

## Pensions Ombudsman Update - July 2022

Welcome to our latest Pensions Ombudsman Update. These 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 examine the latest Annual Report and the newest Court appeals from the Ombudsman: but we start with news of a 'changing of the guard'.

### New Pensions Ombudsman confirmed

This is our last Update during the tenure of Anthony Arter, who has been in post since 2015 and performed a transformative role in streamlining the approach of the office of the Ombudsman.

Anthony will be replaced in post by another pension lawyer: our own colleague Dominic Harris, currently Chairman of the Association of Pension Lawyers' Investment Committee. Following DWP's [announcement](#) of Dominic as their preferred candidate, the Work & Pensions Select Committee has now [approved](#) his appointment.

We are very pleased for Dominic and wish him well in his new venture!

### Annual Report: lessons from the past and for the future

The final [Annual Report](#) of Anthony Arter's seven-year stint reveals that in 2021/22, the Pensions Ombudsman closed 5,221 pension complaints - up 8% on the previous year.

Most were dealt with at the application and assessment stages, with just 257 (less than 5% of all closed complaints) needing a final Ombudsman Determination. This is in line with the Ombudsman's aim of progressively reducing the number of complaints requiring his formal involvement.

In relation to complaints generally:

- 35% of determinations were upheld, at least in part (down from 41% in 2020/21);
- there was a slight decrease in new pension complaints, but the Ombudsman regards this as a one-off occurrence attributable to the pandemic, and expects the longer-term upward trend in complaints to continue over the next three years (especially as the impact of Covid-19 on the financial landscape becomes apparent);
- fewer than half of the complaints closed by the Adjudication Service were closed within a year, predominantly due to a higher number of complex cases (which have a knock-on effect on others);
- the subject matter remains consistent over time - led this year by transfers, retirement benefits and misquotes - although there has been a rise in complaints over unpaid contributions (again, potentially due to the impact of the pandemic).

*Comment:* It seems that any drop in the Ombudsman's workload during COVID-19 was only temporary!

With complaint backlogs on the up, it is therefore good news that for the first time in several years the Ombudsman has secured a significant funding increase in the Government's Spending Review.

### Member could not re-litigate failed Ombudsman claim

Although a bizarre claim in many respects, the case of [Hamill](#) [2022] EWHC 900 emphasises some key principles. The member complained in 2017, after he was wrongly told he would receive his guaranteed minimum pension from age 60 and not age 65. In October 2017 the Ombudsman [held](#) that he member had no right to pension at 60, but awarded him £500 for the inaccurate communication.

The member did not appeal the Ombudsman's ruling. However, in July 2021 he tried to bring High Court proceedings raising essentially the same claim. These were struck out for failing to set out his case in clear language (the form was described in later proceedings as "wholly unintelligible"). Undeterred, the member brought a further claim this year, but on substantially the same grounds, contending that the Court could (and should) overrule the Ombudsman and find in his favour.

The Court struck out the claim, flatly rejecting the argument that any senior court could simply overrule an Ombudsman determination. A decision of a first instance court or tribunal stood, unless and until overturned on appeal: a dissatisfied litigant could not escape the need to appeal by re-litigating the same point in different proceedings in front of a more senior judge. Under [section 151\(3\)](#) of the Pension Schemes Act 1993 the Ombudsman's determination was final and binding on the claimant because he did not pursue the only permissible route to challenge it, namely appeal with permission on a point of law.

At the time of writing, we understand that the member is seeking to appeal to the Court of Appeal.

*Comment:* A useful reminder that Ombudsman decisions can only be unwound in the limited circumstances where appeal is made in a timely fashion; the High Court allows the appeal to proceed; and a higher court goes on to find that the original determination was wrong as a matter of law.

### Scheme medical adviser was not biased against member

In [Appeal by H](#) [2022] ScotSC CSIH\_20 a member who had applied for an ill-health pension challenged the medical advisers' assessment of his reduced earning capacity. His first appeal was conducted by the scheme's medical adviser service. A second appeal was conducted by Dr G, appointed as an external senior physician.

The member complained that Dr G was not in fact external or independent but professionally involved with the medical adviser service, having formerly been employed by them and done consultancy work for them. The Pensions Ombudsman rejected the claim, holding that Dr G's past association with the service did not render his opinion biased. The member appealed.

The Court of Session refused the appeal. There had been no maladministration and no error of law. A fair-minded and informed observer, having considered the facts, would not conclude there was a real possibility that Dr G was biased. Regardless of who employed a physician, that fair-minded observer would expect them to act properly in accordance with their professional ethics and obligations.

*Comment:* Trustees should be reassured by the Court's support for the Ombudsman's reasoned approach. Whilst ill-health claims can be a delicate area, it is important there is no presumption that a medical adviser, properly appointed by a scheme, would not approach the task in a professional and appropriate way.

## Expert's decision binds trustees

The linked complaints in CAS-59054 [Mrs Y](#) and CAS-35438 [Mr L](#) concerned a scheme with just two members, Mr Y and Mr L. Following Mr Y's death, the trustees were Mr L and a professional trustee. The division of scheme funds between the members was disputed and Mrs Y (Mr Y's widow) complained about their allocation between them for the purposes of calculating the death benefit due to her.

Under the scheme rules, any matter on which the trustees were not unanimous was to be referred to an expert appointed by them, "*whose determination shall be binding on the trustees*". The trustees agreed to appoint an independent expert to determine the amount payable. The expert determined a 55/45 split between Mr L and Mr Y which the professional trustee decided to follow in calculating Mrs Y's benefit. However, Mr L brought his own complaint, arguing the expert determination was perverse and the decision to follow it should be set aside.

The Ombudsman rejected Mr L's complaint. There were no reasons to justify setting aside the expert's determination and so the trustees were bound by its findings. However, the Ombudsman went on to opine that not every independent expert's verdict would bind trustees: "*I doubt that it can be correct for the trustees of a pension scheme to proceed on the basis of a determination by an expert if they know that determination to be incorrect*".

Upholding Mrs Y's complaint, the Ombudsman found that Mr L breached his fiduciary duties by failing to deal with the conflict of interest that initially arose from his involvement in deciding the death benefit payable to her. Mr L was directed to pay Mrs Y £2,000 for distress, and to reimburse her for any tax charge incurred as a result of late payment.

The Ombudsman did note that Mr L, as a trustee, could potentially be indemnified from the scheme against "*any costs, claims, demands, expenses, proceedings and liabilities*". However, should the directions made against Mr L end up being funded from the scheme then Mrs Y might have grounds for a further complaint, on the basis this would effectively reduce her own entitlement.

*Comment:* Where a scheme contains this type of dispute resolution provision, the Ombudsman's role is relatively confined: he will not second-guess the substance of the expert decision, but will want to satisfy himself there are no grounds to justify setting it aside.

## New Dishonesty Unit up and running

In recent Updates we've looked at some epic Ombudsman determinations in trustee dishonesty cases. These typically involve members transferring to a trust-based occupational scheme investing in purported high-yield investments which are in fact unregulated, high risk and often perform disastrously. The determinations frequently entail findings of multiple breaches of law and result in the Ombudsman making substantial awards against the trustees in question.

In the light of this trend, the Ombudsman has established a dedicated [Pensions Dishonesty Unit](#) (PDU) to investigate allegations of misappropriation of pension funds and dishonest or fraudulent behaviour by pension trustees. As these cases are extremely complex and generally require oral hearings, the team is staffed by experienced members of the Ombudsman's Casework and Legal departments.

A key task of the PDU is to get unlawful gains paid back to scheme members. Last month, the PDU and the Ombudsman's Legal Team held a forum to provide independent trustees (who will typically be appointed to affected schemes by the Pensions Regulator) with information on how the PDU works, and the benefits of referring cases to it.

The PDU has now taken on responsibility for 48 cases, with assets of over £40m under consideration and a number of oral hearings already held or scheduled. The Ombudsman anticipates the first PDU determinations this summer.

In the meantime, it's worth flagging a helpful update in the Annual Report on the [Norton Motorcycles](#) case, which attracted significant press and Parliamentary interest. The Report is keen to highlight how the Norton trustee's subsequent [criminal conviction](#) for employer-related investment offences followed "*the publicity that surrounded the Pensions Ombudsman's Determination against him*".

*Comment:* The Ombudsman is not alone amongst regulatory bodies in having to devote increasing resources to complex liberation cases. We welcome the creation of a team dedicated to focusing on these, and over time expect it to ease the pressure on turnaround times for more straightforward complaints.

## Don't forget our LawCasts!

Did you know about the CMS Pensions LawCast [video](#) and [podcast](#) series? The series includes a recent update on Ombudsman determinations on overpayments, transfers and distress awards. We regularly add new content: please [subscribe](#) to [Law-Now](#) to stay updated.

### CMS and the Pensions Ombudsman

CMS has had a market-leading Pensions Ombudsman Unit for many years, led by Mark Grant who wrote the only text book on the Ombudsman's role. Mark also established the Pensions Ombudsman Liaison Group, an industry body that meets with the Ombudsman to improve understanding, relationships and communications between his office and key stakeholders. CMS partner Laura Clarke is Secretary to the Group. 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 26 July 2022.*