

Pensions Ombudsman Update – July 2020

Welcome to our latest CMS Pensions Ombudsman Update. Our regular 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. In this edition, we look at determinations on trustee duties, evidence and medical advice; and catch up on wider developments at the Ombudsman's office.

Transfer value, early retirement factor and SIP changes were properly made

Earlier in the year the Ombudsman handed down his much-anticipated British Steel [Final Determinations](#), the culmination of an investigation into 229 linked complaints.

In April 2017 the trustees changed their cash equivalent transfer value (CETV) and early retirement factor (ERF) methodology, with members requesting a transfer value or early retirement after that date receiving much higher values or benefits than those who had already done so.

The members complained that previous trustee communications scared them into taking transfers or early retirement sooner than they would otherwise have done, and that the trustees should have changed the calculation basis earlier and been more open about doing so. The Ombudsman rejected the complaints on the following basis:

Communications: The relevant trustee communications were not misleading. It had been necessary to share information with members, given press coverage at the time and the inevitable concerns it raised. The trustees had to maintain the difficult balance of providing sufficient information to members without overwhelming them, and were not expected to be aware of every member's individual circumstances when taking generic decisions.

Transfer values and ERFs: The applicable CETV calculation basis was a matter for the trustees, and any calculation correctly applying that basis (before it was validly revised) was not maladministration. Nor did trustees have to notify members of their intention to update the CETV calculation basis, or alert them to a potential but uncertain future improvement in CETVs. The same reasoning applied to the ERFs in place at the point of a member's early retirement.

Statement of Investment Principles (SIP): The changes to CETV calculations followed the trustees' earlier amendment of the scheme SIP. Again, however, there was no requirement on the trustees to tell members when weighing up changes to the scheme's investment strategy or SIP nor, when the trustees decided to move to low risk investments, to explain to members the impact on CETVs:

- if no decision had yet been made to amend the calculation basis, information provided would have been speculative and caused uncertainty;
- in alerting members to a potential increase the trustees risked being viewed as encouraging members to transfer away from the scheme;
- a large number of members transferring out over a short space of time could have a negative effect on scheme funding and the remaining members.

Comment: These detailed determinations show the Ombudsman resisting attempts to second-guess reasoned trustee decisions, and defending trustees who adopted proper process and took appropriate advice to navigate a fast-moving situation.

Wayward trustee hit for £14m

In determination CAS-30918-M4P3 [Mr S & others](#) (23 June 2020) the Ombudsman upheld 31 members' complaints against the former sole trustee of three related schemes.

The trustee was also the sole director of a motorcycle company. The schemes were promoted as an opportunity to invest in the company, with members who transferred into them receiving an upfront 'commission' payment. All funds had been invested, without the trustee obtaining any written advice, in preference share capital in the company.

Following an oral hearing (which the trustee declined to attend), the Ombudsman held that the trustee:

- had acted dishonestly and in breach of his 'no conflict' duty, his duty not to profit and his duty to act with prudence;
- had breached statutory and trust law investment duties;
- had breached statutory duties to have adequate controls in place to manage conflicts and ensure effective scheme administration;
- had breached his statutory duty for knowledge and understanding of pensions and trust law; and
- was guilty of maladministration for failing to address conflicts, failing to have regard to the schemes' Statements of Investment Principles, failing to ensure investments were appropriate for members and disregarding the Pensions Regulator's DC Code of Practice.

As investment had not been delegated to a fund manager, the Ombudsman found that the trustee was personally liable for members' investment loss. His wilful neglect and default of his duties meant that he could not rely on scheme exoneration clauses. Nor could he benefit from the protection of section 61 of the Trustee Act 1925, which can allow trustees to be excused from liability where they have acted honestly and reasonably.

The Ombudsman therefore directed the trustee to repay to the scheme the net amounts lost on investment in the preference shares, plus simple interest at 8% (the total figure has been reported as around £14m). He also directed the trustee to pay some £6,000 to each complainant in respect of their distress and inconvenience.

An interesting side-point is the Ombudsman's view that although the trustee received no remuneration in that role, on the facts (in particular the benefit he derived in his personal capacity from the transfers-in) his position could still "*be regarded as analogous to that of a professional trustee*" for liability purposes.

Comment: Like last summer's [Mr L](#) determination (see our July 2019 [Update](#)), this is a stark reminder that the Ombudsman has powers, where needed, to reach deep into the pockets of individual trustees who have acted in breach of their duties.

Leaders in Pensions

Evidence: the role of HMRC

In PO-25899 [Mr N](#) (11 May 2020) the complainant was an active member of the Clydesdale scheme from 1975 to 1986, and the Bradford & Bingley (B&B) scheme from 1986 to 1992. His benefits under the B&B scheme were then bulk-transferred to a third scheme, and subsequently to a fourth. His pension from that final scheme included credit for scheme service from 1986.

Mr N argued that he was entitled to a deferred pension under the Clydesdale scheme, or (in the alternative) that the B&B scheme trustees had received a transfer value for his Clydesdale service and failed to include it in the bulk transfer of his benefits to the third scheme. The B&B trustees said they had no record of a transfer-in, and that the onus was on Mr N to provide evidence for it.

However, the Adjudicator concluded that the member's deferred benefits had been transferred to the B&B scheme. Although Clydesdale scheme records were 'scant' (it had deleted historic transfer-out records on data protection grounds), HMRC records stated that the member's contracted out liabilities for 1978-1986 service had transferred to the B&B scheme. The most likely outcome was that the B&B trustees, when transferring out the member's benefits, had failed to include his previous transferred-in service when calculating his transfer value.

The Deputy Pensions Ombudsman agreed: "*I cannot disregard the evidence provided by HMRC*". She ordered the B&B trustees to reconstruct the original transfer of pension rights from the Clydesdale scheme, re-calculate Mr N's deferred pension in the B&B scheme and, if he so chose, pay him a backdated retirement pension and lump sum, together with simple interest on the payments due.

Comment: This is hot on the heels of PO-27002 [Mr Y](#) (13 January 2020) in which the Ombudsman used HMRC contracting-out data to determine which scheme had responsibility for the whole of a member's deferred benefits. It reinforces how HMRC records can act as a tiebreaker in disputed evidence cases, particularly if schemes have lost or destroyed older member records.

When to get a medical opinion

In PO-17708 [Mrs K](#) (19 February 2020), trustees asked scheme medical advisers about what had caused the member's cancer. The Ombudsman held there was no obligation on the trustees to seek this advice from the member's treating physician (although there would be a stronger argument for doing so if they had been looking for advice on the member's diagnosis or treatment).

The scheme's medical advisers did not come within the Ombudsman's jurisdiction but were answerable to their own professional bodies: it was a matter for their professional judgement as to whether they could supply the specific type of advice sought by the trustees.

Comment: For noting. Trustees should consider the nature of a medical enquiry when deciding to which professional it should be addressed.

The Ombudsman's COVID-19 response

The Ombudsman's office closed to new enquiries at the outbreak of the pandemic, but was able to resume them within weeks. He [confirms](#) that he will take TPR's COVID-19 [guidance](#) into account in his decision-making, and allow for the effects of the crisis on all stakeholders, not least the NHS and care providers.

The Ombudsman reassures applicants that, where necessary, he will use his statutory discretion to extend the usual 3-year time limit for new complaints.

Comment: So far, so good but - as the Ombudsman himself [suggested](#) to the Work & Pensions Committee this week - we can expect a future spike of COVID-19 crisis driven complaints, given the pressure of the crisis on members, trustees and employers alike.

Updated appeals guidance

In our January [Update](#) we noted the judicial criticism - in [Cunningham v Pensions Ombudsman](#) - of the description of Scottish and Northern Irish procedure in the Ombudsman's appeals factsheet.

The [factsheet](#) has now been updated accordingly with detail on appeals outside England and Wales.

Comment: For noting. Even where local laws differ it is essential that members in all parts of the UK have equal clarity as to their rights to dispute Ombudsman findings.

Building oversight of the Ombudsman

On 29 June Alex Robertson, formerly at the Parliamentary and Health Service Ombudsman, began work as the Pensions Ombudsman's [Chief Operating Officer](#).

The office is now [hunting](#) for a permanent Chair: at the time of writing, an assessment panel is 'sifting' the applications received.

Comment: The changes follow DWP's [Tailored Review](#) (see October 2019's [Update](#)) which proposed a full Board structure at the Pensions Ombudsman, in line with Cabinet Office principles. The reforms seem sensible in light of the rapid expansion of the Ombudsman's office in recent years.

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 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 July 2020. CMS Cameron McKenna Nabarro Olswang LLP is a limited liability partnership registered in England and Wales with registration number OC310335.