PENSIONS OMBUDSMAN ROUND-UP

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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 July and August 2016 which cover the following issues.

- A claim that a scheme should pay increases on the member's Guaranteed Minimum Pension accrued prior to 6 April 1988 when these are not paid by the State.
- Whether a member was entitled to interest on a lump sum payment which represented a shortfall in his benefit payments. The shortfall arose because the scheme had been administered on the basis that equalisation took place in 1994 but in 2014 it was concluded that equalisation did not take place until 1999.
- Three cases in which claims were made for pension benefits but the scheme records did not show that the Applicants were entitled to benefits.
- A case which demonstrates some of the factors that might cause a claim in relation to the provision of incorrect information to be unsuccessful.
- A case concerning whether the implied duty for an employer to draw particular scheme rights to a member's attention applied.

In the statistics section we provide a breakdown of the overall outcome of the July and August determinations.

July and August also saw two pieces of other news relating to the Ombudsman.

- As reported in our Pensions Round-Up publication for July, it has been announced that the PO has decided that, going forward, he will 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. 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 there is a significant concern over access to justice and participation is necessary to properly present and argue the points.
- On 31 August it was announced that the Pensions Ombudsman Service has changed its name to The Pensions Ombudsman (or TPO when abbreviated). TPO states that this new name is similar in style to its main partner organisations, The Pensions Regulator and The Pensions Advisory Service, and will provide clarity for the public when they look for advice, guidance and resolution of pension complaints. TPO's work and remit – covering complaints about pension administration and about the actions and decisions of the PPF – will remain the same.

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.

GMP INCREASES

BACKGROUND

The legislation on increases to Guaranteed Minimum Pensions (GMPs) is complex but in summary: (i) it only requires pension schemes to pay increases on the part of the GMP that accrued on or after 6 April 1988, and there is no statutory obligation on schemes to pay increases on the GMP accrued before this date (referred to in this summary as the **"pre-1988 GMP"**); (ii) for those who reached State Pension age before 6 April 2016, the increases on the pre-1988 GMP may instead effectively be paid as part of the State Pension but increases are **not** paid as part of the State Pension if the member's GMP is greater than the additional State Pension. An example of a circumstance where the GMP may be greater than the additional State Pension is if the GMP was subject to a high rate of revaluation.

FACTS

The Applicant in this case (PO-7438) ceased active membership of the scheme at the end of 1992 and subsequently took early retirement at age 50 in 1996. The Applicant's GMP became payable at age 65 in January 2011 and at this point he became aware that his pre-1988 GMP would not receive increases from the scheme. Also in January 2011, the Applicant was informed that his State Pension did not include increases on the pre-1988 GMP. The Applicant argues that the scheme should pay increases on the pre-1988 GMP in lieu of these increases being paid by the State and that the scheme rules should be amended to award such increases when the State does not pay them.

PO'S DECISION

An Adjudicator at TPO's office issued an opinion concluding that the scheme did not need to take any further action. The Adjudicator noted that the Applicant's GMP exceeded the additional State Pension and therefore the State was not required to pay increases on the pre-1988 GMP. The Adjudicator stated that the scheme provider had acted appropriately and is paying increases on the post-1988 GMP that it is legally required to pay, but it has no obligation to pay increases on the pre-1988 GMP (even if these are not paid by the State) and therefore is not obliged to amend the scheme rules.

The Applicant did not accept the Adjudicator's opinion and the case was passed to the PO. The PO agreed with the Adjudicator's opinion and also noted that there has been no maladministration in this case and that he would not instruct the scheme provider to amend the rules as it has no legal obligation to pay increases on pre-1988 GMPs.

For those who reached State Pension age before 6 April 2016, the pre-1988 GMP increases may effectively be paid in the State Pension because of the way that additional State Pension is calculated. However, for those who reach State Pension age on or after 6 April 2016 the increases will **not** be paid as part of the State Pension. This is because the introduction of the single-tier State Pension, and therefore the end of the additional State Pension, means there is no mechanism by which the increases can be picked up in the State Pension. Complaints that such increases are not being paid by schemes may therefore increase and so it is useful to see the PO's view that schemes are not required to pay increases, nor to amend their scheme rules, in these circumstances.

Whilst not mentioned in this determination, members may also bring complaints (and indeed this has been the subject of previous Ombudsman determinations) of maladministration on the basis that incorrect information has been provided if scheme literature states that increases on pre-1988 GMPs will be paid by the State but in fact they are not. Members may also argue that they relied on such information. It is therefore important for schemes containing pre-1988 GMPs to check what their scheme literature says about pension increases and make amendments if necessary to ensure that it accurately reflects the position on GMP increases.

EQUALISATION

FACTS

The scheme in this case (PO-9889) entered a PPF assessment period in April 2013. As a result of a review of the scheme's governing documents by the PPF, it was discovered that Normal Retirement Ages (NRAs) in the scheme had been equalised later than the trustees thought.

The trustees had thought that equalisation had taken place on 1 December 1994. However, the PPF's review found that: (i) the announcement to give effect to this had been signed by the Company Secretary when the scheme rules required a director's signature; and (ii) equalisation had therefore not taken place (and the Barber window had not been closed) until 26 April 1999 when the third definitive rules for the scheme took effect. (It is worth noting that the trustees' position includes that they are "pretty certain" that documentation exists which properly equalised NRAs on 1 December 1994 but, as they cannot find this documentation, they decided to accept the PPF's view.)

The Applicant retired on 30 November 1999. Because his benefits were calculated based on an equalisation date of 1 December 1994 he had been underpaid by nearly £19,000 in pension since his retirement. The trustees have paid this shortfall to the Applicant but his complaint is that interest should also have been paid because of the late payment.

The trustees state that, before deciding whether to award interest, they had to consider the wider membership and how such payments would detrimentally impact on their entitlement and the overall funding level of the scheme (which has limited assets and no sponsoring employer to support it). The trustees also state that they have a duty to act in accordance with the scheme rules which make no allowance for payment of interest. Having considered how the arrears had arisen and the interests of all the members, the trustees decided that they were not in a position to make any discretionary interest payment.

DPO'S DECISION

The DPO stated that the Applicant has no absolute entitlement to interest under the scheme rules or at law and that the failure properly to equalise on 1 December 1994 does not engage a right to interest.

The DPO noted that the Applicant has received benefits that he had no expectation of and that would not have been due to him but for the failure properly to implement the decision to equalise NRAs on 1 December 1994.

The DPO also stated that, when deciding whether to award interest, the trustees considered: (i) that the scheme is in a PPF assessment period with no recourse to an ongoing sponsor for additional contributions; (ii) any payment over and above the member's core entitlement could have a detrimental impact on the entitlement of the remaining membership; and (iii) the scheme rules made no reference to adjusting payments for interest. In addition, she noted that the trustees had treated all members in a similar situation to the Applicant in the same way.

The DPO concluded that the trustees' approach was "*entirely reasonable*" and she did not consider that an injustice had been caused to the Applicant such as to require her to direct that interest be paid.

The outcome of this case is notable for trustees who have to recalculate member benefits as a result of discovering a mistake in the way equalisation was implemented. However, it should be borne in mind that key facts in this case include that the rules did not require interest to be paid and one of the factors relevant to the trustees' decision on discretionary payment was that the scheme was in a PPF assessment period with no sponsoring employer. If trustees discover that a mistake has been made in relation to equalisation for their scheme, they should seek legal advice about how to proceed with re-calculating members' benefits.

CLAIMS FOR BENEFITS

Trustees sometimes have to deal with claims that somebody is entitled to benefits from their scheme when, according to the scheme records, there is no entitlement. Trustees may therefore find it useful to see the approach taken by TPO in three recent cases on this issue.

MEMBER NOT INCLUDED ON BULK TRANSFER LIST

In this case (PO-7950) a bulk transfer took place in 2000 from one scheme (**"Old Scheme"**) to the scheme to which the complaint relates (**"New Scheme"**). The administrators of the Old Scheme provided the trustees of the New Scheme with a list of members. The Applicant was not on this list. HMRC records show an entitlement to a GMP in the Old Scheme accrued during 1991/92.

The Adjudicator concluded that if the Applicant was entitled to a deferred pension in the Old Scheme, his name should have been on the list of members and he should have received a statement from the Old Scheme of his estimated deferred pension shortly after leaving that scheme. The Adjudicator thought that the Applicant had most probably received a net refund of the contributions he paid to the Old Scheme (including those transferred to it from a previous scheme) when he left the Old Scheme and that the administrators had failed to reinstate him back into the State Pension. The PO agreed with the Adjudicator's opinion and the complaint was not upheld.

SPOUSE'S PENSION

The Applicant in this case (PO-10036) complains that she did not receive a spouse's pension following the death of her husband in 2014. The scheme only holds limited computer records for the member which indicate that a normal retirement claim was paid with an action date of 31 January 1997, and that at least three staff members had been dealing with the member's file around the time of his normal retirement age. The provider thinks that the pension was most probably commuted on the grounds of triviality and believes this assumption to be reasonable on the grounds that no pension in payment record was set up and, as the pension was quite low, it was very unlikely that an Open Market Option was taken up with another company.

The member's bank no longer has records for his account for 1997 and so there is no evidence that the member did not receive a payment in 1997.

Whilst the evidence was limited, the Adjudicator's opinion was that there had been no maladministration on the part of the provider in not retaining pension records or paper files, and that it was more likely than not that a triviality lump sum had been paid to the member around early February 1997. The PO agreed with the Adjudicator's opinion and concluded that it is possible to say, on the balance of probabilities, that the member did receive a lump sum on grounds of triviality.

NO RECORD OF BENEFITS

The Applicant in this case (PO-11020) had no evidence of scheme membership in relation to her employment with the respondent employer between 1975 and 1981 other than a letter from August 1981 which stated that she had "*a vested pension benefit*" but did not say in which scheme this benefit was held or what the benefit would be. The employer had no record of benefits for the Applicant. All of the employer's UK schemes were contracted-out at the relevant time but HMRC confirmed that the Applicant had never been contracted-out.

The Adjudicator's opinion was that, as HMRC's records show the Applicant was not contracted-out, this shows that she was not a member of one of the employer's UK schemes. The Adjudicator stated that as the Applicant has no evidence, other than the 1981 letter, to support her claim to a pension from one of the employer's UK based schemes, it is reasonable for the employer and TPO to rely on the information provided by HMRC. The PO agreed with the Adjudicator's opinion and the complaint was not upheld. (It is worth noting that the PO limited its investigation to the employer's UK schemes. Given that any determination would only be legally binding in the UK, the PO exercised his discretion not to investigate the complaint in so far as it related to the employer's US based pension scheme.)

PROVISION OF INCORRECT INFORMATION

FACTS

The Applicant in this case (PO-7667) is a member of a public service pension scheme. Since 2005 she has received retention payments (amounting to 10% of salary) on top of her basic salary. Until March 2012, these payments were incorrectly included in the Applicant's pensionable pay and pension contributions were paid in respect of them. The 2012 annual benefit statement was the last one to incorrectly include the retention payments in pensionable pay. The Applicant states that, following receipt of the 2012 statement and knowing that she could not afford the mortgage on her existing property in retirement, she decided to sell it and buy a property for her retirement and a flat to live in while she continued working (to be sold on retirement). The sale of her house and the purchase of two properties were agreed in August/September 2013 (all subject to contract).

In October 2013 the Applicant received her 2013 annual benefit statement. This did not include the retention payment as part of pensionable pay meaning the estimated pension benefits were lower than in 2012. The Applicant queried this and was informed that the retention payments were not pensionable and the contributions paid on them would be refunded. Contracts were exchanged on the property purchases in November 2013 and on the property sale in December 2013. At stage 2 of the internal dispute resolution procedure, it was recommended that the Applicant be paid £500 for distress and inconvenience and that the employer consider exercising a discretion under the scheme regulations to award an additional pension. The employer determined not to award additional pension but resolved to award a further compensatory sum (in addition to the £500) of around £3,000 which is equivalent to the contributions the employer had paid on the retention payments. The employer has also refunded the Applicant's contributions that related to the retention payments with interest.

DPO'S DECISION

An Adjudicator concluded that the Applicant had not suffered a financial loss and that the compensation payments were adequate. The DPO agreed with the Adjudicator's opinion and thought that the Applicant had been put in the position she would have been in had the maladministration not occurred and had been adequately compensated for distress and inconvenience.

The DPO was satisfied that at the time the Applicant decided to proceed with the property transactions, she had knowledge of the corrected lower pension figures and the employer had confirmed they were correct. The DPO concluded that it was not reasonable in those circumstances to rely on the higher figures as the basis for decision-making.

The DPO stated that, in exercising the discretion to pay an additional pension, the employer has an implied duty of good faith. The DPO noted that this is not a fiduciary duty and the employer may take its own interests into account and indeed favour those interests. The employer provided a summary of its discretionary policy which states that an additional pension may be paid "*in exceptional circumstances subject to the approval of each case by the Chief Executive and Director of Finance*". There was evidence that the Chief Executive and Director of Finance discussed the Applicant's case to consider the discretion. The DPO was satisfied that the employer properly exercised its discretion.

The Applicant also said that had she known that retention payments were not pensionable, she would have sought a better paid job. The DPO noted that a "*good indication of what someone might have done is what they actually did after being informed of the correct position*". The Applicant has remained in her job. On this evidence, the DPO was unable to conclude that the Applicant would have taken this step and that she would have received higher pensionable pay had she been aware of the situation earlier.

This case demonstrates that claims of reliance on incorrect information may fail if it was not reasonable to rely on the information, and if the evidence suggests that the member would not have acted in the way they claim they would have done had correct information been provided.

FAILURE TO PROVIDE INFORMATION

FACTS

The Applicant's complaint in this case (PO-9507) is about the death benefit paid to him in respect of his late wife's entitlement under the public service pension scheme of which she was a member.

Under the scheme if a member dies whilst in pensionable employment, the death benefit payable is a lump sum of three times salary. If the member dies without becoming entitled to payment of their benefits and has opted out or left service, the death benefit is based on 3/80ths of pensionable salary multiplied by the reckonable service completed.

In 2012 the member indicated her intention to stop paying contributions to the scheme as she had completed 40 years' reckonable service. She signed an opt out form in November 2012. The first page of the form included a section headed "Why should I be a member of the scheme?" and one of the points listed was that a death grant is payable on death before retirement. The form also included a declaration (which the member signed) confirming that she had read the guidance and that, in full knowledge of the potential benefits available as a member of the scheme, she elected to terminate her membership.

The member died in October 2013. The Applicant received a lump sum death benefit of £67,453. It is submitted that if the member had been contributing to the scheme at the time of her death, an additional sum of £64,610 would have been payable, and that the member would not have stopped contributing to the scheme had she been informed that this would substantially reduce the death grant payable.

The Applicant argues that the employer's duty of care (as outlined in the case of *Scally*) applies. This is a reference to a 1991 case in which the House of Lords found that a duty to inform employees about a contractual right could be implied into a contract of employment 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 DECISION

The PO noted that subsequent cases have indicated that the implied duty to provide information is to be narrowly defined. That is, it is only a duty to take reasonable steps to inform an employee about any contractual rights. The PO went on to state that the first step in determining whether the duty applies should be to consider whether the option to opt out of the scheme could be said to be a contractual right. The PO noted that this is a grey area but then, assuming it is a contractual right, went on to consider whether the requirements set out above were met.

The PO stated that requirements (i) and (ii) were met but did not think that requirement (iii) was met. The PO referred to the notes on the first page of the opt-out form, the declaration on the form, and that the administrator states that the information about the benefits for active and deferred members was on its website and in the scheme booklet. The PO therefore concluded that the member ought reasonably to have known about the consequences of opting out – the information was readily accessible and her employer did not need to bring it to her attention. The PO did not dispute that the member may have believed that a death benefit of three times salary would be payable but he did not consider that this was due to anything that the employer or the administrator had told her. The PO therefore stated that he was unable to find maladministration on the part of the employer and the administrator and the complaint was not upheld.

This case demonstrates the importance of ensuring that information about members' benefits is readily accessible to them and that, if the information is available, it can be difficult for applicants to demonstrate a breach of the implied duty to provide information.

STATISTICS

JULY

NUMBER OF DETERMINATIONS		37
Number of these determinations which are Ombudsman decisions following an appeal from an Adjudicator's opinion		35
SCHEME TYPE	Public service scheme	15
	Private sector scheme	22
OUTCOME	Upheld	7
	Partly upheld	3
	Not upheld	27
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£100
	Highest award	£500

AUGUST

NUMBER OF DETERMINATIONS		29
Number of these determinations which are Ombudsman decisions following an appeal from an Adjudicator's opinion		27
SCHEME TYPE	Public service scheme	12
	Private sector scheme	17
OUTCOME	Upheld	6
	Partly upheld	1
	Not upheld	22
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£500
	Highest award	£500

* 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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