

Pensions Ombudsman Update – January 2022

Welcome to the 20th CMS Pensions Ombudsman Update. Our regular Updates are designed to help you get to grips with the Ombudsman's thinking, keep track of decisions on individual topics and identify underlying trends. In this edition we look at recent determinations and guidance on pressing issues for trustees, including the evergreen themes of overpayments and scams.

Dealing with overpayments

One point that can come up in overpayment cases is whether, if trustees recoup past overpayments from future benefits, they can offset against the member's GMP. Another is in what circumstances a member may have accepted overpayments in 'bad faith', thus depriving themselves of a possible defence to recovery. PO-23848 [Mrs S](#) (19 August 2021) considered both.

Member's GMP could not be disturbed

The overpayment arose from the member having failed to inform the scheme that she had been cohabiting (which should have led to abatement of her widow's pension). She complained about attempts to recoup the overpayment by offsetting against GMP due after it was discovered.

The Ombudsman noted that under s159 of the Pension Schemes Act 1993, "every assignment of or charge on" a GMP is void. He held that although the section did not specifically refer to offsetting, the word "charge" did, in the circumstances, include it. This meant the scheme was not entitled to deduct any part of the overpayment from the GMP, nor could the member agree to such a deduction.

Careless members can resist recovery

The Ombudsman analysed the member's plea of a 'change of position' defence. This requires a member to show that they took irreversible steps, to their financial detriment, in reasonable reliance on a representation made to them. The defence is not available where the member had acted in bad faith in retaining the overpayment. The Ombudsman explained that bad faith for these purposes:

- is not synonymous with dishonesty, and could also include "a degree of sharp practice" or where the member turns a 'Nelsonian' blind eye; but
- does not include acting negligently: a careless recipient could still invoke the defence.

Applying the test to the facts, the Ombudsman commented: "*Mrs S is asking me to accept that not once in the 12 years from 2004 to 2016 did she read any of the newsletters sent to her each year... or, if she did, she did not understand that she needed to notify... cohabitation.*" But although the decision was 'finely balanced', he concluded that Mrs S did lack actual or Nelsonian knowledge. She had genuinely not known about the rules on cohabiting, and the change of position defence therefore applied.

Comment: As well as sounding a warning over recouping overpayments from GMP, the determination serves as a useful summary of the Ombudsman's approach to the change of position defence. In light of this case and [Mrs E](#) last summer (see our [previous Update](#)), it seems that members are being given some latitude to claim ignorance that they were receiving more than they were entitled to.

Reinstatement ordered in scams case

PO-11134 [Mr S](#) (7 December 2021) saw a member complain that his public sector scheme had allowed him to transfer to a suspected pension liberation scheme, under which he now believed his benefits to be lost.

The transfer was originally requested in January 2013, and took place in September that year. The transferring scheme's manager admitted that it did not put in place the additional checks suggested by the Pensions Regulator's February 2013 'Scorpion' guidance until November. The Ombudsman found that this failure to assess the member's request in accordance with the Regulator guidance at the time was maladministration.

The Ombudsman accepted that even if the member had received the Scorpion risk warning, he would have chosen to proceed. However, he upheld the member's complaint on the basis that Mr S was not an "earner" under the transfer legislation when final approval for the transfer was given, as his only income was Jobseekers Allowance. This meant that he had no statutory right to a transfer. Moreover, there was no provision in the transferring scheme rules to make a non-statutory transfer. The transfer-out was invalid.

The scheme manager claimed that it could not reinstate Mr S, as the relevant section was closed to new members. However, the Ombudsman said that Mr S was not a new member but "a previous member whose membership ought never to have ceased". He ordered Mr S to be reinstated as if no transfer had occurred: failing that, the manager must provide equivalent benefits through another pension arrangement.

An interesting quandary on remedies in these cases is how to allow for recoveries a member might yet get from the receiving scheme. The Ombudsman said that the scheme manager should be entitled to claw back from Mr S any recoveries he received. However, as the Ombudsman is unable to make directions against members, he could do no more than 'recommend' the parties enter into an agreement allowing the scheme manager to recover such amounts.

Comment: This determination echoes the [Mrs H](#) reinstatement case (see our [Update](#) two years ago). There, the member was also living on state benefits and had no "earnings" at the time of transfer. With the current vogue for IDRPs complaints orchestrated by claims management companies, we can expect more past transfers to be challenged on these grounds.

Trustee liable for members' lost funds

In PO-15521 [Ms T & others](#) (2 July 2021) a suspected liberation scheme was established to invest solely in the preference shares of one company, Realsave. According to the determination, Realsave had no annual returns or accounts, no existing investments, no contracts in place and an empty warehouse.

On agreeing to transfer in, members were offered 20% of their transfer value in cash. They were not told that 30% of the sum transferred would be paid to an introducer company as commission, with the rest ostensibly to be invested in Realsave. For his part, the trustee claimed to be unaware of trustee duties or of TPR's website or guidance.

The Ombudsman found that the trustee had breached his duties to manage conflicts, not to profit from his role, to operate necessary internal controls, and to have sufficient knowledge and understanding of pensions and trusts. He committed breaches of trust by transferring large sums into his brother's unregulated introducer company, investing remaining assets in Realsave, and providing false information to members.

The trustee was also guilty of maladministration in failing to have regard to TPR's DC Code of Practice, and failing to make enquiries to establish whether the cash payments to members on joining were authorised under tax legislation.

The Ombudsman directed the trustee to restore the lost funds invested by scheme members, together with interest at 8% per annum; and to pay the three applicants £6,000 each for non-financial injustice.

Comment: A neat demonstration of the Ombudsman's new approach in dishonesty cases, outlined in his [Annual Report](#), under which respondents can be put on the hook not just for complainants' losses, but for losses incurred by all scheme members.

Remedy granted despite lack of scheme information

In PO-28905 [The Estate of Mr K](#) (5 January 2022) a small self-administered scheme failed to pay out promised benefits following the member's death.

The Ombudsman could not source a copy of the scheme rules, nor establish precisely who its trustees were. The respondent, Mr N, had initially engaged with the executor of Mr K's estate but then failed to respond either to her formal complaint, or to the Ombudsman's office.

It was up to the Ombudsman to fill in the blanks. He held that the scheme was a UK occupational pension scheme, on the basis that HMRC held contracting-out reference numbers for it. The Ombudsman then satisfied himself that previous e-mails between Mr N and the complainant showed that the scheme held funds on behalf of the late Mr K; and that Mr N was, on the available evidence, a trustee.

The Ombudsman directed Mr N to pay the benefits attributable to Mr K's share of the scheme (together with any sums recovered from a failed scheme investment) to his executor, together with interest at 8% per annum. However, despite the undoubted maladministration, the Ombudsman said he could not direct payment of a distress award, as the complainant was acting as executor rather than in her personal capacity.

Comment: The determination shows how the Ombudsman will not necessarily be stymied by respondents who refuse to engage with his enquiries.

Ombudsman declines to investigate trustee of wound-up scheme

In PO-25165 [Mr N](#) (20 September 2021) the Ombudsman resisted a member's attempt to add the trustee company of a now wound-up scheme as respondent to a transfer value complaint against the scheme administrator. The Ombudsman's power to investigate complaints was discretionary; and as the scheme had wound up and the trustee company had been discharged from its duties, any directions made against it would be unenforceable.

The Ombudsman also turned down the invitation to investigate the former trustee directors individually, noting that he could only "*pierce the corporate veil*" to find directors personally liable where there had been dishonesty. There was no evidence of that here.

Comment: This may provide comfort for former trustee directors of wound-up schemes. It appears that the Ombudsman will be slow, without good cause, to involve them in ongoing complaints.

What might 2022 have in store?

In his 2021-24 [Corporate Plan](#), the Ombudsman anticipates an uptick in demand as the full impact of the pandemic unfolds. He also suggests some specific trends for future determinations:

- complaints about non-payment of automatic enrolment contributions (although there may be a time lag before potential AE maladministration complaints arrive on a much larger scale);
- an increase in scam cases - the interaction of pension freedoms with the pandemic having increased early retirement and transfer value requests, and member vulnerability;
- the forthcoming Pensions Dashboard, which will raise pensions awareness, leading to demand for his services at an earlier stage;
- the Conditions for Transfers Regulations, effective last November, and likely to lead to an increase in complaints about wrongly-blocked transfers.

Comment: These predictions suggest that the long-term trend - a rising Ombudsman workload, and increasingly complex complaints - is unlikely to change.

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.

The information in this publication is for general purposes and guidance 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 definitive. The Update is intended to simplify and summarise the issues which it covers. It represents the law as at 17 January 2022.