



PENSIONS OMBUDSMAN ROUND-UP

NOVEMBER 2016

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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 September and October 2016 which cover the following issues.

- Complaints about the provision of incorrect information where members' claims that they had relied on incorrect information by paying off debts were rejected, as well as cases where it was concluded that it was not reasonable to rely on the incorrect information.
- A complaint from an active member concerning a fall in her transfer value in which the member claimed that she had been treated unfairly compared to a deferred member who would receive a three month guarantee on the transfer quote.
- Cases where it was decided that either no compensation needed to be paid for non-financial injustice or that a payment of £100 was sufficient.
- Appeals from decisions where the PO has participated in the appeal proceedings, including a case on overpayments and limitation periods, and a case on the issue of contractual commitments by public authorities.

In the statistics section we provide a breakdown of the overall outcome of the September and October 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.

PROVISION OF INCORRECT INFORMATION

FACTS

The Applicant in this case (PO-9965) retired on 1 October 2014. He had been a member of a public service pension scheme. His complaint is that, over the seven months prior to his retirement, he received benefit estimates which were overstated because a period of temporary promotion prior to his retirement was incorrectly counted in the final salary calculations, and he relied on this information when deciding to retire. The Applicant was informed of the errors on 10 October 2014 – his lump sum had been overpaid by £83,000 and his pension had to be reduced by £13,000 per annum. The lump sum was paid on 1 October and the Applicant states that by the time he was informed of the error he had already used it to pay off loans, mortgages, other debts and had bought a car. He also states that his life style plans have had to change as they were based on the incorrect pension figures. The Applicant now has a new job in the private sector and has access to new pension provision.

PO'S DECISION

An Adjudicator at The Pensions Ombudsman's ("TPO") office issued an Opinion in this case rejecting the Applicant's complaint. The case was subsequently referred to the PO who agreed with the Adjudicator's Opinion. The Adjudicator concluded that it was more likely than not that the Applicant would have retired on 1 October 2014 even if he had received the correct information from the outset. The Applicant's submissions included that, based on the incorrect estimates, he retired as planned and the Adjudicator thought this suggested that he was already intending to retire. The Adjudicator and the PO did not think that the Applicant was financially disadvantaged as claimed – the temporary post was going to end as a result of organisational changes meaning the Applicant's earning capacity would have reduced in any event, and the Applicant has income from his new employment.

In relation to the items on which the Applicant spent the lump sum, the Adjudicator stated that the loans, mortgages and other debts were long standing ongoing financial commitments entered into before the provision of incorrect information, and such items would have to

be paid off in any event, and therefore there is no justifiable claim for detrimental reliance in relation to these actions. The PO added that the Applicant may have gained considerably through the saving of interest on these financial commitments. The PO acknowledged that having to pay the overpayment may take some time and it must be a "considerable disappointment" to the Applicant that he is not entitled to the benefits he thought were payable. However, the PO also noted that as interest is not being added to the amount to be repaid to the scheme, the interest saving may be of "significant benefit" to the Applicant. The PO also concluded that there was nothing to prevent the Applicant from selling the car he purchased.

As there was a loss of expectation rather than actual financial loss it was concluded that compensation for distress and inconvenience was the appropriate course and the Adjudicator and PO thought that the £4,000 offer already made in this regard was reasonable.

This case is notable for TPO's view that repayment of loans, mortgages and other debts is not sufficient to demonstrate detrimental reliance. This is not the only recent case to demonstrate this point. In PO-11794 the member was incorrectly informed that she could retire from age 55 with an unreduced pension when in fact her retirement age was 60. The member claimed that she relied on the incorrect information including by working extra hours and making overpayments on her mortgage in order to reduce it as soon as possible before her 55th birthday. The Adjudicator concluded that making the overpayments could not be deemed as the member acting to her detriment as the mortgage needed to be repaid. In PO-12613 the member was provided with an estimate which overstated her lump sum by over £21,500. The member stated that had she known the correct figures she would not have chosen to retire when she did and also stated that she depended on the higher amount in planning to pay off her mortgage. As reported on page 4 of this newsletter, the complaint was not upheld as the DPO thought that it was not reasonable for the member to rely on the information but the DPO noted that in any event not being able to repay a mortgage is not a financial loss.

PROVISION OF INCORRECT INFORMATION

The cases reported earlier in this newsletter demonstrate that complaints in relation to the provision of incorrect information may not be upheld if the actions that the member claims they took are not sufficient to show detrimental reliance. Another point that has to be considered when assessing complaints is whether it was reasonable for the member to rely on the incorrect information. In this section we focus on this particular aspect of two recent determinations.

INCORRECT BENEFIT STATEMENT

In this case (PO-12613) the Applicant received a retirement statement in July 2015 which referred to a reduced pension of £2,379 and a lump sum of £47,222. The Applicant retired on 31 December 2015. However, on 22 January 2016 she received a revised quotation referring to a reduced pension of £3,849 and a lump sum of £25,666. The Applicant proceeded with taking her benefits but brought a complaint stating that she based her decision to retire on the amount of the lump sum in the July statement and would not have retired had she known the lump sum would only be around £26,000. At stage two of the Internal Dispute Resolution Procedure the trustees said that earlier deferred statements consistently showed the correct level of lump sum so the Applicant ought to have reasonably cast doubt on the figure of £47,000. The Applicant said that she had no recollection of receiving earlier quotations from the scheme.

An Adjudicator at TPO's office noted that copies of the previous statements issued from 2006 to 2015 have been provided and there is no reason to conclude that these were not sent to the Applicant. The Adjudicator also noted that the information in the recent statements (2011 to 2015) differed significantly from the July 2015 statement. The Adjudicator said that given the fact the majority of the Applicant's benefits were made up of her deferred benefits (the Applicant had two periods of service in the scheme), it should have been apparent that the amounts in the July 2015 statement could not be believed. The Adjudicator thought that the Applicant should have noticed the incorrect amounts and concluded that it is not unreasonable to expect that she would have queried this. The Adjudicator concluded

(and the DPO agreed) that it was not reasonable for the Applicant to rely on the incorrect statement in making a decision whether to retire and her claim was not upheld.

INCORRECT SALARY CALCULATION

In this case (PO-8142) the Applicant was a member of a public service pension scheme. He started to receive his benefits from the scheme as from 1 September 2011. In the year prior to his retirement the Applicant had been working as an acting head teacher. In August 2013 he was informed that his benefits had been overpaid because they had been calculated using the wrong salary figure. Under the rules of the scheme, salaries taken into account to calculate pensions are restricted if the year on year increase in any of the final three years exceeds a particular level. The Applicant's salary increase in his final year before retirement exceeded this level and therefore it should have been restricted. The overpayment amounted to around £36,600 and is currently being recouped by deductions from the Applicant's pension of £5,000 a year.

In May 2011 the Applicant had used the scheme's online application tool to obtain a benefits statement. This statement contained a caveat stating: "*important note: the salary used to calculate your retirement benefit may be restricted if your salary is increased by more than 10% in any of the last 3 years before retirement or £5000, whichever is higher*". When the Applicant applied for his pension online, the supporting notes contained a similar statement. On this issue, the PO stated that while the website did not definitively state that a salary restriction would be applied, it drew the member's attention to the fact that it could be applied. The PO concluded that as the Applicant's salary had increased considerably in the last year before he retired, he ought reasonably to have known that his final salary could have been affected and if he was unsure he could have clarified the position with the administrator, but did not do so. The PO went on to consider the Applicant's claims of reliance but concluded that the Applicant did not have a change of position defence.

TRANSFER VALUES

FACTS

The complaint in this case (PO-12359) relates to a transfer value quotation. The Applicant requested a Cash Equivalent Transfer Value (CETV) on 4 June 2015, at which time she was an active member of the scheme. The Applicant planned to transfer to a DC scheme. The quotation showed a transfer value figure of £686,687. In all, there were three distinct warnings on the covering letter and quotation that the CETV was not guaranteed. It was stated to be for “*illustration purposes only*” and “*therefore not guaranteed*” and it also said that as the Applicant had not left the scheme, the transfer value was “*not guaranteed*”. Following the appointment of a new actuary earlier in the year, the transfer value basis was changed in July 2015. Following a telephone call to the administration team, the Applicant was provided with an updated CETV on 11 August 2015 which showed a revised figure of £644,226. The Applicant decided to proceed with her transfer and so she opted out of the scheme in late August 2015 and the CETV of £644,226 was paid.

The Applicant claims that she has been treated unfairly compared to a deferred member who receives a three month guarantee on the CETV. She stated that active members could only receive the three month guarantee if they first opted out of the scheme with no possibility of opting back in again, and therefore an informed decision could not be made. She has also argued that: the warning that the transfer value was not guaranteed was not prominent enough; and that the trustees should have informed her in June 2015 that the transfer basis would be changing and allowed her to opt out immediately (opt outs took effect on the last day of the following month).

PO'S DECISION

The case was originally considered by an Adjudicator in TPO's office who concluded that no further action was required by the trustees. As the Applicant did not accept the Adjudicator's Opinion, the case was referred to the

PO who agreed with the Opinion and therefore the complaint was not upheld. The conclusions included the following.

- There were sufficient warnings in place that the CETV was not guaranteed. The PO stated that, in his view, the wording “*could not be clearer*”.
- There was no statutory requirement for the trustees to place a three month guarantee on the CETV because the Applicant was not a deferred member, “*so this has nothing to do with acting fairly or not*”. The trustees have complied with legislation and the Applicant was treated fairly and no differently to any other active member.
- If the rules state that once an active member has opted out they cannot opt back in, the PO could not see how that can be interpreted as unfair. He went on to state that “*If the rules are being applied correctly there can be no maladministration*”.
- It was not maladministration for the trustees to appoint a new actuary who was then asked to review the existing transfer basis. Whilst the CETV was reduced, the PO concluded that he could not say that the new basis was unfair because the revised CETV still represented a fair market value of the pension benefits that the Applicant was giving up. The PO did not think that the Applicant would have acted any differently had she been quoted the lower amount in June 2015.
- During the formal complaints process, the trustees recognised that they should have contacted the Applicant sooner to inform her that the transfer basis had changed and offered £500 compensation. The PO thought that this was sufficient to cover the non-financial injustice.

As well as a reminder of when a guaranteed CETV can be obtained, this case is notable for trustees for the finding about the change to the transfer value basis, and in demonstrating the importance of clear warnings about the status of quotations.

COMPENSATION PAYMENTS

Shortly after taking office, on 15 June the current PO issued a factsheet providing guidance about redress for applicants for non-financial injustice caused by maladministration. This stated that not all maladministration inevitably leads to non-financial injustice and if the non-financial injustice is not significant, no award is likely to be made. It also stated that if the non-financial injustice is significant, awards should properly reflect this, with the usual starting point for awards being £500 or more and, in most cases, redress being likely to range from £500 to £1,000. It is useful for trustees dealing with IDRPs to have information about TPO's view of when non-financial injustice is not significant as well as when it is significant. In this section we therefore report on some recent cases where either no award was made or amounts lower than £500 were considered appropriate.

- In PO-8706 the scheme administrator had made an amendment to its records in error which reduced the Applicant's service and had therefore provided an incorrect benefits statement. The DPO concluded that amending the record was maladministration. The Applicant contacted the administrator on 16 March 2015 to inform it of the issue. The administrator contacted the former employer which clarified the position on service on 17 March. On 23 April the administrator recalculated the pension entitlement. The full pension is now being paid. The DPO concluded that whilst it was "unfortunate" that the Applicant had to bring the problem to light, the maladministration was remedied promptly when she did so and in these circumstances the DPO found that the non-financial injustice was not so significant as to require further remedy.
- In PO-11921 the relevant part of the complaint relates to service levels. The Applicant had been a member of several sections of a public sector scheme. His main complaint – that he had been led to believe he was entitled to a refund at any time – was raised through the IDRPs for his current section of the scheme. He also made contact with the section of the scheme he originally joined ("former section"). He initially contacted the former section on 29 October 2015 but it treated this as a query and telephoned him on 12 November and stated that a refund was not possible. The Applicant sent emails on 2 and 3 December and clearly raised a complaint about how his initial contact was dealt with. It was not until after the Applicant contacted TPO in February 2016 that the former section responded to the complaint and provided details of the IDRPs. In relation to the complaint about the level of service, the former section offered £100 in respect of non-financial loss but the Applicant believed £250 to £500 should be considered. The PO concluded that the maladministration was limited to the fact that the former section ought to have acted on the emails in December but failed to do so until February 2016. However, once it realised the oversight the former section considered all aspects of the complaints within a reasonable time frame. The DPO concluded that the fact that the former section has looked into its practices, apologised and offered £100 is fair.
- In PO-12573 the Applicant was incorrectly told by the scheme administrators in 2009 and 2010 that if he did not start taking his pension at normal retirement age, late retirement factors would be applied meaning his benefits would increase by 8% plus RPI each year until they were put into payment. In fact, late retirement factors did not apply to deferred members' benefits and instead if the deferred benefits were put into payment late, the member received backdated payments plus interest. The trustees acknowledged that incorrect information had been provided and offered the Applicant two options: (i) they would honour the incorrect information and apply a late retirement factor (although of 6% plus RPI as the late retirement factors had been changed following a review in 2011); or (ii) to receive his benefits as if he had begun drawing them in 2009. They also offered £100 for distress and inconvenience. The PO noted that he would have directed the benefits to be backdated (option (ii)) and stated that the offer to honour the incorrect information (option (i)) was very fair and more than he would have directed. As to the Applicant's argument that £100 was not sufficient for the distress and inconvenience suffered, the PO noted that the trustees offered to honour the incorrect information and provide an increased pension almost immediately. He therefore concluded that the period during which the Applicant can be said to have been distressed by being given incorrect information was not significant and as such he did not direct that any further compensation be paid.

APPEALS

In July it was announced that, going forward, the PO would be more robust in participating in appeals against his decisions if he considers that to do so would be beneficial to the pensions industry at large. It was stated that examples of increased participation may include where the decision could have a wider impact on the pensions industry, such as pension liberation or automatic enrolment, or where participation is necessary properly to present and argue the points. In this section we report on two recent appeals in which the PO has participated, noting the issue in the case and why the PO decided to participate.

RECOVERY OF OVERPAYMENTS

A judgment issued in October concerned the recovery of overpayments and limitation periods. By way of background, in summary: (i) legislation about limitation periods provides that an action cannot be brought more than a specified number of years from the date that the cause of action accrued; (ii) in court cases the relevant cut-off date (that is, the date on which an action is brought) is when the claim form is issued; and (iii) case law provides that TPO has to give effect to limitation defences. In this case the member had been overpaid and brought a complaint to TPO about the recovery of those overpayments. The case had already previously been considered by TPO and the High Court and whilst the member's claim that he had a change of position defence to recovery had been rejected, in 2014 the High Court concluded that he had a limitation defence to the recovery of any overpayments made more than six years before the relevant cut-off date. The issue for the High Court to consider in this latest judgment was what the relevant cut-off date is in these circumstances. The High Court concluded that it was the date of receipt by TPO of the administrator's letter which made clear, with supporting reasoning, that it opposed the allegations in the member's complaint.

In TPO's Annual Report issued in July it was reported that the PO was participating in this appeal as he believes that it raises wider issues for his office. Following the issue of the judgment in October, TPO issued a statement reporting that it will be

reviewing its processes and procedures for dealing with overpayment cases, together with existing legislative provisions with a view to considering whether any possible amendments are necessary.

You can read more about this case in the [October 2016 edition of Pensions Round-Up](#). Trustees who are trying to recover overpayments in cases where the member may have a limitation defence should consider seeking legal advice about the implications of this judgment.

SETTLEMENT AGREEMENT

Public sector employers may be interested to note the outcome of an appeal decided in November. In April 2016 the PO concluded that the Applicant's former employer (the predecessor of the respondent) made a commitment to her, following settlement negotiations at the termination of her employment, to provide her with an unreduced pension when she reached age 55 and that there was no justification subsequently to renege on that commitment. In November the High Court overturned the PO's decision and concluded that the commitment was worded in such a way that, in the circumstances, the respondent was not contractually bound to give the Applicant access to an unreduced pension at age 55.

In a statement issued on 10 November the PO stated that: (i) by participating in the appeal he had hoped to obtain clarity as to whether the respondent, as a public authority, could avoid the effect of its contractual commitment on the ground that making the commitment lay beyond its powers; and (ii) this clarity was sought because the legal position is uncertain and this is a matter of potential relevance for a significant number of complaints he receives. The PO believes that the effect of the uncertainty is that an inequality arises between public and private sector pension schemes. The High Court's conclusion on the construction of the wording of the commitment meant that this issue did not have to be decided, although the court did note that the law on this point is uncertain. The PO hopes that, in the interests of providing clarity, the issue will come before the courts in the near future.

STATISTICS

SEPTEMBER

NUMBER OF DETERMINATIONS		29
Number of these determinations which are Ombudsman decisions following an appeal from an Adjudicator's opinion		24
SCHEME TYPE	Public service scheme	14
	Private sector scheme	15
OUTCOME	Upheld	11
	Partly upheld	3
	Not upheld	15
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£300**
	Highest award	£1,000

OCTOBER

NUMBER OF DETERMINATIONS		35
Number of these determinations which are Ombudsman decisions following an appeal from an Adjudicator's opinion		32
SCHEME TYPE	Public service scheme	20
	Private sector scheme	15
OUTCOME	Upheld	4
	Partly upheld	3
	Not upheld	28
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£100
	Highest award	£750

* 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.

** The Respondent had already offered £200 to the Applicant. The direction to pay £300 was to bring the total compensation to £500.

CONTACT DETAILS

Cathryn Everest

Professional Support Lawyer, London
T +44 (0)20 7153 7116
cathryn.everest@dlapiper.com

Ben Miller

Partner, Liverpool
T +44 (0)151 237 4749
ben.miller@dlapiper.com

Vikki Massarano

Partner, Leeds
T +44 (0)113 369 2525
vikki.massarano@dlapiper.com

Claire Bell

Partner, Manchester
T +44 (0)161 235 4551
claire.bell@dlapiper.com

Kate Payne

Partner, Leeds
T +44 (0)113 369 2635
kate.payne@dlapiper.com

Tamara Calvert

Partner, London
T +44 (0)20 7796 6702
tamara.calvert@dlapiper.com

Matthew Swynnerton

Partner, London
T +44 (0)20 7796 6143
matthew.swynnerton@dlapiper.com

Jeremy Harris

Partner, Manchester
T +44 (0)161 235 4222
jeremy.harris@dlapiper.com

David Wright

Consultant, Liverpool
T +44 (0)151 237 4731
david.wright@dlapiper.com



www.dlapiper.com

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