



MAY 2022

Pensions Ombudsman Round-Up

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Introduction

Welcome to DLA Piper's Pensions Ombudsman Round-Up publication in which we report on recent determinations made by the Pensions Ombudsman and Deputy Pensions Ombudsman.

In this edition we look at determinations covering issues including overpayments, death benefits and transfers.

In the statistics section we provide a breakdown of the overall outcome of the determinations in the

four months to February 2022, as well as the range of awards made for distress and inconvenience.

In this newsletter references to:

"TPO" mean the organisation The Pensions Ombudsman;

"the PO" mean the Pensions Ombudsman; and

"the DPO" mean the Deputy Pensions Ombudsman.

If you would like to know more about any of the items featured in this edition of Pensions Ombudsman Round-Up, please get in touch with your usual DLA Piper pensions contact or contact Megan Sumpster. Contact details can be found at the end of this newsletter.



Overpayments

In PO-27022, Mrs G, a member of the Teachers' Pension Scheme (TPS) was overpaid a sum of approximately GBP96,000 over a relatively short period, which Teachers' Pensions (TP) then sought to recover. Prior to 1971, Mrs G was a member of the National Health Service Pension Scheme (NHSPS). After this point, Mrs G was given the option of remaining in the NHSPS or transferring her membership to the TPS. Mrs G opted to remain a member of the NHSPS. In spite of this, TP maintained a record of her non-pensionable service within the scheme. In 2001, Mrs G commenced part-time employment; for this reason, she was no longer eligible for membership of the NHSPS. From 2006, Mrs G began accruing pensionable service in the TPS. Around this time, Mrs G began receiving benefits from the NHSPS for her period of service between 1971 and 2001. In February 2013, TP updated its computer system, which affected Mrs G's records and resulted in her non-pensionable service in the TPS between 1971 and 2001 showing as pensionable on TP's records.

In March 2013, TP issued a statement to Mrs G confirming that her service in the TPS was seven years. In June, however, TP provided Mrs G with a statement showing pensionable service of 34 years. Mrs G queried this information with TP; TP said that its records were correct based on the information provided by Mrs G's employer. Mrs G contacted TP again and reiterated her concerns that its calculations were incorrect and that she had only been a member of the TPS since 2006. Mrs G also spoke to her employer, Lancashire County Council (LCC),

who said that she had only started paying into the TPS in 2006. Mrs G noted that TP had correctly recorded her pensionable service in the past. TP said it would contact LCC to clarify the situation. In July, Mrs G spoke with TP again and was quoted as saying, *"I don't agree with what they're sending me. It's very nice but I don't think I'm entitled to as much as I've got and ... they're going to find out and I'm going to have to pay it all back."* TP noted that it had contacted LCC but had not yet had a response so the matter was still under investigation. Mrs G retired in September and her pension was put into payment.

TP contacted LCC again in 2015, 2016 and 2017. LCC responded in 2017, stating that its records indicated that TP contributions started in 2006 and that it was not able to confirm any service in relation to the NHSPS. In March 2017, TP contacted Mrs G to confirm her corrected benefits, which showed her pensionable service as being four and a half years. TP informed Mrs G that she had been overpaid around GBP96,000 and requested that she repay the full amount.

PO's conclusions

The complaint was partly upheld. The PO noted that, in general, money paid in error can be recovered, even if the party responsible has been careless; the trustees of a pension scheme can only pay the benefits specified in the scheme's rules. However, there may be circumstances where a defence against recovery applies. The PO was of the view that a "change of position" defence was not available to Mrs G as she had not spent the overpayment

in good faith. The PO commented that bad faith was not synonymous with dishonesty and accepted that Mrs G initially acted in good faith by contacting TP and notifying it of her belief that the pension was miscalculated. At that stage, she did everything she could reasonably be expected to do. However, at the point at which Mrs G spent the overpayment, Mrs G knew or appreciated that she may not have been entitled to it and yet spent it regardless. The PO was not convinced that Mrs G was at any point persuaded that the pension she was paid was correct. Further, the PO commented that, had the inconsistency in the figures been small, an assumption that the situation had been resolved might have been reasonable, but, in this case, the discrepancy, that is, an extra 27 years' service, was significant. The PO also considered whether other defences were available, including negligent misstatement and the doctrines of estoppel and laches but was of the view that these were not applicable. Therefore, TP was entitled to recover the overpayment from Mrs G. The PO did, however, believe that TP's delayed handling of the situation was *"unfathomable"* and amounted to maladministration, which would have caused Mrs G exceptional distress and inconvenience. The PO awarded Mrs G GBP3,000 in compensation. Finally, the PO noted that, although ordinarily the PO would expect a repayment plan to be at least as long as the time period that the overpayment accrued, in this case, he would expect TP to be generous in the length of time it would allow for repayment to be made by Mrs G.

Transfers

In PO-11134, the PO upheld a complaint by a deferred member of the Armed Forces Pension Scheme (the **AFPS**), who argued that the Ministry of Defence (the **MOD**) had failed to carry out sufficient due diligence in processing his transfer request to the Capita Oak Pension Scheme (the **Scheme**), which he believed to be a fraudulent arrangement. This is a notable case as it involved an oral hearing as part of the PO's investigation. Mr S was an active member of the AFPS from 1988 to 2001, after which he became a deferred member. Some years later, Mr S was cold-called by a representative of the Scheme. Mr S was persuaded to transfer his benefits to the Scheme and the transfer took place in September 2013. Mr S submitted that: (i) the MOD did not conduct sufficient due diligence before allowing him to transfer benefits; (ii) the MOD should have pointed out the risks of the transfer; (iii) it would have been reasonable for the MOD to have put in place more stringent due diligence processes in time for the transfer in September, given that the Regulator's Scorpion guidance (the **Scorpion guidance**) in relation to pension liberation was released in February; (vi) had the MOD done this, it would have discovered that the Scheme had only been established one year before and that it was based in Cyprus; (vii) had the MOD informed him of these warning signs, he would not have transferred out his benefits; and (viii) the MOD knew that Mr S was in receipt of employment benefits and therefore not currently in employment.

The MOD argued that the substantive transfer process took place in February and March 2013

and that their due diligence reflected the law and regulatory guidance at the time; the delay to the actual transfer until September owed solely to obtaining correct identification information. It stressed that the complaint should be decided on the basis of established legal principles at the time the due diligence took place and not with the benefit of hindsight. Further, citing the High Court judgment in *Hughes*, while the MOD agreed that it had a common law duty to act prudently and in a scheme member's best interests, this did not override its duty to authorise a transfer where a statutory right had been established. The MOD also: noted that, in previous cases, TPO had allowed scheme managers time for procedures to be updated following the introduction of the Scorpion guidance; and stated that it is not aware of any benchmark which demonstrates that a period of six months was sufficient for a public sector scheme to have complied.

PO's conclusions

The PO concluded that the MOD misdirected itself in its construction of the statutory right to transfer under the Pension Schemes Act 1993 by focusing on the status of the receiving scheme, i.e. by checking that it was a registered scheme, and not taking into consideration Mr S's employment status. The PO considered the judgment in *Hughes*, which explores the requirement for a transferee to be in receipt of "earnings" in order for there to be a statutory right to transfer. Mr S was in receipt of Jobseeker's Allowance and therefore not an "earner" and so did not have a statutory right to transfer and the transfer was

invalid. In considering the due diligence aspect of the complaint, the PO stated that he did not believe it "*tenable*" for a reasonably competent pension provider not to be aware of the Scorpion guidance before September 2013 and unable to implement it until November. February 2013 was not the first time the Regulator had highlighted the problem of pension liberation; warnings had been given before. The PO acknowledged MOD's point that, in previous cases, TPO had allowed time for scheme administrators to implement the Scorpion guidance but noted that that was only around one month. There was sufficient time for the MOD to implement the Scorpion guidance before Mr S's benefits were transferred in September 2013. Had the MOD done this, the warning signs would have been clear. The PO concluded that it was maladministration that the MOD did not act on the Scorpion guidance before authorising the transfer. The PO also reflected on the MOD's statement that it could not reinstate Mr S's benefits into the AFPS as the relevant section is closed to new members. The PO, however, was of the view that Mr S would not be a new member but a previous member whose membership should not have ceased. Therefore, he should be continuing as a deferred member. The PO directed: that Mr S's benefits be reinstated in the AFPS or that he be provided with equivalent benefits in another pension arrangement; and that the MOD pay him GBP2,000 for the severe distress and inconvenience caused to him by its maladministration.

Death benefits

In CAS-43846-T2W7, Mr S complained that he was not granted a dependant's pension by the Scheme trustees (the **Trustees**) following the death of his late partner, Miss R. Miss R was employed by the Random House Group Limited (the **Employer**) and was an active member of the defined contribution (**DC**) section of the Penguin Random House Pension Scheme (the **Scheme**). In June 2019, Miss R died, leaving no surviving spouse or children. In early July, a phone call between the Employer's HR department and Mr S took place, in which the HR department informed Mr S that the Trustees were considering whether they might provide any support to Mr S in relation to the lease on the flat he had shared with Miss R. A week later, the HR department informed Mr S by email that the Trustees had decided to pay the lump sum death benefit to Miss R's sister. This was consistent with the expression of wish form that Miss R had completed.

Mr S believed that he should be eligible for a dependant's pension from the Scheme. He complained, among other things, that: (i) Miss R and he had paid equal shares towards the rent on their flat and he could not afford it alone without a significant reduction in his standard of living; (ii) he was the only person eligible to be considered for a dependant's pension as he was financially interdependent with Miss R; (iii) by failing to pay him a dependant's pension, the Trustees had exercised their powers for the improper purpose of financially benefitting the Employer; (iv) the Trustees had not taken into account all relevant facts as they did not seek information from him

as to the extent of his financial interdependency with Miss R; (v) the Employer-nominated Trustees had a conflict of interest; and (vi) the decision made by the Trustees could not have been reached by any other reasonable trustee board. Mr S also made reference to the way in which death benefits in the Scheme were insured and questioned how much money was received from the insurers after Miss R's death. The Trustees argued that the Scheme rules (the **Rules**) gave them absolute discretion to decide whether a person qualifies as a "financial dependant" and that Mr S did not meet that definition.

PO's conclusions

The PO looked at the Rules, which define a "financial dependant" as, "any person who in the opinion of the Trustees has been dependent on the Member for maintenance or support or financially interdependent with him ...". The PO noted that it is the Trustees' role to administer the Scheme in accordance with the Rules, which give the Trustees full discretion to determine if an individual meets the criteria for a dependant's pension to be paid. The information Mr S provided in relation to the meaning of financial interdependency under other scheme rules was not relevant in this case. Under the Rules, "financially interdependent" is not defined, so the usual dictionary definition would apply.

In response to Mr S's questions about the funding and insurance of Miss R's death benefits, the PO commented that trustees of both defined benefit and DC schemes have a duty to pay benefits in accordance with the rules of the scheme. When making this decision,

they should not be influenced by how such benefits are funded, and which benefits are or are not insured is irrelevant to their deliberations, as is the amount of any payment that may be available from the insurers.

In relation to Mr S's concerns that the Employer-nominated Trustees had a conflict of interest when making their decision not to award him a dependant's pension, the PO referred to the Rules, which provide that no decision by the Trustees would be invalidated where a Trustee had a conflict of interest and stated that it is inevitable that conflicts could arise and that he had seen no evidence that the Trustees considered benefitting the Employer when exercising their discretion.

The PO stressed that it was not his role to say whether he agreed or disagreed with the decision made by the Trustees in exercising their discretion not to pay Mr S the dependant's pension; it was his role to consider whether the procedure that the Trustees followed in coming to their decision was reasonable having properly considered the evidence. He concluded that, on the facts, the Trustees could have made a different decision but that he was satisfied that the one they made fell within the bounds of what was reasonable. The PO was satisfied that the Trustees took into consideration all relevant matters and no irrelevant ones, that they asked the correct questions, correctly followed the Rules and that the decision was not perverse. The PO did not uphold the complaint.

Overpayments

PO-28555 relates to overpayments. In the 1980s, Mr S was a member of the Thomas Tilling Pension Scheme (the **Scheme**), which then became part of the Invensys Scheme. In 1991, Mr S's benefits in the Scheme were transferred to a Section 32 buy-out arrangement with the Co-operative Insurance Society, which then became Royal London. In 2014, Mr S retired and was paid a lump sum of GBP42,632 and an annual pension of GBP6,394 by the Invensys Scheme. In 2018, the Invensys Scheme undertook a reconciliation exercise with HMRC to establish its contracted-out liabilities. HMRC confirmed that Mr S's benefits had been transferred to Royal London. Shortly after, the Invensys Scheme administrators, PSAL, wrote to Mr S informing him that he was being paid a duplicate pension. PSAL informed Mr S that he had been overpaid GBP67,462 and that there were three options for repayment: a lump sum; instalments over 54 months; or a charge on any property he owned for recoupment in the event of its sale.

Mr S complained under the Scheme's IDR. Responding to the repayment options, Mr S said that a lump sum was *"out of the question"*; instalments over 54 months would leave him with just GBP111 per month on which to live; and his family lived in his property, which would not be sold in the event of his death. Mr S said that he had spent his overpayment by giving his daughters GBP8,000 each, buying himself a new car and taking his family on holiday, as well as other general household maintenance costs. The Trustee

was prepared to accept that Mr S's expenditure on gifts to his family and a family holiday, amounting to GBP23,000, was irreversible and that he would not have incurred them had he not received the overpayment. However, the Trustee did not consider it clear that the other expenditure Mr S referred to would not have been made in any event. Mr S's complaint was partially upheld and the Trustee offered to reduce the overpayment it would seek to recover by GBP23,000 to GBP43,462. It also offered GBP1,000 in recognition of distress and inconvenience. Mr S then complained to TPO.

PO's conclusions

The Trustee had already accepted that Mr S had a change of position defence to the recovery of GBP23,000. The disagreement lay in whether, and to what extent, Mr S had a defence to the recovery of the remainder of the monies paid to him in error.

The starting point in any consideration of an overpayments complaint is that schemes can recover the overpayment, subject to a legal defence being established. When establishing the change of position defence, the Adjudicator noted the three limbs required: (i) the circumstances of the individual who received the overpayment have changed detrimentally; (ii) the change of circumstances has been caused by receipt of the monies paid in error; and (iii) the individual has not been disqualified from relying on the defence because they acted in bad faith when changing their position. In respect of limb (iii),

the Adjudicator simply noted that the Trustee had accepted that Mr S had received the monies paid to him in good faith. In considering limbs (i) and (ii), the Adjudicator noted that not all expenditure counts for the purposes of a change of position defence. There is no absolute requirement for the monies to have been spent on extraordinary items, such as a car or holiday. Rather, the requirement is for there to have been a causal link between receipt of the money and the expenditure. In *Philip Collins v David*, the Courts were prepared to allow a change of position defence where there had been a series of payments that had been used to fund a better lifestyle. However, the expenditure does have to be irreversible. The Trustee had accepted that Mr S had a change of position defence to the recovery of GBP23,000 comprising gifts to family and a family holiday. In relation to the further purchases, i.e. GBP22,000 on a car and several thousands on a boiler, furniture and a new door, the PO regarded that it was difficult to conclude that these purchases would not have been made had the overpayment not been made; the purchases were items that people tended to replace when they needed to do so. Therefore, a change of position defence was unlikely to succeed in respect of such items. The fact that Mr S had significant savings before receiving the overpayment also contributed to this conclusion. The PO agreed with the Adjudicator that other defences, i.e. estoppel and the existence of a contract, were not available to Mr S. The PO did not uphold the complaint.

Statistics

November 2021

Number of determinations		18
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		16
Scheme type	Public service scheme	12
	Private sector scheme	6
Outcome	Upheld	0
	Partly upheld	3
	Not upheld	15
Awards for distress and inconvenience*	Lowest award	GBP500
	Highest award	GBP1500

December 2021

Number of determinations		16
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		14
Scheme type	Public service scheme	9
	Private sector scheme	7
Outcome	Upheld	3
	Partly upheld	4
	Not upheld	9
Awards for distress and inconvenience*	Lowest award	GBP500
	Highest award	GBP2000

January 2022

Number of determinations		14
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		11
Scheme type	Public service scheme	2
	Private sector scheme	12
Outcome	Upheld	2
	Partly upheld	3
	Not upheld	9
Awards for distress and inconvenience*	Lowest award	GBP1000
	Highest award	GBP2000

February 2022

Number of determinations		8
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		7
Scheme type	Public service scheme	3
	Private sector scheme	5
Outcome	Upheld	0
	Partly upheld	3
	Not upheld	5
Awards for distress and inconvenience*	Lowest award	GBP500
	Highest award	GBP3000

* For these purposes, awards are considered by looking at what is payable by a single respondent to a single applicant. There may be some awards that are, in aggregate, higher than the awards listed here because more than one respondent is directed to make a payment to the applicant or one respondent is directed to make payments to more than one person in the same case.

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