

## Leaders in Pensions

## Pensions Ombudsman Update - October 2017

Welcome to our latest CMS Pensions Ombudsman Update. Our quarterly Updates are designed to help you get to grips with the Ombudsman's thinking, to keep track of decisions on individual topics and to identify underlying trends.

## Schemes should have warned of liberation risk

A notable feature of the last quarter has been the number of determinations that deal, either directly or indirectly, with potential pension scams. The first two examples relate to detailed tPR guidance, issued on Valentine's Day 2013, warning members and trustees of the risk of pension liberation. In previous determinations, the Pensions Ombudsman has viewed the issuing of this guidance as a key point following which trustees should have revisited their transfer-out procedures.

In determination PO-10365 [Mr R](#) (20 July 2017) a former member brought a complaint against a pension fund authority for having allowed him to transfer his benefits to a scheme which appears to have been a pension liberation vehicle. He had requested a transfer value quote on 26 February 2013, signing his transfer request two days later.

The Ombudsman found, in line with the High Court decision of [Hughes v The Royal London Mutual Insurance Society Ltd](#) [2016] EWHC 319 (Ch), that the transfer had been lawful: the member had a statutory right to insist on it being made. Nevertheless, the pension fund was guilty of maladministration in failing to issue the member with a liberation warning following tPR's press release. Although warnings had been issued to other members, there was no formal process yet in place at the time of the member's transfer, and he had not been identified as being at risk.

The Ombudsman went on to find that even had the member received appropriate warning, he would have transferred out anyway. He had already exhibited high-risk behaviours and made previous attempts to access pension. The £1,000 already offered to him by the pension fund, for its failure to provide a warning, was therefore sufficient redress.

Determination PO-11136 [Mr R](#) (23 August 2017) explored similar issues. The member complained about trustees having allowed him to transfer to a suspected liberation scheme in May 2013 (so three months after tPR's guidance). Although the trustees had discussed scams at their April trustee meeting, no action was taken to suspend transfers whilst a new procedure was put in place, or to ensure that tPR's "Scorpion" information packs were issued when transfers were in train. This was maladministration.

Again, however, the Ombudsman ruled that even if the trustees had issued Scorpion packs the member, who had been in strained financial circumstances, would have transferred anyway. The trustees had already offered him £1,000 and this was sufficient compensation for their failure to send him the Scorpion leaflets.

*Comment:* The determinations make it plain that trustees should have taken prompt action following the 2013 tPR guidance, and may herald a toughening of TPO's approach to such cases. Trustees may escape substantial claims, despite their maladministration, because it will be obvious on the facts that the member would have ignored their warnings. Where the facts are less clear-cut, the trustees may find themselves on the hook for a member having lost his pension.

## Suspect transfer could, and should, have been stopped

In PO-9935 [Mrs N](#) (27 June 2017) a Swedish pension scheme had been accepted by HMRC to its list of qualifying recognised overseas pension schemes (QROPS) in May 2011. It only stayed on that list for seven weeks, but the scheme administrator allowed the member to transfer out to the Swedish scheme in 2012, incorrectly thinking that the scheme was still on the list. The receiving scheme unlawfully paid the monies which it had received directly to the transferred member, and HMRC contacted her seeking substantial unauthorised payment charges.

The Ombudsman's Adjudicator said that even though this all happened prior to tPR's 2013 scams campaign, the administrator should still have made reasonable basic checks. Although it did check the QROPS list the day before transfer, and there were schemes on the list with a similar name, the scheme in question was absent. At that point, additional checks should have been undertaken to establish why, and had that happened then the transfer would not have taken place.

After some discussion as to the correct redress, the Ombudsman's office accepted the administrator's proposal to repay the complainant the unauthorised member payment tax charges which she had incurred, less the tax charge that she would have paid had the pension been lawfully cashed out (this became possible following the introduction of new DC flexibilities in April 2015).

The administrator said that it did not believe the redress payment would be taxable, but would reconsider its position if the complainant could later demonstrate that she had suffered a tax liability as a result of receiving it. The Ombudsman was content that this approach (which fell short of the member's demand for a tax indemnity) was a reasonable stance to adopt.

*Comment:* The case shows how administrators may be liable for a member's losses in circumstances where accurate checks would have stopped the transfer from being made. It made no difference that the losses were suffered as the result of an unlawful pay-out, beyond the transferring scheme's control.

## Trustees entitled to follow "white list" procedure for transfers-out

The [Code of Good Practice on Combating Pension Scams](#) describes a possible "white list" approach under which scheme administrators may hold and manage a list of schemes which they do not consider as presenting a risk of pension scam activity. The Code explains that a robustly managed list can significantly reduce the due diligence needed on individual transfers.

In PO-17003 [Mr T](#) (20 June 2017) the member complained that, because the scheme he wished to transfer to was not on the transferring administrator's "white list", he had encountered unnecessary delays in transferring out. He argued that it was unnecessary for the administrator to write

# Leaders in Pensions

to HMRC about the status of the receiving scheme (a step which it took for non-white listed schemes).

The Deputy Pensions Ombudsman disagreed, accepting that because the receiving scheme was not on the white list, the administrator's internal procedures required it to write to HMRC to confirm the receiving scheme's registration. She also noted that the administrator had no control over how long it took HMRC to respond. The overall time taken to complete the transfer (in fact, within 30 days of the member's request) was reasonable.

*Comment:* The DPO's pragmatic approach will support those trustees who have chosen to follow a suggestion set out in industry best practice guidance.

## Trustee not bound to pay benefits that it couldn't precisely establish

PO-10366 [Mrs D](#) (23 August 2017) looked at the aftermath of a transfer to a potential liberation scheme. This time, the member's complaint was against the receiving scheme (now managed by a tPR-appointed independent trustee, appointed shortly after she transferred to it). The member's pension savings in the scheme were invested in a reforestation fund, a foreign exchange fund and cash. The new trustee told members that no benefits would be paid out for the time being: the uncertain structure of the scheme and its extensive investment in illiquid overseas assets meant that it could not establish an accurate value for members' benefits.

Unfortunately, the complainant, who would shortly reach age 55, had already entered into a contract to buy a property with the tax-free lump sum she then planned to take. The property fell through and after she had to borrow money to pay a penalty fee, the lender threatened her with court action.

The trustee still refused to pay anything to her on the basis that despite there being liquid funds available in her name, it could not determine an accurate value for her pension benefits, and so could not calculate her maximum lump sum. There was also an unresolved issue over HMRC tax charges, meaning that a deduction for those might need to be made from any payment due.

The Deputy Ombudsman expressed her "utmost sympathy" for the member's position, but could identify no maladministration by the trustee. The scheme's circumstances were not normal and the decision not to pay benefits out at the current time was reasonable and legitimate.

The trustee had also responded to all relevant correspondence within reasonable timeframes and it was

appropriate for it to manage its member communications to reduce costs which, in the absence of a solvent employer, would otherwise be met from scheme funds. "While Mrs D is entitled to request ad hoc updates it does not seem to me that there is anything to be gained by doing so."

*Comment:* The outcome, if harsh for the member, suggests a reluctance on the DPO's part to interfere with a trustee's professional judgment in what was obviously not a straightforward scenario.

## Ombudsman finds company director within jurisdiction

We move away from the liberation theme to alight on a case about the reach of the Ombudsman. The nub of the complaint in PO-12679 [Mrs A](#) (20 July 2017) - the employer's failure to pay over member and employer contributions to a group personal pension plan - was not, of itself, unusual.

The interesting point was that although the employer company had been dissolved, the Ombudsman held that a Mr Ryan, its sole director, fell within his jurisdiction as an "administrator" because he had personally carried out "acts of administration" in relation to the scheme when collecting and transferring contributions to the provider. This, said the Ombudsman, rendered Mr Ryan personally liable for his actions as a 'de facto' administrator. Mr Ryan was ordered to pay the outstanding contributions plus interest to the pension provider, and to pay Mrs A £2,000 for distress.

*Comment:* The result echoes one of Anthony Arter's first cases, PO-1145 [Forrest](#) (19 June 2015), in which he also found that the sole director of an employer was personally liable as a 'de facto' administrator. The new determination proves that [Forrest](#) was not a one-off and that individuals (particularly sole directors) can no longer assume that they are sheltered behind the 'corporate veil'.

## 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 recently instituted Legal Forum.

*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 10 October 2017. CMS Cameron McKenna Nabarro Olswang LLP is a limited liability partnership registered in England and Wales with registration number OC310335.*