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 **("PO")** and Deputy Pensions Ombudsman **("DPO").**

In this edition we look at determinations from November and December 2015.

The first case concerns *errors in calculating benefits, overpayments* and *late payment* and demonstrates how a lack of evidence to substantiate claims of reliance and investment loss can lead to complaints being rejected.

The next two cases concern the duty on employers to provide information but each considers a different aspect of this issue. One case concerns the extent to which the employer has *a duty of care to provide information about the tax implications of re-employment* when the member has a protected pension age. The other case concerns the *duty to draw certain contractual rights to an employee's attention.* It also looks at the question of *time limits for bringing complaints* and therefore provides a useful reminder that when trustees are considering the approach that the Ombudsman may take to a complaint, the first hurdle is whether the Ombudsman has jurisdiction to hear the complaint.

The fourth case concerns *ill health retirement* and demonstrates the correct approach to take when assessing whether the member's incapacity is permanent.

As well as being the PO, Anthony Arter is also the Pension Protection Fund Ombudsman. The fifth case considered in this newsletter is a determination which he issued in this capacity in November. The case relates to an appeal by a scheme trustee against the PPF's decision to only partly waive *interest on the late payment of the PPF levy.*

Finally, in the statistics section we provide a breakdown of the overall outcome of the November and December determinations.

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.

BENEFIT MISTAKES

FACTS

The complaint in this case (PO-372 & PO-4244) relates to two mistakes with the payment of the Applicant's benefits. The respondents are the trustees of the scheme and the administrators.

Errors made in calculating the Applicant's pension increases resulted in an overpayment. When the error was discovered the pension was reduced to the correct amount going forward and the trustees sought recovery of £1,416 of the £1,694 overpayment. The Applicant argues that the failure to provide him with details of calculations or obtain his consent before reducing the pension was unlawful and that the overpayment cannot be recovered because he has already spent the money.

The Applicant had three AVC policies but when he retired in 2009 only two of these were paid. In March 2013 the third AVC fund was paid to the Applicant as a lump sum. The Applicant rejected an offer of compensation for the late payment based on interest at the Bank of England base rate of 0.5%. He argued that he would have invested the funds in the UK equity income sector and compensation should be at a rate of 12.3%. The supporting evidence submitted included generic financial advice and newspaper articles advising investment in this sector and a breakdown of his investment portfolio showing this sector to be the largest component. The respondents did not consider this to be sufficient evidence. However, they were prepared to offer 4% interest, but this was rejected by the Applicant.

PO'S CONCLUSIONS

Whilst the PO concluded that the overpayment of pension and the late payment of the AVC fund constituted maladministration, the complaint was not upheld.

The PO concluded that the respondents had provided reasonable evidence that the Applicant was not entitled to the higher amount of pension. He noted that they explained why his pension had to be reduced before the lower figure became effective. The PO thought that it was reasonable that the respondents asked the Applicant to prove that he had spent the overpayment on something which he would not otherwise have done and that it could not be recovered. The PO stated that he would expect the respondents to *"be pragmatic and not apply a very strict standard of proof... when doing so"*. However, the Applicant had not provided any evidence to substantiate his statement that he had changed his position in reliance on the overpayment.

In the PO's view, the additional evidence that the Applicant was asked to provide in relation to the AVC issue was not unreasonable, and the best indicator of how he would have invested the third AVC fund is how he invested the other two AVC funds. The Applicant initially asserted that he invested the other AVC proceeds in stock market investments but later said he used them towards purchasing a property. The PO concluded that the evidence provided so far was inadequate to substantiate the claim that the funds would have been invested in the UK equity income sector and that the respondents had offered adequate compensation for the late payment.

The Applicant also argued that the administrators improperly offered him misleading financial advice because they told him that the AVC fund could be used to purchase an annuity or take a tax free lump sum with an annuity, but did not state that the full amount could be taken as a tax free cash lump sum. Whilst the PO concluded that the failure to provide full information about the options constituted maladministration, he did not think that this could be regarded as improper financial advice.

The PO was satisfied that an offer of £1,000 compensation for distress and inconvenience was in the broad range he would expect to see and, given the nature of this type of compensation, did not agree with the Applicant that it should be based on an hourly rate for his time spent dealing with the issue.

This case demonstrates that when considering the merits of member complaints relating to incorrect information or investment loss, an assessment of whether there is sufficient evidence is crucial.

EMPLOYER'S DUTY TO PROVIDE INFORMATION

FACTS

Three determinations were issued in December (PO-7096, PO-7097 and PO-7098) all of which relate to the Police Pension Scheme. The Applicants all had protected pension ages which meant that they could draw their benefits under age 55 without this resulting in unauthorised payments. However, under the Finance Act, this protected pension age would be lost in certain circumstances including re-employment by the previous employer unless there has been (i) a break of at least six months or (ii) a break of at least one month and the new employment is materially different.

In all of these December cases the members were re-employed by their previous employer within around two weeks of taking their retirement benefits and, as a result, have lost their protected pension age and face tax penalties. The Applicants' complaints relate to the failure of their employer to inform them of the tax consequences of their re-employment. Whilst the employer's position is that it did not have a legal liability to advise employees on their tax and pension liabilities, it has recognised that the Applicants commenced their re-employment in order to accommodate its needs. The employer has therefore agreed in principle to indemnify the Applicants against the tax liabilities.

PO'S CONCLUSIONS

The PO agreed that the employer was under no legal obligation to advise employees on their tax liabilities. However, he thought that the issue here was the provision of relevant information, not advice. The PO concluded that it was reasonable to expect the employer to have provided the salient information to the Applicants about the implications of re-employment as contained in a Home Office circular. He also stated that, as a responsible employer, the employer *"had a duty of care"* to inform the Applicants of the tax implications of re-employment on their retirement benefits and, as a consequence of the failure to do so, the employer should reasonably meet the tax liabilities.

The PO did not think that the employer's agreement *"in principle"* to indemnify the Applicants went far enough as it is not a binding commitment. The PO therefore directed the employer to pay the Applicants the amount due to HMRC in relation to the loss of protected pension age. However, in recognition of the fact that the Applicants have to complete a self-assessment process in relation to the tax charges, the PO also directed that any penalties and interest imposed by HMRC for delays, not being a direct consequence of the loss of protected pension age, will not be payable by the employer.

The finding that the employer had a "*duty of care*" to provide information in this case is potentially concerning for employers. However, this concern could arguably be eased by the fact that the PO's conclusions state that the duty was "*to inform [the Applicants] of the tax implications of re-employment on [their] retirement benefits*". The conclusions do not state that there is a general duty on employers to provide information to employees about tax liabilities relating to pensions.

In an August 2014 determination the (then) DPO held that an employer did not have an obligation to inform the Applicant of the financial benefits of taking his benefits before a change in the law concerning the annual allowance in April 2011. It may be that the seemingly different conclusion in the December cases arises from: (i) the fact that the action giving rise to the tax charge could be regarded as employer-related (that is, re-employment to accommodate its needs) rather than being a decision by the member to draw their benefits; (ii) the fact that a process is now in place to ensure individuals are not re-employed until at least a month has elapsed and the employer acknowledged this to be a step a responsible employer who has had the tax issues brought to its attention would take; and (iii) the employer's agreement in principle to meet the tax charges.

However, it remains to be seen whether the PO will apply the approach taken in the December cases to future cases concerning the provision by employers of other information concerning tax implications and therefore it is worth employers being aware of this possibility, and in any event, bearing in mind the conclusions about the duty of care when dealing with cases of protected pension ages and re-employment.

EMPLOYER'S DUTY TO PROVIDE INFORMATION

FACTS

A case determined in late November (PO-7511) considered a different aspect of the question of the employer's duty to provide information. In 2012 the Applicant complained to the PO that her employer did not inform her of the option to transfer her service in the Teachers' Pension Scheme to the Northern Ireland Local Government Officers' Superannuation Scheme when she commenced employment in 1992 and specifically did not inform her that there was a 12 month time limit in which to apply for a "club transfer", that is, a transfer between certain public service schemes which would have resulted in a higher amount of pensionable service being credited. She also complained that the employer acted incorrectly in completing an application form for membership without her consent.

This case was previously considered in 2014 when the then DPO upheld the complaint and directed the employer to meet the cost of the additional pension as if the transfer had been made within the 12 month limit. The Northern Ireland Court of Appeal allowed the employer's appeal against that decision and remitted the case for reconsideration. The Court of Appeal indicated that a 1991 House of Lords case *(Scally)* had *"a clear resonance"* in this case and that when the matter is reheard *"the implications of that decision must be teased out"*. In *Scally* it was found that there is an implied obligation on an employer to take reasonable steps to inform employees about a contractual right if: (i) the terms of the contract have not been negotiated with the individual 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 their attention.

PO'S CONCLUSIONS

The first point the PO considered was whether an application form and employee guide were sent to the Applicant in 1992. This case is notable because the PO held an oral hearing which is very rare. The PO found the evidence of a former employee in the employer's HR department the most persuasive on this point and concluded that, on the balance of probabilities, the documents were sent. However, these documents do not mention club transfers or the 12 month period and therefore the PO concluded that they did not sufficiently publicise the relevant right to the Applicant.

In 2005 the Applicant contacted the scheme to investigate the transfer of her benefits and as a result of this came to be in possession of knowledge of the transfer right and the time limit, that the employer had partially completed an application form on her behalf, and that she should have been given a copy of the form which contained a section for her to list her preserved benefits in other schemes. The Superannuation Committee had discretion to allow a late transfer but in 2005 the Applicant also became aware that the employer was not willing to cover the costs of her transferring in late.

The PO concluded that in 2005 the Applicant was therefore able to bring a complaint in full knowledge of the injustice now claimed and any breach of the *Scally* duty to provide information had been corrected at this point. The PO rejected the Applicant's argument that this was not the case until 2009 when she obtained a copy of the partially completed application form because in 2005 the Applicant had a letter confirming that the employer had done this.

The three year time limit for bringing a complaint to the Ombudsman Service therefore expired in 2008 and the PO did not consider it appropriate to exercise his discretion to extend the time limit to 2012. He also noted that, even if he did consider it appropriate, he cannot provide a remedy which would be defeated by a limitation defence in court and a court claim for breach of contract would have expired at the latest in 2011. The PO therefore decided that the complaint cannot proceed.

This case is notable in demonstrating the PO's view as to what amounted to the employer having taken reasonable steps to inform the Applicant of the right for the purposes of the *Scally* duty and in providing a reminder that claims may fail if they are brought outside of the statutory time limits.

ILL-HEALTH RETIREMENT

FACTS

A case from November (PO-4674) demonstrates a mistake that can arise in the approach taken to ill health cases when assessing whether the member's condition meets the requirement of permanency.

The rules of the public service pension scheme in this case defined "retirement on medical grounds" as retirement with a medical certificate issued by the Scheme Medical Adviser which states that the person concerned is prevented by ill-health from discharging their duties and that the ill health is likely to be permanent. Under the rules, permanent meant until the member reaches pension age.

In January 2011 the Applicant applied for ill-health retirement on the grounds that she was suffering from Chronic Fatigue Syndrome. On 1 June 2011 the Scheme Medical Adviser issued a report in which he stated that, having reviewed the evidence and considering that the Applicant had 10 years of pensionable service ahead of her, *"it would be premature to conclude that the issue of permanent incapacity had been established at this stage"*.

The Applicant appealed this decision and provided new medical evidence but the Scheme Medical Adviser remained of the view that it would be premature to conclude that permanency had been established. A similar conclusion was reached at the second stage of the medical appeal process. The Applicant's complaint under the internal dispute resolution process was also unsuccessful.

DPO'S CONCLUSIONS

The DPO noted that the matter for her to consider is whether the decision to refuse ill health retirement had been reached in a proper manner. She stated that the question that all of the doctors were required to answer was whether, on the balance of probabilities, the Applicant's condition was likely to be permanent. The DPO's view was that by concluding that it was premature to decide that the incapacity was permanent, the doctors were simply deferring the decision.

The DPO went on to state that:

- the doctors should have considered whether the Applicant's condition was likely to improve as a result of the treatment she was receiving (bearing in mind that this would be completed by November 2011) and when, as a result, she was likely to be able to resume doing her job;
- proper regard should also have been given to the speed with which any improvement might be expected; and
- given that the Applicant was within 10 years of her pension age when her application was first considered, the improvement would have to be in that timescale.

The DPO could see no evidence that these considerations played a part in the initial decision-making process or on subsequent appeals and therefore concluded that the decisions were flawed.

The complaint was therefore upheld and the decision was remitted for further consideration. The DPO directed that the opinion of the Scheme Medical Advisers for the purposes of the reconsideration should be from a doctor not previously involved with the case. The Applicant was also awarded £500 in respect of distress and inconvenience arising from the flaws in the decision making process, including the length of time taken to address stage two of the IDRP.

This case demonstrates the importance of ensuring that, when deciding ill health cases, any requirement for permanency is properly considered rather than essentially being deferred. The DPO's comments about what should have been considered when assessing permanency are useful for trustees to note when considering similar applications and when reviewing medical advice provided to them.

PPF OMBUDSMAN (PPFO) – LATE PAYMENT OF LEVY

If the PPF levy is not paid within 28 days, legislation states that interest will be charged unless it is waived in whole or in part. The PPF has discretion to waive interest in certain circumstances including where it is satisfied that it is reasonable not to charge interest. For the purposes of considering the question of reasonableness, the PPF must have regard to such matters as it considers relevant and the legislation sets out a number of matters for the PPF to consider where relevant.

FACTS

The trustee submitted a Type A contingent asset for the 2011/12 levy year but the PPF decided that this would not be recognised. On 27 September 2011 the PPF issued an invoice of around £1.6m for the 2011/12 levy year. The trustee paid around £150,000 which included the amount of the scheme-based levy. However, on 18 October 2011 it applied for a review of the risk-based levy calculation.

Legislation requires a review decision to be issued within 28 days but if the PPF cannot do so, it can send an interim reply. In this case the review decision was not issued within 28 days but the PPF said that it would be issued by 17 January 2012. In fact it was not issued until 10 April 2012 when the calculation of the levy was upheld. The trustee made further appeals resulting in a PPF reconsideration decision on 15 June 2012 and a Deputy PPFO decision on 5 July 2013. The review decision was upheld. The trustee's appeal to the High Court was dismissed on 16 January 2014.

The trustee paid the remaining balance of the levy on 5 February 2014. Interest was payable on this late payment at a rate of 5.5%. The PPF decided to waive interest for the period between when it said it would issue a review decision and when it actually did so (17 January 2012 to 10 April 2012). Given that the High Court judge had been critical of the DPPFO's decision, the PPF concluded that it had been reasonable for the trustee to bring the appeal and also waived interest for the period between the date of the DPPFO's decision and the High Court judgment (5 June 2013 to 16 January 2014). In total the PPF had waived 40% of the interest and the amount waived was around £74,000. The trustee argued that interest should also be waived to reflect the full period of delay after the 28 days in which the PPF should have issued its review decision and the delay in the DPPFO's determination.

PPFO'S CONCLUSIONS

The PPFO was satisfied that the PPF had considered waiving interest in accordance with the legislation. For example, in relation to the matters for consideration set out in the legislation, the PPF had regard to: (i) the fact that in paying £150,000 the trustee had paid the scheme-based part of the levy on time and an "on account" payment for the risk-based levy; and (ii) whether it had been reasonable to appeal the DPPFO's decision.

The PPFO noted that the PPF took its delay in issuing a review decision into account and he concluded that the decision to only waive interest for the period from January 2012 to April 2012 rather than the whole period of delay after 28 days could not be regarded as perverse. The PPFO did not agree with the trustee's suggestion that this approach incentivises the PPF to delay issuing review decisions because evidence indicates that the PPF could earn a higher rate of interest from obtaining payment and investing the funds. He also did not agree that charging interest during an appeal penalises the scheme because the scheme has use of the funds and is free to invest them. Neither did the PPFO think that it was perverse for the PPF to decide not to waive interest for the period of the DPPFO's investigation on the basis that the two bodies are independent of each other and the trustee was aware that the investigation could take some time. The PPFO also noted that the PPF made it clear by way of an FAQ when interest would accrue and therefore the trustee should have been alert to the possibility of interest being charged and was in a position to take steps to mitigate the risk.

This case is notable because it is interesting to see the approach of the PPF and PPFO to waiving interest, and is also a useful reminder of the potential consequences of failing to pay the levy on time.

STATISTICS

NOVEMBER

NUMBER OF DETERMINATIONS		4*
SCHEME TYPE	Public service scheme	3
	Private sector scheme	1
OUTCOME	Upheld	1
	Partly upheld	0
	Not upheld	3
AWARDS FOR DISTRESS AND INCONVENIENCE**	Lowest award	£500
	Highest award	£500

DECEMBER

NUMBER OF DETERMINATIONS		6
SCHEME TYPE	Public service scheme	4
	Private sector scheme	2
OUTCOME	Upheld	4
	Partly upheld	0
	Not upheld	2
AWARDS FOR DISTRESS AND INCONVENIENCE**	Lowest award	£700
	Highest award	£700

* There was also one determination by the PPF Ombudsman, as reported on page 7 of this newsletter.

** For these purposes, awards are considered by looking at what is payable by a single respondent to a single applicant. There was only one case in each of November and December in which an award was made for distress and inconvenience, and therefore the same amount is recorded as the lowest and the highest award for each month.

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