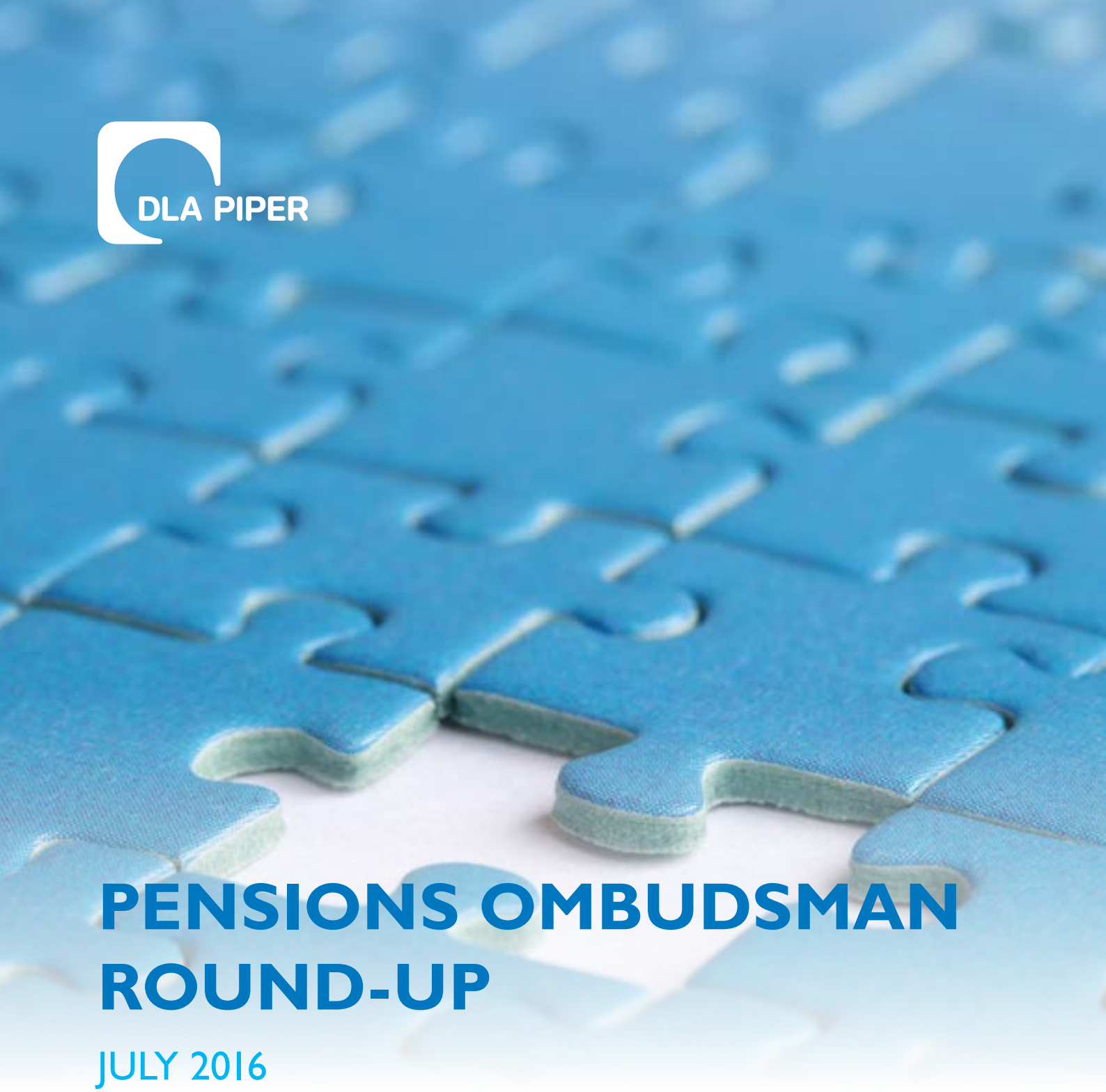

# PENSIONS OMBUDSMAN ROUND-UP

## JULY 2016

## IN THIS ISSUE

# INTRODUCTION

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

In this edition we look at determinations from May and June 2016. The determinations from May and June demonstrate a change in approach to published decisions which the Pensions Ombudsman Service (**"POS"**) explained in an update added to its website on 8 June. There are two areas of change.

- The POS has started publishing Opinions issued by its Adjudicators as well as formal Ombudsman determinations. Adjudicator's Opinions are published if they are appealed to the PO or DPO or are considered to be of interest. In the summaries in this newsletter, we therefore now note where cases were the subject of an Adjudicator's Opinion.
- All decisions are now generally anonymised, with the name of the applicant and any other identifying personal data removed unless it is essential for understanding the decision. However, the name of the scheme and the respondents are still given. The POS notes some examples of cases where it may decide not to anonymise the applicant's data, for example, where it is a particularly notable case with wider public interest implications or where the name of the person is relevant to the issue such as a claim to a pension entitlement where the policy cannot be found.

The issues considered by cases covered in this edition of Pensions Ombudsman Round-Up include the following.

- A refusal to pay a spouse's pension, including the employer's decision not to exercise its discretion to make a payment where the scheme's definition of spouse was not met.
- The payment of lump sum death benefits in a case which demonstrates the importance of decision-makers asking themselves the correct questions.
- A complaint by a member that a buy-in was completed without consultation and without his consent and that he was excluded from a subsequent pension increase exchange exercise.
- A case concerning delays in the consideration of an application for an ill-health pension.
- A case concerning the provision of incorrect information which shows that including appropriate warnings in benefit projections can result in a claim being unsuccessful.

Finally, in the statistics section we provide a breakdown of the overall outcome of the May and June determinations. Given the POS' new approach to publishing Adjudicator's Opinions, we now include additional statistics as to the number of each month's cases which are Ombudsman decisions made following an appeal from an Adjudicator's Opinion.

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 Cathryn Everest. Contact details can be found at the end of this newsletter.

# SPOUSE'S PENSION

## FACTS

In this case (PO-8302) the member retired and started to receive his scheme pension in 1997. At this time the member was co-habiting with the Applicant but they were not married. The Applicant and the member married on 13 December 2013. The member died on 6 June 2014. To qualify for a spouse's pension, the rules of the scheme required the marriage to have subsisted for at least six months before the member's death. This requirement was not met and therefore the scheme declined to pay a spouse's pension to the Applicant.

However, the trustees also contacted the Principal Employer to ask whether it would be willing to exercise its discretion under the scheme rules to fund a discretionary pension in this case. The Principal Employer decided that it did not want to create a precedent of funding discretionary pensions and that any additional payments it made to the scheme should be used to reduce the scheme's deficit.

## PO'S DECISION

An Adjudicator issued an Opinion stating that no further action was required by the trustees or the Principal Employer. The Adjudicator concluded that the trustees had correctly applied the rules and that the Principal Employer had exercised its discretion reasonably and explained the rationale behind its decision. The Applicant did not accept the Adjudicator's Opinion, and the case was therefore referred to the PO who agreed with the Adjudicator's Opinion and therefore did not uphold the complaint.

In his decision the PO noted that the Applicant has argued that she has been treated unfairly and that the fact that she and the member had co-habited for over 20 years should count for something. Whilst the PO expressed "*enormous sympathy*" for the Applicant's situation and the arguments she had made, he noted that his role does not extend to considering whether she has been treated fairly in the general sense, but only to whether there has been maladministration or a breach of law. Notably, the PO also stated that neither the trustees nor the Principal Employer are obliged to act in the Applicant's best interests but that "*they are quite entitled to prefer wider interests and/or take into account the interests of the other Scheme Members when reaching their decision*". The PO stated that he could only interfere if the decision made was perverse but concluded that "*is plainly not the case*" as the explanation provided by the Principal Employer is rational.

It is also worth noting that another case decided in May (PO-7345) concerning a refusal to pay a spouse's pension appears to relate to the same Applicant but a different scheme. In order to qualify for a spouse's pension in that case the scheme's rules required the person to have been the member's spouse or civil partner at the earlier of the member's normal pension date and the date the member ceased to be an employee of a scheme employer. That requirement was not met and there was no discretion for the trustees to override it. Whilst again expressing sympathy for the Applicant's position, the PO did not uphold the complaint because the trustees had applied the rules correctly and had no discretion in this matter.

These types of exclusion in relation to spouses' pensions may be found in other schemes' rules and it is therefore useful to see the approach taken by the PO, in particular to the case where the Principal Employer had discretion to pay a pension. In cases where scheme rules include a similar discretion, care should be taken to ensure that it is exercised in a way that is not perverse and that a rational explanation is given of any decision made.

# PAYMENT OF LUMP SUM DEATH BENEFITS

## FACTS

This case (PO-7864) concerns the distribution of discretionary death benefits. Whilst the scheme involved is a Self-Invested Personal Pension (SIPP), the PO's analysis of the way that the discretion was exercised is equally applicable to occupational pension schemes.

The Applicant and the member had been partners for four years prior to the member's death in July 2012. The member set up the SIPP in 2009 and, in an undated nomination form received by the scheme in 2009, nominated himself as the sole beneficiary of the death benefits. Under the rules a lump sum death benefit could be paid to "*Eligible Recipients*" who were defined to include the member's Spouse, Dependants, persons interested in his estate and persons nominated by the member in writing. The Scheme Administrator was satisfied that the Applicant met the definition of a Dependant (which was the same as that in the Finance Act 2004) and was therefore an Eligible Recipient. Other Eligible Recipients were the member's children and grandchild and, in light of his nomination for himself, his estate.

When making its decision, the Scheme Administrator noted that it was not clear that the member had made a final decision as to whether to make a nomination in favour of the Applicant. It also stated that the extent of the contribution that the member made to their shared living expenses was not such that the Applicant would, in its opinion, suffer from a material fall in living standards. The Scheme Administrator did not therefore consider that there was sufficient reason for overriding the nomination made by the member and concluded that the death benefits should be paid to the member's estate. In communicating the decision to the Applicant, the principal reason given was that there was insufficient evidence as at the date of death to establish that the member had decided to make a nomination in the Applicant's favour.

## PO'S CONCLUSIONS

The PO stated that the questions the Scheme Administrator needed to ask itself were: who were Eligible Recipients for the lump sum death benefit and how should the benefit be distributed amongst them? However, the PO concluded that the way that the matter was considered indicates that, in effect, the questions actually asked were: what were the member's wishes and could these be complied with? The PO stated that these were not the correct questions, that the member's wishes were only one factor to be considered and that the Scheme Administrator was not and should not have allowed itself to be bound by the member's wishes. It was therefore concluded that there was maladministration in that the decision of whether or not to exercise discretion in the Applicant's favour was flawed, and the complaint was upheld.

The PO noted that there are some difficulties with this case because the only asset of the scheme was the lump sum death benefit which has been paid to the member's estate and may or may not be recoverable. The PO also noted that the Scheme Administrator is a limited company and if it is potentially liable for the sum already paid and it is irrecoverable then it could seek to rely on the scheme's exoneration clause. The PO remitted the matter for reconsideration but stated that if the new decision is in the Applicant's favour but she receives a smaller proportion because the assets are limited, she may revert to the PO's office for a further determination.

The Scheme Administrator was also directed to pay the Applicant £1,000 as redress for the distress and inconvenience she has suffered arising out of the way in which her claim was dealt with.

This determination provides a reminder for trustees not to place too much weight on a nomination form when exercising discretion as to how to distribute death benefits. It also demonstrates the difficulties that can arise in providing remedies in such cases and it will be interesting to see how the PO will deal with this case should the Applicant have to refer the matter back to the POS.

# LIABILITY MANAGEMENT

## FACTS

A case decided by the DPO in May (PO-10167) concerns the decision to complete a buy-in and the decision about which members to include in a pension increase exchange (**"PIE"**) exercise. The Applicant is a pensioner member of the scheme who retired in 2001. In 2013 the trustee completed a buy-in of the pensioner liabilities with an insurance company. A full buy-out of the scheme was completed at the end of 2015 and, prior to this, a PIE was conducted. The Applicant was excluded from the PIE.

The Applicant complains that the buy-in was carried out without consultation and without his consent and he believes he was excluded from the PIE because the financing and control of the pension fund had transferred to an insurance company which made the decision to exclude him.

## DPO'S CONCLUSIONS

This case was the subject of an Adjudicator's Opinion which concluded that no further action was required by the trustee or the scheme employer. The Applicant did not accept the Adjudicator's Opinion and therefore the case was passed to the DPO. The DPO agreed with the Opinion and did not uphold the complaint.

In relation to the buy-in, the Adjudicator concluded that the trustee does not have to consult with members over the choice of investments and has discretion to choose the investment strategy that it believes is appropriate for the membership. The Adjudicator did not consider that the trustee had acted incorrectly or that the decision to complete the buy-in was perverse, noting that the trustee had taken appropriate advice on choosing an insurance company and that it could be argued that the buy-in meant that members' benefits were more secure.

The conclusions in relation to the PIE include the following.

- The Adjudicator noted that this decision was taken by the employer and that it was within its discretion to decide which members would be offered the PIE. The Adjudicator stated that it is not the role of the POS to determine whether a member should be included in such an exercise or not.
- The Applicant argued that the trustee could have refused to execute the deed which made the PIE possible and that it was wrong of it not to do so. However, the DPO was satisfied that in executing the deed the trustee: (i) made it possible for any of the members chosen by the employer to have a PIE; and (ii) did nothing to rule the Applicant out of the PIE exercise.
- Whilst the DPO acknowledged that the insurance companies' pricing of individual risks with and without the PIE would be relevant to who was selected, she did not agree with the Applicant that the insurers had control over powers that rightly belonged to the trustee. She noted that the obligations to pay the benefits had not transferred to the insurer as a result of the buy-in. Whilst the employer had taken advice from the insurance companies involved in the buy-ins because they had information on the pensioners, the employer stated that it was its ultimate decision which pensioners to exclude. The employer stated that the PIE offer was made to those members where it was anticipated the largest savings could be made in order to reduce the anticipated total cost of the buy-out. The DPO saw no reason to doubt the employer's assertion that it made the decision in light of its own commercial interests in securing the cheapest total scheme buy-out.

The reasoning in this determination is brief but the decision is useful to note for trustees when dealing with complaints concerning buy-ins and when making decisions about executing deeds that will permit a PIE to take place, and for employers who are conducting PIE exercises.

# ILL-HEALTH PENSION

## FACTS

A case decided in June (PO-6365) demonstrates the importance of not unnecessarily delaying decisions on applications for ill-health pensions. The scheme in this case is an industry wide scheme and control over the relevant section is exercised by a Pensions Committee. The relevant definition of Incapacity is "*bodily or mental incapacity or physical infirmity which, in the opinion of the Trustee on such evidence as it may require, shall prevent, otherwise than temporarily, the Member carrying out his duties, or any other duties which in the opinion of the Trustee are suitable for him*". In November 2011 the Applicant sustained an injury when he was knocked down by a car and he remained absent from work until his employment was terminated in April 2013 on grounds of capability.

An application for incapacity benefits made in June 2013 was refused on the basis that whilst the Committee was satisfied that the Applicant was unlikely ever to be able to return to his old job, it thought that he would be suitable for other duties now and in the future. The Applicant appealed through the Internal Dispute Resolution Procedure (IDRP) and at stage one it was decided that the Committee should review its decision under stage two of the IDRP. In June 2014 the Committee decided to defer its decision until 12 months from the date of the Applicant's last medical assessment, noting that the Applicant had not tried all reasonable treatment options.

In July 2015 the Committee considered the case again. The Committee noted that there was still uncertainty as to whether the Applicant would be able to perform any other duties in the future and that there were still treatment options open to the Applicant. The Committee agreed that there was no evidence to show the incapacity was permanent. However, it decided to uphold the dispute and pay the benefits from the date of leaving service in April 2013 but that the application should be subject to review in two years' time. The Applicant complains that the Committee did not make its award in a timely manner and claims that he should be paid compensation for distress and inconvenience.

## DPO'S CONCLUSIONS

The DPO agreed with the Adjudicator's Opinion that the Committee's 2015 decision could equally have been made in 2014 as the main reason given for the 2015 decision was the same as that given in 2014 when the decision was deferred. The complaint was therefore upheld. The Adjudicator's findings also included that in 2014 and 2015 the Committee did not ask whether the further treatment options were likely to enable the Applicant to return to suitable work and in 2014 did not mention what other duties it thought the Applicant could undertake.

Whilst the benefits had already been backdated to April 2013 by the Committee, because there had been a delay of more than 12 months, the DPO directed that simple interest should be paid on the benefits that would have been payable in June 2014 and that £750 should be paid as compensation for distress and inconvenience.

The Applicant had also claimed that he should be reimbursed for his legal and medical fees but this was rejected because he had chosen to instruct solicitors when he could have engaged the free services of the Pensions Advisory Service and he had commissioned the medical reports.

This case shows that it is important not to unnecessarily delay making a decision on ill health benefits as this could ultimately result in interest being payable on any backdated pension.

This outcome also seems consistent with a previous DPO determination reported in the January 2016 edition of Pensions Ombudsman Round-Up. In that case the DPO concluded that where the medical advisers had to decide whether the Applicant's condition was likely to be permanent, a conclusion that it was premature to decide this amounted to simply deferring the decision, and the DPO set out the questions which the medical advisers should have considered when assessing permanency which included the likelihood of the success of the treatment the Applicant was receiving.

# PROVISION OF INCORRECT INFORMATION

## FACTS

A case decided in June (PO-9713) shows how including appropriate warnings in benefit projections can result in the failure of a complaint about the provision of incorrect information.

The Applicant became a deferred member of the scheme in 1999 when he left the employment of the scheme employer. In March 2014 the Applicant used the scheme's online portal to obtain a projection of what his benefits would be if he took them at age 60 (normal retirement age for the scheme was 65). In light of the figures obtained through the online portal, the Applicant informed his current employer of his intention to retire from its employment at age 60. He also requested a formal benefits illustration from the scheme.

The Applicant left his current employment in May 2014. However, in June 2014 he received his formal benefits illustration which showed the correct figures for retirement at age 60 which were lower than those provided via the online portal. The error with the figures on the online portal had arisen because they had not properly taken into account a period of transferred-in service. The Applicant states that he is suffering a shortfall in pension of £1,375 per annum compared to the quote received through the online portal. He states that this would cost him in the region of £27,500 over the course of his lifetime. The Applicant argues that as the scheme encouraged members to use the online portal, it should honour the higher pension figures it provided to him.

The Trustees rejected the Applicant's complaint noting that warnings were clearly displayed on the online portal which advised members that they should not rely on any information provided in the quotations and stated that members should obtain a formal benefits illustration before making any decisions. The Trustees did not believe that it was reasonable for the Applicant to have reached his decision to take early retirement before obtaining a formal quotation of his benefits. However, the Trustees offered the Applicant £500 compensation for the error in the online projection and the delay in providing the formal benefits illustration.

## DPO'S CONCLUSIONS

The DPO agreed with an Adjudicator's Opinion in this case that the complaint should not be upheld. Whilst the DPO thought that the provision of the incorrect online projection amounted to maladministration, she concluded that this produced a loss of expectation rather than a direct financial loss.

The DPO stated that, given the very clear warnings and disclaimers attached to the figures contained within the online projection, she did not consider that it was reasonable for the Applicant to reach his decision to retire solely based on these figures and before obtaining a formal quotation of expected benefits. The DPO disagreed with the Applicant's characterisation of the warnings as "small print" but rather she referred to them as "*a very sensible inclusion to advise users that the amount payable at retirement may differ from the on-line projection*".

The DPO was satisfied that the Trustees' offer to pay £500 compensation was an appropriate amount for the circumstances of the case and that it was in line with awards in similar cases.

Schemes may increasingly want to offer members online access to information about their pension benefits but this case demonstrates that complaints can arise if that online information may not be as accurate as a formal benefits illustration. However, the case also demonstrates that carefully worded and clear warnings about the status of the online projections, including that they should not be relied on, can prevent such claims from being successful.

# STATISTICS

## MAY

| | | |
|---|---|---|
| **NUMBER OF DETERMINATIONS** | | 14 |
| Number of these determinations which are Ombudsman decisions following an appeal from an Adjudicator's opinion | | 10 |
| **SCHEME TYPE** | Public service scheme | 4 |
| | Private sector scheme | 10 |
| **OUTCOME** | Upheld | 2 |
| | Partly upheld | 1 |
| | **Not** upheld | 11 |
| **AWARDS FOR DISTRESS AND INCONVENIENCE*** | Lowest award | £500 |
| | Highest award | £1,000 |

## JUNE

| | | |
|---|---|---|
| **NUMBER OF DETERMINATIONS** | | 31 |
| Number of these determinations which are Ombudsman decisions following an appeal from an Adjudicator's opinion | | 30 |
| **SCHEME TYPE** | Public service scheme | 15 |
| | Private sector scheme | 16 |
| **OUTCOME** | Upheld | 8 |
| | Partly upheld | 5 |
| | **Not** upheld | 18 |
| **AWARDS FOR DISTRESS AND INCONVENIENCE*** | Lowest award | £450** |
| | Highest award | £1,000 |

* 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 in the same case.

** In this case the Respondent had already paid £50 compensation to the Applicant and therefore the total payment was £500.

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