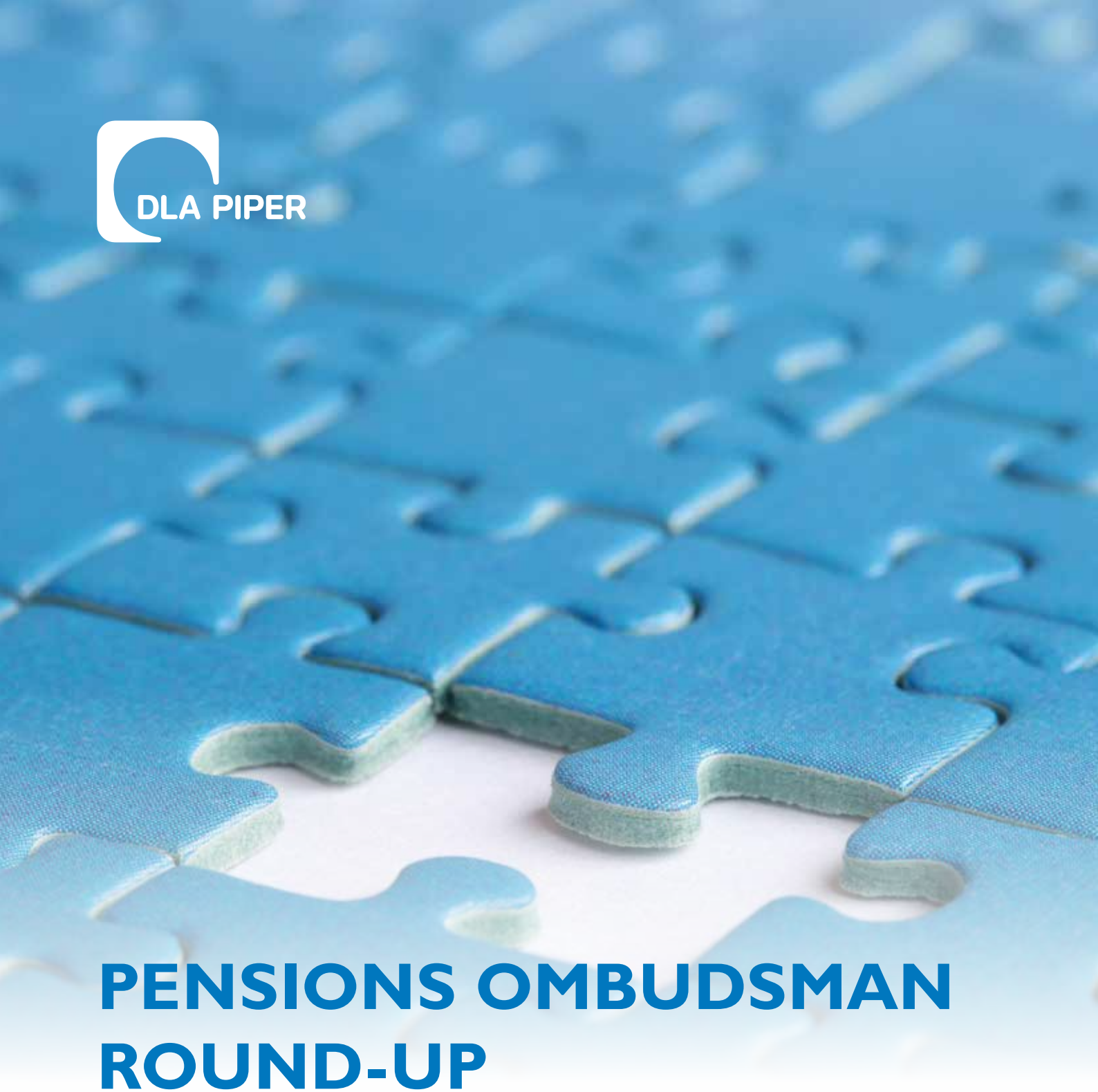

PENSIONS OMBUDSMAN ROUND-UP

NOVEMBER 2015

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 September and October 2015.

The first two cases concern the *provision of incorrect information* and demonstrate factors that can cause an Applicant's claim to fail. In the first case, it was held to be unreasonable for the Applicant to rely on the incorrect information given that she was aware that it conflicted with a previous benefit statement. In the second case, the amounts involved were too small for it to be concluded that they would have changed the member's decision to retire.

The third case concerns a *failure to provide information* about a Guaranteed Annuity Rate to a member considering retirement options and demonstrates the importance of administrators (and trustees) understanding the options offered by the scheme.

The fourth case concerns an application for *ill-health retirement* and demonstrates some of the mistakes that can be made when considering applications.

In June the PO issued a factsheet providing guidance about redress for applicants for non-financial injustice. This suggested that awards for distress and inconvenience may increase and also seemed to suggest that the number of cases in which awards are made could fall. In this newsletter we therefore report more generally on recent awards for *distress and inconvenience* and how these fit with the June guidance.

Finally, 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-4546) was a member of the relevant scheme (which is a public service pension scheme) between April 1995 and November 1998 and subsequently re-joined in 2002.

In October 2012 the Applicant received an estimate of benefits containing figures significantly higher than those in an October 2010 benefit statement. The Applicant states that in December 2012 she emailed two people in her employer's pensions department about the disparity but did not receive a response, and therefore she telephoned the department in January 2013 and was told that the October 2012 figures were correct. It was subsequently discovered that there had been a mistake in the calculation of the Applicant's benefits and her actual entitlement was lower. A comparison of the figures is set out in the table below.

	PENSION	LUMP SUM
October 2010	£6,005 p.a	£40,030
October 2012	£13,080 p.a.	£87,201
Actual benefits	£5,302 p.a.	£35,350

The mistake arose from the fact that during the Applicant's original period of membership she had elected to pay added years contributions. When she returned in 2002 her employer incorrectly resumed deducting these contributions. The employer had not made the position in relation to added years contributions clear to the scheme administrator. The level of contributions being paid led the administrator to think that the Applicant's pensionable pay was higher than it was and, in turn, to overstate the Applicant's benefits. The Applicant claims that had she known the correct figures she would not have retired when she did but would have continued working instead.

PO'S CONCLUSIONS

The PO concluded that the employer, rather than the administrator, was responsible for the cause of this complaint, noting that the administrator does not have access to employee records and is therefore reliant on information supplied by employers.

However, the PO did not uphold the claim about reliance on the incorrect information. He noted that whilst the October 2010 statement was received two years before the Applicant applied for her benefits, it was clear that she had this information to hand because she referred to it in a July 2012 letter. He therefore concluded that it was unreasonable for the Applicant to rely on the October 2012 estimate. As to the Applicant's claim that the employer confirmed that the October 2012 figures were correct, the PO stated that there is no record of the conversations and due to the lack of evidence he did not take a view on whether misinformation was given. In any event, the email and the alleged telephone call to query the disparity post-dated the application to take the benefits.

The complaint was, however, partly upheld as the PO found that there had been maladministration by the employer in incorrectly continuing to deduct added years contributions (these were subsequently refunded in 2013) and failing to record the contributions correctly, as well as miscommunicating the Applicant's retirement date. The employer was directed to pay the Applicant £500 for distress and inconvenience.

This case demonstrates one of the reasons that claims of reliance may fail which is where the member's awareness of the discrepancy makes it unreasonable for them to rely on the incorrect information. It is also interesting to see the approach taken by the PO to the lack of evidence as to whether the phone call took place in January 2013.

PROVISION OF INCORRECT INFORMATION

FACTS

The scheme in this case (PO-9113) is described as one in which members receive a pension which is guaranteed to increase annually, broadly in line with inflation. If the actuarial valuation shows a surplus, members could also receive a "bonus pension" although the bonus pension is not guaranteed or subject to increases and, if a subsequent actuarial valuation shows a deficit, the bonus pension can be converted into reducing bonuses.

In 2014 at age 50 the Applicant took his pension of £116.46 per week (which is the reduced pension having taken a lump sum of £40,373). However, in January 2015 an error was discovered and the member was told that the new amount of his pension would be £112.12 per week.

There had been a total overpayment of £422.47 but the trustees decided not to seek recovery.

The Applicant claims that the trustees should continue to pay his pension at the incorrect amount because he based his decision to retire at age 50 on the amount he expected to receive. The Applicant states that whilst the weekly shortfall may appear small, it will add up to over £9,900 if he receives his benefits for another 25 years. This calculation by the Applicant is based on a weekly shortfall of £7.69 as he is comparing the correct figure of £112.12 per week **not** to the original amount of £116.46 but to the £119.81 per week his pension had increased to as the result of a bonus by the time he was informed of the error.

PO'S CONCLUSIONS

The PO stated that the question to consider is whether it is reasonable to hold that the Applicant would have retired when he did had he been informed that his pension was actually £112.12 per week.

Unlike the Applicant, the PO based his analysis on the shortfall between the original pension quoted of £116.46 and £112.12. This was on the basis that the Applicant could not have known that the pension would increase to £119.81 shortly after his retirement.

The PO stated that he understood the Applicant's view that what appears to be a small sum can amount to a significant sum over 25 years but noted that the Applicant fails to take into account that he may receive bonuses which will erode this amount. Ultimately the PO concluded that there is no evidence that the Applicant would have retired later than he did for the sake of around £4 a week, and that the "*relatively minor amounts in question here are not what we would envisage as making a difference*". The fact that the Applicant has benefited from the overpayment was also seen as further diminishing his loss.

The PO also decided not to award compensation for loss of expectation. The trustees have decided not to seek recovery of the overpayment and the PO regarded this as "*sufficient and proportionate compensation for the error*".

Like the previous case, this determination demonstrates a factor that can cause a complaint of reliance on incorrect information to fail which is where the amounts are simply too small to have made a difference to the member's decision.

Whilst the PO did not express the difference between the quoted and the actual benefits as a percentage it is notable that the percentage is around 4% and the conclusion that this is too minor to have made a difference is consistent with a comment made by the previous DPO in a March 2015 decision. In that decision (PO-4489) the DPO stated that a difference of 10% was "*on the cusp of the region where [she] might have been able to conclude more easily whether [the Applicant] may have retired anyway or may not have retired*".

FAILURE TO PROVIDE INFORMATION

FACTS

The plan in this case (PO-569) is a DC occupational pension scheme established in 1974 (**"Plan"**). The Trustee holds an individual policy in respect of the Applicant under which the annual amount is guaranteed to be no less than a specified rate if her fund is used to purchase an annuity with the provider that issued the policy (**"Provider"**). This is known as a Guaranteed Annuity Rate (**"GAR"**). In the run up to the Applicant's retirement date of 25 July 2004 the Administrator informed the Provider that it would give the Applicant full details of her retirement benefits. On 1 July 2004 the Administrator wrote to the Applicant and asked her to complete forms to enable it to approach the open market for annuity quotes. The Applicant was not informed of the GAR. Ultimately an annuity was purchased on the open market in June 2005 backdated to 25 July 2004 but this was **not** purchased with the Provider. The annuity purchased was around £1,900 per annum but, because of the GAR, an annuity from the Provider would have been around £2,800 per annum.

In June 2006 the Provider acknowledged in a letter to one of the Trustee Directors that there had been some confusion among its staff as to whether GARs applied under the Plan. The Administrator states that it was not conclusively aware that a GAR applied until September 2006. The Applicant claims that had the Provider or the Administrator made her aware of the availability of a GAR she would have chosen this over the open market option. The Trustee is paying its legal advisers to "*help and assist*" the Applicant with her complaint. The Applicant did not include the Trustee as a respondent and believes that it has done all it reasonably could in the circumstances to act in her best interests to resolve the matter.

PO'S CONCLUSIONS

The complaint was upheld against the Provider and the Administrator. The PO concluded that it was maladministration by the Provider not to confirm definitively that a GAR applied to the policy when quoting figures for the Applicant at her retirement.

However, he took the view that the Provider was not entirely at fault. Whilst the Administrator states that it did not conclusively know that GARs applied until September 2006, the PO noted that the Administrator accepts that it was on notice as to the potential application of GARs by June 2002 when there had been confusion on the subject of GARs in the case of another member. The Provider confirmed that GARs applied to the Plan on 7 June 2002. The PO stated that the context of this correspondence was that GARs applied to the Plan rather than a particular policy, and that in view of this past confusion, when the Administrator carried out its review of the open market it should have asked the Provider specifically for details of the benefits it would provide for the Applicant.

The PO was satisfied that had the Applicant known the correct position she would have elected to receive her benefits from the Provider. The PO directed the Provider to set up an annuity for the Applicant from 25 July 2015 onwards of the amount of the difference between what would have been provided under the GAR and the annuity purchased on the open market. The Provider was also directed to pay the Applicant a lump sum of £7,603 plus interest representing arrears for the period 25 July 2004 to 24 July 2015. The Provider and Administrator were directed to pay £750 each to the Applicant for the inconvenience caused to her.

This case demonstrates the importance of fully understanding the benefits available to a member when issuing retirement quotes. Whilst the respondents were a provider and administrator it is still important for trustees to be aware of this issue because the PO stated that the Trustee is ultimately responsible for its agents and the administration of the scheme and therefore the Applicant could have included the Trustee in the complaint. However, what the outcome would have been had the Trustee been included is not clear with the PO stating that he did not consider whether the Trustee has a duty of care as that was not the complaint before him.

ILL-HEALTH RETIREMENT

FACTS

Under the rules of the public service scheme of which the Applicant in this case (PO-6196) is a member, in order to qualify for ill health retirement her employer had to determine: (a) to terminate her employment on the grounds that her ill health rendered her permanently incapable of discharging efficiently the duties of her current employment; and (b) that she had a reduced likelihood of obtaining any gainful employment before her normal retirement age. Before the employer made a decision, it had to obtain a certificate from an Independent Registered Medical Practitioner (**"IRMP"**) as to whether these criteria were met.

In November 2009 as part of its Managing Attendance Procedure the Applicant's employer noted that she was receiving treatment at a pain clinic but said it was not possible to wait a further three months until this treatment could be reviewed and it had no alternative but to terminate her employment. The employer said that it wanted to leave the option of pursuing ill health retirement open for a further six months. The employer did not obtain a certificate from an IRMP because ill health retirement was not considered the appropriate route at that time. In January 2010 when the Applicant said she would like to take ill health retirement her employer said that this was not possible because the occupational health adviser's opinion was that her condition could improve following surgical intervention.

There followed a period of enquiries from The Pensions Advisory Service (TPAS) and the submission of further medical evidence until in October 2014, following a definite diagnosis being given, the employer's occupational health adviser gave the opinion that on 26 April 2013 the Applicant became permanently incapable of discharging efficiently the duties of her former employment. The adviser did not think that the criteria were met in November 2009. The Applicant claims that her eligibility for ill health retirement has not been considered properly.

DPO'S CONCLUSIONS

The DPO upheld the Applicant's complaint noting a number of errors which the employer had made in considering the application including the following.

- The initial decision that ill health retirement was not the appropriate route was itself a decision under the rules and a certificate should therefore have been obtained from an IRMP before that decision was made.
- When the Applicant submitted additional evidence indicating that surgery was not considered appropriate, the employer simply repeated what it had already said and gave no indication that the additional evidence had been considered. The evidence suggests that the employer merely adopted the advice from its occupational health advisers, and whilst it was open to it to accept the advice, it "*should not have done so blindly*".
- The IRMP should have been asked to give an opinion, on the balance of probabilities, as to the likely efficacy of any continuing or potential treatment. It was not appropriate to defer making a decision on the grounds that treatment was ongoing. The DPO's conclusions also note that lack of a definite diagnosis should not automatically be a bar to ill health retirement.

The DPO directed that the employer make a fresh decision. The employer was also directed to pay £1,000 in recognition of the unnecessary distress and inconvenience caused. The DPO stated that this "*higher than usual*" amount was awarded in recognition of the particular circumstances of the case and the fact that the employer has "*done so little to make things any easier for [the Applicant]*".

This case demonstrates the importance of following the requirements of the rules before making a decision on ill-health cases, and that higher distress and inconvenience payments may be awarded where the failure properly to consider matters has been ongoing for a number of years.

DISTRESS AND INCONVENIENCE PAYMENTS

BACKGROUND

The current PO took office in May 2015 and on 15 June 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.

This suggested that the number of cases in which awards are made could fall in the future but that, provided the non-financial injustice is significant, a £500 award could be expected as a minimum which would be an increase from the previous position. However, this was not immediately apparent in all cases with the lowest award in each of June, July and August being £200.

AWARDS IN SEPTEMBER AND OCTOBER

This new approach can be seen more clearly in determinations for September and October and it is useful for employers and trustees to be aware of this so that they know what to expect should a complaint be made to the PO and for the purpose of considering compensation offers in IDRP cases.

The lowest award in September was £500 and in October was £750 (albeit that two respondents were each directed to pay this amount) and the highest award from a single respondent in each month was £1,000. In terms of factors that may result in higher awards, two cases in which £1,000 was awarded involved matters that were ongoing for a number of years. One of these was the ill-health case reported earlier in this newsletter. The other case (PO-2821) related to a refusal to comply with a stage two IDRP determination dated November 2010. Whilst the PO did not uphold the substantive complaint, he noted that both IDRP processes and the original decisions being reviewed were "*strewn with errors*" some of which constituted breaches of the regulations governing scheme administration and that "*throughout the many years of correspondence*" the employer had been slow to respond to the Applicant on a number of occasions.

It is also notable that in the case concerning GARs reported earlier in this newsletter the Administrator submitted that an award of £1,000 would not be justifiable and noted a 1997 court judgment which it said referred to indications by the courts that awards of this size should only be made in exceptional circumstances. Ultimately the PO directed each respondent to pay £750 but in his conclusions distinguished the GAR case from the court judgment in that the latter related to an overpayment rather than a person being denied a payment actually due to them. The PO also stated that inflation has considerably reduced the value of compensation since 1996 and therefore comparing a similar value today to that of many years ago is flawed. This approach appears to be in line with the PO's June factsheet in which he also stated that although the courts have historically held that an award over £1,000 should only be given in exceptional circumstances, there has been a recognised general shift in attitudes to make higher awards.

A case from October is worth noting in relation to the question of whether awards will be made in all cases of non-financial injustice. In this case (PO-6655) the claim was partly upheld and the PO found that failure to explain a decision to refuse an application for ill-health retirement and to notify the member of the right to appeal as well as delays during the process would have caused distress and inconvenience but that it did not amount to distress "*of a magnitude which would justify a monetary award*". There were two cases in September in which the complaint was upheld but no award was made for distress and inconvenience. In one case (PO-5361) the issue does not appear to have been raised. In the other (PO-7548) the submissions suggest distress may have been claimed relating to the length of time the matter had been ongoing. The conclusions do not expressly address the issue of non-financial injustice but do note that there had not been undue delay in the stage of the matter under consideration in the determination.

STATISTICS

SEPTEMBER

NUMBER OF DETERMINATIONS		12
SCHEME TYPE	Public service scheme	7
	Private sector scheme	5
OUTCOME	Upheld	5
	Partly upheld	1
	Not upheld	6
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£500
	Highest award	£1,000

OCTOBER

NUMBER OF DETERMINATIONS		5
SCHEME TYPE	Public service scheme	2
	Private sector scheme	3
OUTCOME	Upheld	1
	Partly upheld	2
	Not upheld	2
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£750
	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.

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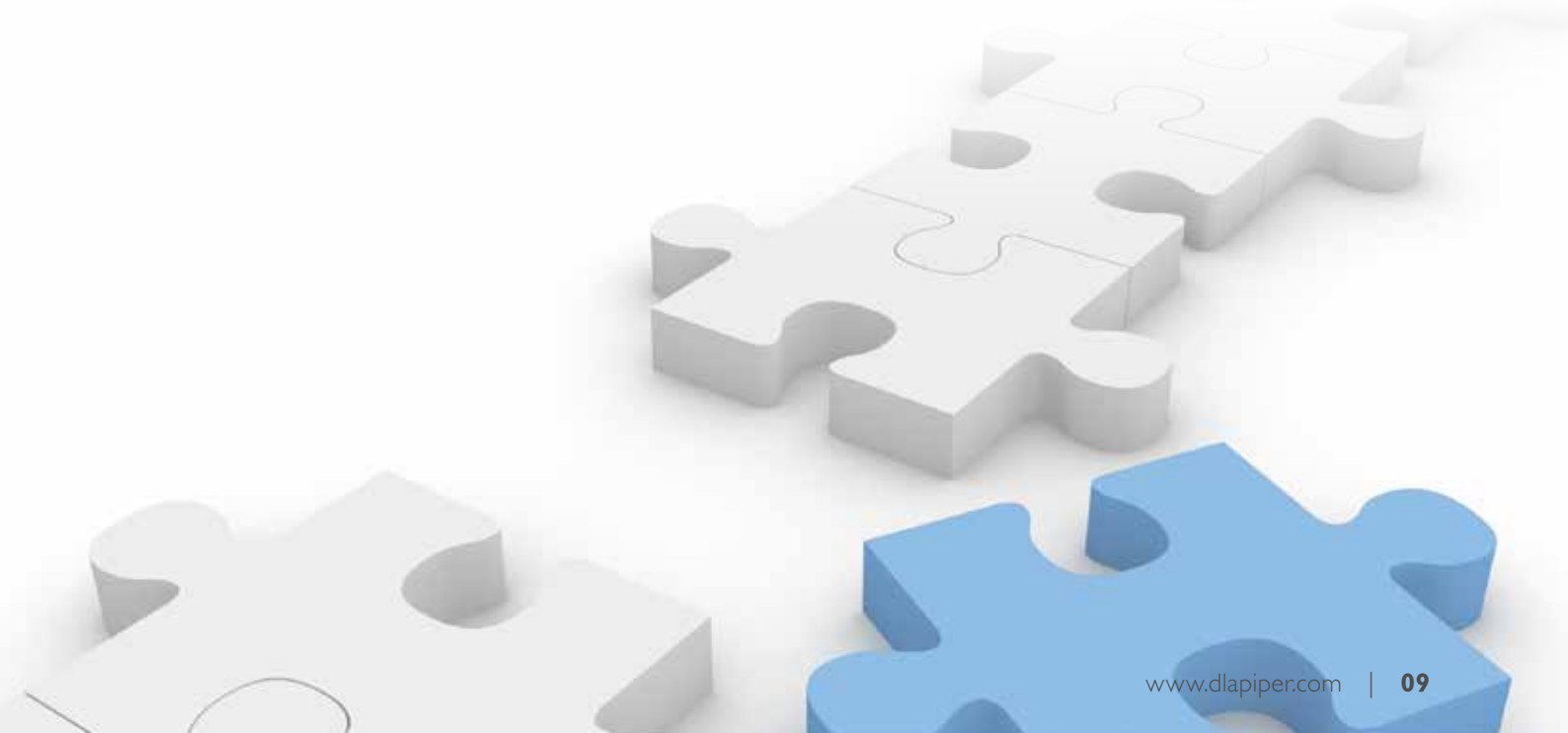

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