criteria which might typically be used to allocate awards into each of these bands. The guidance takes immediate effect for all cases.

The factsheet reminds parties of the overarching approach that all awards are made based on facts and circumstances of individual cases and intended not to penalise or punish, but to remedy genuinely-suffered injustice.

Comment: In principle, the new transparency is welcome. It has the potential to make the process better for complainants and respondents not just at the Ombudsman stage of a dispute, but when seeking to resolve internal dispute resolution procedure (IDRP) complaints.

A fix for the signposting problem

Last month the Ombudsman issued a [press release](#) about 'signposting', a subject which has caused confusion since his office acquired the former TPAS dispute resolution team in March. Perhaps the main problem was that the regulations governing disclosure of disputes information to members have not been amended to reflect the changed roles of both the Pensions Ombudsman and TPAS.

Now, a joint [statement](#) from the Pensions Minister and the Regulator confirms the Government will update legislation by April 2020 to reflect the fact that complaints or disputes concerning workplace pension arrangements should be referred to the Ombudsman; general requests for information or guidance should be referred to TPAS or the single financial guidance body to supersede it; and that complaints bound for the Ombudsman that are intended for the Early Resolution Service (the former TPAS disputes function) will not first have to go through scheme IDRP.

In the meantime, so long as schemes change their signposting to reflect this policy, the Pensions Regulator will not impose penalties for technical non-compliance with the existing legislation. For his part, the Ombudsman is happy for schemes and members to choose not to go through IDRP before contacting the Early Resolution Service.

The information in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It is not an exhaustive review of recent developments and must not be relied upon as giving definitive advice. The Update is intended to simplify and summarise the issues which it covers. It represents the law as at 9 October 2018. CMS Cameron McKenna Nabarro Olswang LLP is a limited liability partnership registered in England and Wales with registration number OC310335.

Comment: This clear statement from the trinity of the Regulator, Ombudsman and the Minister should give ample reassurance to trustees that they can rely on the Ombudsman's own [template signposting wording](#).

Juggling change with caseload

The Ombudsman's [Corporate Plan for 2018-21](#) outlines key strategic aims for the next three years. These are supporting and influencing the pensions industry; acting as a hub for resolving workplace pension complaints; and transforming his office's services and processes.

Specifically, the Ombudsman promises to seek changes to legislation where necessary; respond to consultations where appropriate; and produce guidance for the pensions industry. He also wants earlier intervention in disputes, continuing to encourage the adoption of one-stage IDRPs.

There are interesting observations on caseload, with the Ombudsman commenting that he had insufficient resource (at the time of writing the Plan) to deal with new investigations in 2018/19. The steady increase in investigations in hand means that his office has been holding numbers of open investigations "*well in excess of the ideal*": but, given the issues around recruiting additional resource, he notes with admirable frankness that there is unlikely to be any improvement.

Comment: As he nears the expiry of his first four-year term (next Spring), Anthony Arter has plainly not lost his appetite for reforming the role of the Ombudsman. However, the Plan raises the prospect that budgetary restraints could yet curtail his ambitions.

Trustees and scheme indemnities

Finally, note PO-12332 [Miss A](#) (29 June 2018), a death benefit distribution decision case. Here, the Ombudsman made a non-financial injustice award (of some £6,000, divided between three complainants) against the pension administrator but not the trustees, on the grounds that the trustees would have been able to rely on the indemnity clause in their rules (so that any award against them would have been met from scheme funds).

Comment: This outcome suggests that, when considering awards for non-financial (or also perhaps financial) injustice, the Ombudsman could make administrators his first line of attack!

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.