

## Pensions Ombudsman Update - October 2019

Welcome to the 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. This month we look at recent cases, the latest from Government, new guidance for litigators and the Ombudsman's annual report.

### Annual Report: another hectic year

The Ombudsman's 2018/19 [Annual Report and Accounts](#) is the first to include the work of the Early Resolution Team that joined his office from TPAS in March last year. By way of headlines, the Ombudsman service:

- took on 1,528 new investigations, but only completed 1,268 (against a target of 1,400: the Ombudsman blames the shortfall, in part, on the difficulties in recruiting replacements for Adjudicators who had left the service);
- took on 2,566 early resolution cases (around 50% more than anticipated, the higher than expected demand being attributed to better signposting), and resolved 2,165;
- decided 80% of cases informally and 90% without an Ombudsman's intervention;
- upheld 28% of complaints determined by an Ombudsman in whole or in part (this is consistent with the pattern from previous years); and
- took an average of 5.3 months to complete new investigations (within the target of 6 months).

*Comment:* The many innovations adopted by Anthony Arter as Ombudsman (there is even reference to the risk of 'change fatigue' amongst his staff!) seem to have bedded down well. However, the challenges continue: "with limited resources," the Ombudsman notes, "we need to be more strategic about how we work".

### Extending the Ombudsman's powers

In [January](#) we flagged the Government's [consultation](#) on the Ombudsman's powers and jurisdiction. In August, the DWP finally published its [response](#).

A key focus is the interaction of the Ombudsman's early resolution service (ERS) with scheme internal dispute resolution procedure (IDRP). DWP supports making ERS available at any stage of IDRP, or before it; but says parties are not bound to participate and that it will not give agreements reached during ERS a specific legal status: parties can agree their own settlement. DWP still believes that in most cases IDRP should precede any formal Ombudsman investigation, but will consider flexibilities (for example, where the same issue has already been considered under IDRP in respect of a different member).

The response confirms that the Ombudsman's jurisdiction will be widened to allow employers to bring complaints against providers of group personal pensions (GPPs). This seems logical in the era of universal automatic enrolment.

Legislation to implement the Government's proposals will be brought forward "in due course".

*Comment:* We will report back in a future Update on the scope of the draft legislation when published.

### Ombudsman orders unauthorised transfer payment

PO-22236 [Ms N](#) (29 July 2019) concerned a member who had moved to Canada, and asked to transfer her benefits to a Canadian qualifying registered overseas pension scheme (QROPS). However, by the time her pension provider was ready to make the transfer payment, the receiving scheme had been removed from HMRC's list of authorised overseas schemes.

The Ombudsman agreed (and the provider accepted) that its delays had stopped the transfer being made. The problem was that the scheme rules did not allow unauthorised payments. There were also no longer any Canadian schemes on the QROPS list, so it was not possible to direct transfer to a different Canadian scheme that met HMRC requirements.

The Ombudsman held that he had power to direct trustees to make an unauthorised payment, and therefore ordered the provider to make a payment to the Canadian scheme (or such other scheme chosen by the member), reflecting the value of her funds in the plan. The provider would have to meet any tax charges - including the unauthorised payment charge - that she incurred as a result. It would also need to make up any lost investment growth, upon the member providing satisfactory evidence that the investment would have performed better under the Canadian scheme than it had under her current plan.

The Ombudsman acknowledged that in light of the scheme rules prohibition on unauthorised payments, the provider might consider itself unable to follow his direction: in that case, it could make up the sum outside the plan, from its own resources. If it did, he would direct that it was no longer liable to Ms N for the value of her fund.

For completeness, the Ombudsman made a final direction that, if the above directions proved unworkable, the provider should refer the matter back to him promptly for some more directions.

*Comment:* The determination may raise a few eyebrows, but schemes should be aware that if a member had a statutory right - and lost it through trustee or administrator delay - the Ombudsman is prepared to contemplate this type of remedy.

### High Court rules on employer duties

[Corsham v Police & Crime Commissioner for Essex](#) [2019] EWHC 1776 (Ch) involved police officers who had retired and opted for their police pension, but then taken civilian employment in the force within one month. By doing so, they lost their Finance Act 2004 right to a 'protected pension age' of 50, rendering their cash lump sums and pre-age 55 pension instalments unauthorised.

Originally, in PO-7038 [Mr R & others](#) (21 August 2018), the Ombudsman held there was no employer duty to advise members of the tax consequences of resuming employment after a protected pension was put into payment.

# Leaders in Pensions

The Ombudsman rejected arguments based on the House of Lords case, [Scally v Southern Health Board](#) [1992] 1 AC 294, which held that an employer must take reasonable steps to inform employees of a valuable contractual right where the right requires action by the employee, but the employee cannot reasonably be expected to be aware of it unless it is drawn to his attention.

The members' appeal was partially upheld in the High Court. The police authorities that re-employed the members should have been aware of the protected pension age issue, and the members reasonably relied on an incorrect suggestion by those authorities that their pensions would be unaffected.

However, the court agreed with the Ombudsman that the Chief Constables (who had employed the members as police officers) were not liable to the members. The tax consequences of the members' actions were external to the employment relationship and it would be a major and unjustified extension of case law to hold that the Chief Constables had a duty to advise, inform or warn them of those tax consequences.

Similarly, in PO-23961 [Mr T](#) (11 June 2019) the Ombudsman held there was no employer duty to warn new joiners that they might lose lifetime allowance protection on auto-enrolment. To routinely provide such members with detailed information on the tax protection would be a "significant and unwarranted administrative burden".

*Comment:* Employers must not mislead employees as to the potential effect of re-employment; but it is helpful that the court declined an invitation to widen the scope of [Scally](#) to create a proactive 'duty to warn'.

## Always follow the Rules

[Downe v Universities Superannuation Scheme](#) [2019] EWHC 2403 was an appeal from an Ombudsman [determination](#) last year. The member signed a compromise agreement on leaving employment but argued that she had effectively been made redundant and was thus entitled to the enhanced pension payable on redundancy.

The scheme rules defined redundancy as "cessation of... employment attributable wholly or mainly to... the requirements of [the activity for which the member was employed] to carry out work of a particular kind... ceasing or diminishing, or being expected to cease or diminish."

The Ombudsman had dismissed the complaint, holding that there was nothing to contradict the employer's view that employment had ended by mutual agreement. However, the High Court held that the Ombudsman had not provided reasoned answers as to whether the reorganisation, even if in its early stages and so falling short of a formal redundancy process, still met the relevant factual test described in the scheme rules. The case was remitted to the Ombudsman.

*Comment:* A sharp reminder to the Ombudsman that the wording of the rules has primacy.

## Changes to the Chancery Guide

New pensions updates to the [Chancery Guide](#) deal with appeals from the Ombudsman. Reflecting a well-worn theme, the Guide advises parties that although no Practice Direction compels them to keep the Ombudsman in the loop, he "often finds it helpful to be kept informed of the progress of the appeal and copied into relevant correspondence."

The Guide also draws attention to the court's power to make an order to limit recoverable costs in appeals, urging applications to be made as soon as practicable. This echoes the [Annual Report](#), in which the Ombudsman warned that "appeals can be costly affairs".

Any order made following an appeal from an Ombudsman determination must be clear about which aspects of the determination are upheld, set aside or remitted to the Ombudsman. Parties seeking to compromise an appeal should, therefore, liaise with the Ombudsman's office about the wording of the consent order.

*Comment:* The updates suggest practical workarounds to minimise the inconvenience and cost that appeals by unrepresented individual members can cause for the parties involved.

## Tailored review: suits you, sir

The DWP has published its [tailored review](#) of The Pensions Ombudsman. The lead reviewer, Hazel Hobbs, declared the Ombudsman's office to be well-respected and effective, with impressive staff, and describes feedback praising the quality, clarity and impartiality of determinations. As a result, the report does not suggest fundamental changes to his remit, partly driven by the reality that DWP has other priorities for "scarce legislative and Parliamentary capacity".

The report does comment on confusion about the overlap, in a small number of cases, between the Ombudsman and the Financial Ombudsman Service (FOS). It also asks the Ombudsman to clarify externally which cases are appropriate for ERS and provide assurance that they are handled independently from other parts of the organisation.

*Comment:* The Ombudsman passes this test with flying colours, although it is welcome that the review does not gloss over the ongoing stakeholder uncertainty about the precise roles of FOS and the ERS.

## 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 15 October 2019.*

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