JANUARY 2020

Pensions Ombudsman Round-Up
<table>
<thead>
<tr>
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<th>Section Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>03</td>
<td>Introduction</td>
</tr>
<tr>
<td>04</td>
<td>Spouses’ pensions</td>
</tr>
<tr>
<td>05</td>
<td>Provision of information in relation to a bulk transfer</td>
</tr>
<tr>
<td>06</td>
<td>Overpayments</td>
</tr>
<tr>
<td>07</td>
<td>Change of index</td>
</tr>
<tr>
<td>08</td>
<td>Statistics</td>
</tr>
<tr>
<td>09</td>
<td>Contact details</td>
</tr>
</tbody>
</table>
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:

- spouses’ pensions;
- provision of information in relation to a bulk transfer;
- overpayments; and
- change of index.

In the statistics section we provide a breakdown of the overall outcome of the determinations for August and September 2019 and 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.
Spouses’ pensions

Background
This complaint (PO-24316) concerns the cessation of a widow’s pension from a public service scheme (the Scheme) after the widow (the Applicant) began co-habiting with a new partner.

The Applicant relied upon a statement made in Booklet R, which was sent to the Applicant’s spouse, Mr N, when he applied for retirement in 2006. Booklet R stated that, following the death of a member, a “permanent pension” would be payable of an amount equal to half of the member’s pension.

The DPO noted that, where a complaint concerning the provision of incorrect information is brought to TPO, it will usually consider two legal concepts: negligent misstatement and estoppel. TPO will also consider whether there has been maladministration.

The starting point is that where incorrect information has been provided, a scheme generally is not bound to pay the benefits as incorrectly described as a member is only entitled to receive the benefits provided for under the scheme’s governing documents. Broadly, TPO will provide redress in connection with the provision of incorrect information if it can be shown that financial loss has flowed from the incorrect information.

In relation to estoppel, TPO will not allow either party to rely on a fact contrary to that which they have previously represented if it would not be fair to do so. In addition to, or instead of, financial compensation, TPO may award compensation for distress and inconvenience if what was done amounted to maladministration.

Negligent misstatement
Although the statement in Booklet R was: (i) clear and unequivocal; (ii) made by someone who owed a duty of care towards Mrs R; and (iii) inaccurate, the Adjudicator was of the opinion that it was not reasonable for the Applicant to rely on Booklet R. This is because she received annual newsletters informing her that she needed to contact NHS BSA if she cohabited with a new partner as this may affect her benefits and so she should have been aware that her widow's pension was not permanent. Therefore, the complaint of negligent misstatement failed.

Estoppel
The Adjudicator was of the view that Booklet R contained a clear representation but that it was not foreseeable that the Applicant would rely upon it. He noted the NHS Pension Scheme Regulations 1995, which governed Mr N’s benefits state that, should a widow co-habit with another partner, the widow’s pension would cease. He also noted the annual newsletters that the Applicant received. The Adjudicator also considered that NHS BSA going back on the representation made in Booklet R would not be unconscionable because the consequence of the estoppel would be to do something contrary to statute or public policy.

Maladministration
In the Adjudicator’s opinion, NHS BSA’s action did not amount to maladministration because Booklet R was not intended to be a full statement of the law that governs the Scheme.

The DPO’s conclusions
The DPO largely agreed with the Adjudicator and did not uphold the Applicant’s complaint. She found that the Applicant could have contacted NHS BSA to query how her widow’s pension would be affected if she cohabited with her partner and that, had she done so, she would have been able to mitigate her losses. The DPO also noted that the estate of a deceased person cannot suffer distress and inconvenience and that there was not any maladministration in the way that the Scheme communicated with the Applicant.
Provision of information in relation to a bulk transfer

The Applicant’s complaint in this case (PO-25827) is that his Employer failed to provide clear, full and timely information about his transfer options in relation to his accrued pension benefits around the time of a bulk transfer in 2016. As a result, he was denied the opportunity to make an informed decision about whether to take part in the transfer.

Background
The Applicant started working for the Inland Revenue in 1987 and was admitted to the relevant public service scheme (the Scheme). In 2004, the Applicant’s employment and accrued benefits were transferred to Capgemini and the Capgemini Scheme, respectively. In December 2015, the Applicant’s employment was transferred to his current public service Employer and he was readmitted to the Scheme. His benefits remained, for the time being, in the Capgemini Scheme whilst arrangements were made for the bulk transfer of benefits from the Capgemini Scheme to the Scheme. In March 2016, the Applicant received some generic information from the Scheme regarding the proposed bulk transfer but, in August, the Applicant turned 60 and he requested his benefits in the Capgemini Scheme be put into payment. In September, the Scheme wrote to the Applicant to inform him that arrangements had been made for the bulk transfer. However, after making enquiries, the Applicant was told he was not entitled to take part in the bulk transfer as he was already receiving benefits from the Capgemini Scheme.

In summary, the Applicant complained to TPO that the Employer had failed to take reasonable steps to make him aware of his actual/potential pension rights following the bulk transfer and that he had incurred a loss of about £9,900 in lump sum benefits and he could potentially incur a loss of about £37,000 in annual pension benefits.

The DPO’s conclusions
The DPO found that the Employer had not breached a legal duty or made an administrative error in failing to inform the Applicant that a bulk transfer would take place soon after he intended to retire.

The Applicant referred in his complaint to the judgment in Scally v Southern Health and Social Services Board, where the House of Lords found that, in a limited set of circumstances, a duty to inform employees about a contractual right could be implied into a contract of employment. As set out in the November 2019 Pensions Ombudsman Round-Up, the circumstances are that: (i) the terms of the contract have not been negotiated individually with the employee; (ii) a particular term of the contract makes a valuable right available contingent upon the individual taking some action; and (iii) the employee cannot reasonably be expected to know of the term unless it is drawn to his attention.

The DPO agreed with the Adjudicator that the requirements for a Scally duty to arise were not met. She was of the view that the Employer had not failed to tell the Applicant about a valuable right under his contract of employment. She considered that the option to participate in the bulk transfer was a valuable right (even though the benefits it offered were actuarially equivalent) but that the Applicant was, in fact, aware that he would be offered a bulk transfer option. He did not know the precise terms of it at the point he chose to retire from the Capgemini Scheme but he knew that the option would be there in the future and he had enough information to allow him to make further enquiries.

The DPO also considered that the Employer could not have been under a duty to tell the Applicant that he would be better off delaying his pension as that would have constituted advice, which goes beyond the scope of the Employer’s duty. Nor was the DPO satisfied that the Applicant could demonstrate any financial loss flowing from his decision to take benefits from the Capgemini Scheme rather than the Scheme. She noted the actuaries who worked on the bulk transfer were required to, and did, satisfy themselves that it took place on an actuarially equivalent basis. Finally, the DPO was not persuaded that the Applicant could show that he would have acted differently had he had full information about the bulk transfer option earlier.

For these reasons, the Applicant’s complaint was not upheld.
Overpayouts

Background
This complaint (PO-19417) relates to the overpayment of the Applicant’s annual pension and lump sum between September 2009 and 2013, totalling £83,185.48. The overpayment arose owing to the incorrect inclusion of previously transferred-out service. The Trustee first contacted the Applicant to arrange for repayment of the overpayment in March 2013. The Applicant claims that he changed his position based on the higher amounts and, therefore, should not be made to repay the overpayment. Following an IDRP complaint, which was not upheld by the Trustee, the Applicant complained to TPO. DLA Piper acted on behalf of the Trustee.

As part of the investigation process, the Trustee confirmed that it wished the Applicant to repay the overpayment by immediate lump sum, if he is able to do so. Should there be a successful limitation defence against the recovery via lump sum, the Trustee requested the overpayment be recouped from the Applicant’s pension in payment.

The Adjudicator first considered whether the Applicant had a successful defence against recovery by arguing that either (i) he changed his position based on the higher amount; or (ii) the Limitation Act 1980 (the Act) applied. The Adjudicator’s view was the Applicant did not have a successful change of position defence as he ought to have noticed he had significantly more service than he was entitled to. However, the Applicant did have a partially successful claim under the Act. This was on the basis that, with reasonable due diligence, the Trustee also should have noted the overpayment error prior to paying the Applicant his benefits. As per Section 5 of the Act, the Trustee was required to bring a restitutionary claim within six years from the date of the first overpayment. In court proceedings, the Limitation Act clock stops when the claim form is issued. In relation to a TPO complaint, the High Court has interpreted this as being the date when TPO receives the respondent’s response to the complaint. In this case, TPO received the Trustee’s response to the Applicant’s complaint on 6 December 2017. Therefore, it was the Adjudicator’s opinion that the Trustee could not recover the sums paid to the Applicant before 6 December 2011 and is only entitled to seek recovery of overpayments made after 6 December 2011. This means that the Trustee is only entitled to recover via repayment the sum of £16,840.48.

The Adjudicator then considered whether the Applicant had a successful defence against recovery by recoupment by arguing that: (i) the Act applied; or (ii) the doctrine of laches applied. The Adjudicator noted that recoupment is an equitable self-help remedy and is not subject to the Act, as determined by the courts and as reported in the May 2019 edition of Pensions Round-Up. Further, the Adjudicator was not of the view that the doctrine of laches applied as he considered that the Applicant was also responsible for delays in responding to the Trustee’s requests for information and repayment of the overpayment. Therefore, the Trustee could recoup the overpayment. In this case, the Adjudicator held that: it was not entitled to apply interest; it could only take sums from future payments; the sums could only be recovered over the same time period as the overpayment; and the payments must be fair, just and reasonable.

Following the Adjudicator’s opinion, the Trustee questioned whether it could recover £16,840.48 and recoup the remaining balance from the Applicant’s future pension payments. It was highlighted to the Trustee that, in doing so, the rate of recoupment would have to be affordable and the fact that the Applicant had already repaid a large sum would also need to be taken into consideration.

The DPO’s conclusions
The DPO agreed with the Adjudicator’s conclusions. That is, that the effect of the Act is to limit the amount the Trustee can claim by way of repayment but any recoupment from future payments is not subject to the six year limitation period under the Act. The DPO added that, should the Trustee seek to recover £16,840.48 by lump sum or instalment and recoup the remainder of the overpayment, it must take into consideration a rate of recoupment that is affordable, bearing in mind any repayments and the overall impact upon the Applicant’s finances. The DPO added that he would expect the parties to agree a reasonable and fair course of action.
Change of index

Background
This case (PO-21607) is similar to the complaint previously determined by TPO and reported in our September 2019 edition of PO Round-up (PO-23717). In these cases, the applicants complain that the Scheme’s Trustee changed the basis for annual increases from the Retail Prices Index (RPI) to the Consumer Prices Index (CPI).

The Scheme’s Rules provide that pensions in payment are increased by reference to the Retail Price Index, which as defined as: “Retail Price Index shall have the same meaning as the Index in Schedule 5 (Inland Revenue Limits).” The definition of Inland Revenue limits provides that “Index means the Index of Retail Prices published by the Central Statistical Office of the Chancellor of the Exchequer or any index which is accepted by the Commissioners of Inland Revenue for this purpose.”

The Applicant made a number of complaints including that: i) the Trustee was working “hand in glove” with the Employer to reduce the outgoings of the company to the detriment of the scheme beneficiaries; ii) the appointment of a corporate trustee and removal of the member-nominated trustees was not good practice; (iii) the Scheme was fully-funded and the Employer had just finished a PIE exercise when it confirmed that future increases would be at RPI; (iv) the Rules were never intended to be interpreted to allow CPI; (v) members should have been consulted about the change from RPI to CPI; (vi) the Scheme was fully-funded “in most respects” at the time of the change to CPI; (vii) he will suffer financial loss as a result of the change; and (vii) the decision in the recent BT Scheme judgment would prevent the trustee from changing the index to CPI.

The complaint was considered by an Adjudicator, who concluded that no further action was required by the Trustee. The Adjudicator noted TPO’s previous determination in PO-23717 that, whilst the applicant may have felt that his pension had been devalued, he was only entitled to the benefits provided under the Scheme Rules. The Rules allow pension increases to be measured by use of CPI and there is no guarantee of any particular index. The Adjudicator was of the view that the Applicant had not provided any persuasive arguments that would lead to a different conclusion in this case.

The Adjudicator then considered the additional complaints made by the Applicant in this case. He noted that the decision to move to a sole, corporate trustee was within the remit of the Employer and that the Trustee sought legal and actuarial advice when it considered the change from RPI to CPI. In addition, the Trustee considered the relevant legal principles when coming to its decision, that is: to exercise any power vested in it for the purpose for which it was given; give proper consideration to relevant factors and exclude irrelevant factors; ask itself the correct questions in law; direct itself properly in law; and not arrive at a perverse decision.

The Adjudicator also distinguished the decision in the BT judgment. In that case, the BT Scheme Rules allowed the use of an alternative index only if RPI were discontinued or became inappropriate; as RPI continued to be a recognised index, the trustees of the BT Scheme could not use an alternative index. Whereas, in this case, the Rules allow an alternative index to be used and do not require the discontinuation of RPI first. The Adjudicator concluded that it was not unreasonable for the Trustee to change from RPI to CPI in the expectation of improving the security of the Scheme.

The PO’s conclusions
The PO agreed with the Adjudicator and concluded that the Trustee had behaved in a professional manner. The PO noted that trustees must take into account an employer’s position and its ability to meet the costs of a scheme. This may require some compromise from time to time in relation to the pace of funding and also to consider diligently any proposals from an employer such as a change from RPI to CPI.
Statistics

August 2019

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* 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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