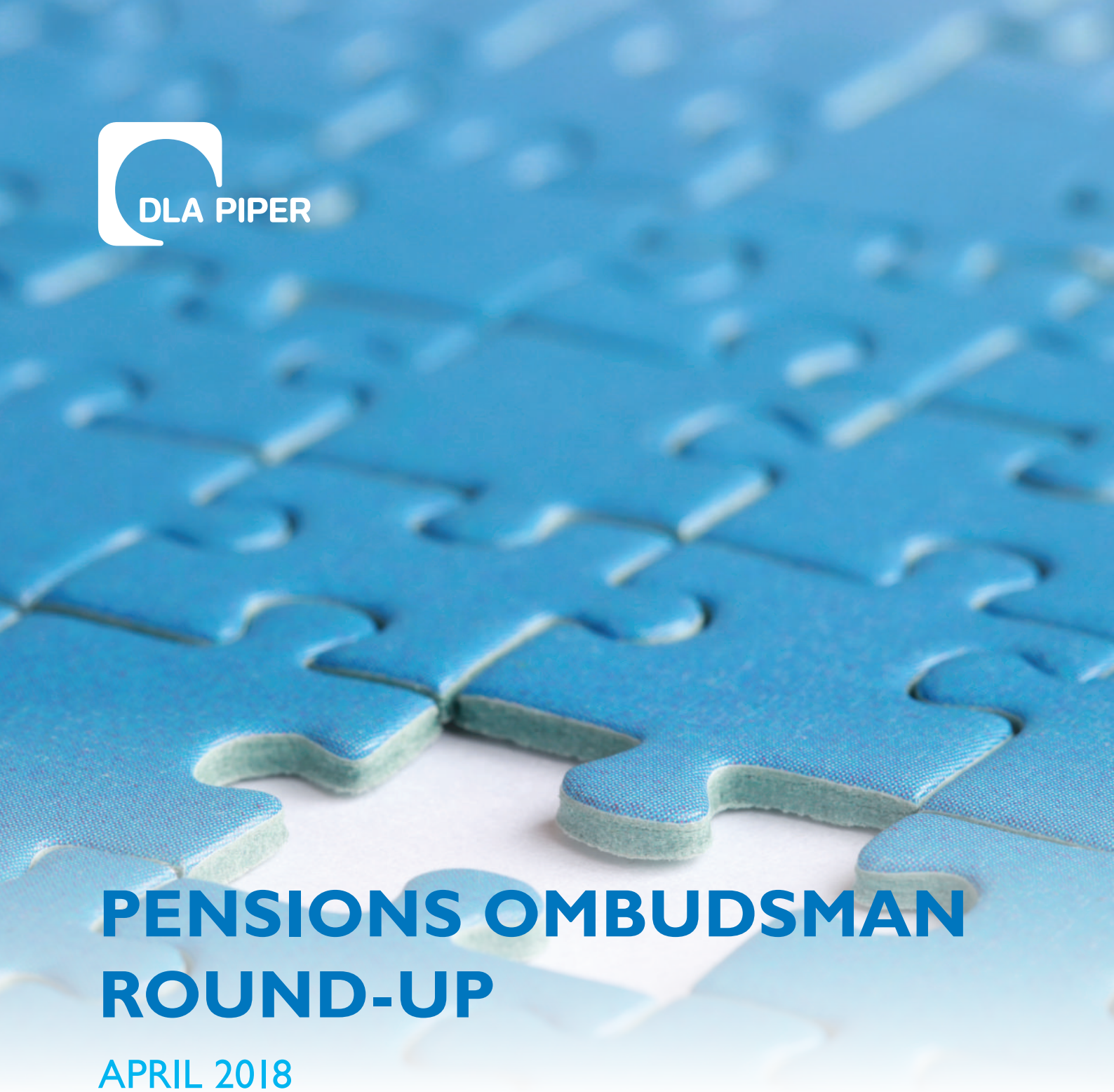

PENSIONS OMBUDSMAN ROUND-UP

APRIL 2018

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 a selection of determinations from January and February 2018 which cover the following issues.

- Two determinations concerning the provision of incorrect information, one which relates to information about a contingent spouse's pension and one which relates to an overstatement of pension benefits.
- A determination concerning delays in dealing with a transfer in which the DPO directed that £2,000 be paid in relation to distress and inconvenience.
- A complaint concerning the reduction of a transfer value.
- Two determinations which demonstrate the importance of considering medical evidence and seeking clarification where necessary when dealing with ill health applications.

In the statistics section we provide a breakdown of the overall outcome of the January and February determinations and the range of awards made for distress and inconvenience.

A NOTE ABOUT DISTRESS AND INCONVENIENCE AWARDS

Trustees and employers may also find it of interest to know some of the circumstances in which higher awards have been made for distress and inconvenience. As noted in the statistics section of this newsletter, the highest award made for distress and inconvenience in January was £2,000 and in February it was £2,500.

The award of £2,000 in January was in the case concerning delays in making a transfer which is reported on page 4 of this newsletter.

The award of £2,500 in February was in a case (PO-18396) concerning failure to pay pension contributions into the scheme. The Applicant is the relevant member and the Respondent is her former employer. In 2015 the Respondent informed the Applicant that she had been automatically enrolled into a pension scheme. Pension contributions were deducted from her monthly salary from September 2015 until August 2016 when her employment with the Respondent ceased. However, the Respondent has accepted that the deducted contributions were not paid into the pension scheme. Multiple requests have been made since July 2016 by the Applicant, The Pensions Advisory Service and an Adjudicator at The Pensions Ombudsman's (**"TPO"**) office for the employer to provide further information. However, the employer has not provided a substantive response and the PO stated that this is maladministration. As well as making directions in relation to the payment of the contributions, the PO directed the Respondent to pay the Applicant £2,500 for the "*very significant*" distress and inconvenience caused by the maladministration. The PO also stated that he would report the Respondent to the Pensions Regulator.

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

PO-16971

In this case the Applicant received incorrect information about the level of the contingent spouse's pension payable on his death. A retirement statement dated July 1999 quoted a contingent spouse's pension of £12,133 but the figure should have been £11,702. In January 2014 the Applicant was informed that the figure was currently £27,746. The Applicant queried this as the scheme's website gave a figure of £28,295 and the administrator informed him that the figure shown on the website was wrong and assured him that the figures quoted in January 2014, and in January 2011, 2012 and 2013, were correct. However, these figures were in fact incorrect. In March 2015 the Applicant and his wife gave their daughter £93,200 which was around 28% of the purchase price of an investment property. The Applicant states that this decision was taken after considering several factors including a spouse's pension figure of £24,800 derived from figures provided to him. In May 2016, as part of a pension increase exchange exercise, the Applicant received a correct figure for the contingent spouse's pension of £23,726. The Applicant states that, had he known the correct figure, he would have given £13,500 less to his daughter as he calculates this as the shortfall in the expected spouse's pension over a 15 year period.

The complaint was partly upheld. An Adjudicator and the PO both concluded that there has been no actual financial loss, with the PO noting that the Applicant's assessment of loss is "*based on a scenario that may, or may not, materialise in future*". However, it was also concluded that an award should be made in relation to the distress and inconvenience caused by the maladministration of providing incorrect information. The PO thought that, given the number of errors made, a higher award than he would normally make was warranted. In deciding the level of the award he took into account that the mistakes concerned the value of a contingent benefit which may never be relied upon and concluded that an award of £1,000 was appropriate. As £500 had already been paid by the administrator, the PO directed that the trustee pay an additional £500 to the Applicant.

PO-17016

The Applicant had two periods of service in the same public service pension scheme with different employers. The first period was 17 years and 203 days from 1990 to 2008 and the Applicant started to receive his pension in 2008. When the Applicant's new employment started in June 2008, his previous service (in respect of which a pension was already in payment) was incorrectly recorded as qualifying service and included in the calculation of his future benefits in benefit statements. Those benefit statements set out the amount of service which included the 17 years and 203 days from the first period of service. Following a request from the Applicant, in March 2016 the scheme provided an estimate of his benefits if he retired on his 60th birthday of a pension of £8,420.25 and a lump sum of £15,186.30 but these calculations also contained the first period of service in error. The Applicant decided to take early retirement on his 60th birthday in October 2016. Before taking his benefits, the Applicant transferred in benefits from a personal pension. Following this, the error was discovered and in November 2016 he was given the option of a pension of £5,934.53 with no lump sum.

The Applicant stated that he decided to take early retirement based on the March 2016 estimate and, on the expectation of higher benefits, he purchased a family holiday and a new car and had his bathroom refurbished. An Adjudicator and the PO concluded that it was reasonable to expect the Applicant to have queried the inclusion of the first period of service in the statements. The PO stated that it was not therefore reasonable to subsequently rely on the March 2016 estimate to make this type of financial decision. The Adjudicator also stated that: (i) the Applicant did not try to get his job back or look for a similar position once he knew about the error and therefore it is possible that he may have taken early retirement even if the correct figures had been provided; (ii) the holiday was booked prior to the March 2016 estimate and the car was purchased after he had been informed of the error and therefore it seems likely that the Applicant would have made these purchases in any event; and (iii) the refurbishment of the bathroom cannot be said to be a financial loss as it would in all likelihood have increased the overall value of the property. It was also concluded that the scheme's offer of £1,500 compensation in respect of distress and inconvenience was reasonable.

TRANSFERS

In this section we report on a determination (PO-16581) concerning delays in dealing with a transfer which is notable because the DPO awarded a £2,000 distress and inconvenience payment.

BACKGROUND

The Applicant wanted to transfer her benefits from a public service pension scheme in the UK to a pension provider in Australia. She contacted an independent financial adviser (IFA) in late 2014 regarding the transfer. The Applicant and her IFA were in regular contact with the scheme administrators throughout November and December 2014 and into early 2015. There were delays because the administrators were unable to find the Applicant's details on its system as her name and address had reverted to out of date details when the IT system was updated in 2014. Information provided by the IFA in December 2014 helped to locate the Applicant's record but the administrators then stated that they required evidence of her name change. There were also delays when the administrators informed the IFA that a letter of authority was not valid because it was more than three months old, but in fact the administrators had already received a more recent letter of authority.

The relevant transfer documents were sent to the Applicant on 24 March and the administrators received her transfer form on 30 March 2015. On 6 April 2015 changes were made to the legislative requirements for a scheme to be a recognised overseas pension scheme to introduce a new requirement that the transferred benefits are payable no earlier than they would be under a registered pension scheme. This meant that if the benefits could be paid earlier, the scheme would not be a recognised overseas pension scheme and a transfer to it would be an unauthorised payment. Following this change in legislation, HMRC suspended its list of recognised overseas pension schemes on 17 June 2015 and schemes which did not meet the new requirements were not included on the new list of recognised overseas pension schemes published on 1 July 2015.

Between April and November 2015 there was some correspondence between the Applicant and the administrators about the transfer including that on 30 June the administrators stated that the transfer was progressing and would be completed by 21 July 2015.

However, by this stage HMRC's list had been suspended and the proposed receiving scheme was no longer on the list. On 7 November 2015 the administrators informed the Applicant that the transfer could only proceed if the scheme was on HMRC's list of recognised overseas pension schemes but the proposed receiving scheme was no longer on it. During the scheme's internal dispute resolution procedure (IDRP) it was concluded that the delays resulted in the Applicant missing the opportunity to transfer her benefits to her chosen receiving scheme and she was offered £300 compensation for the distress and inconvenience caused.

CONCLUSIONS

An Adjudicator and the DPO concluded that the legislation does not allow the transfer to be made and the scheme rules also prevent an unauthorised payment from being made. The DPO noted a provision of the Finance Act which states that an unauthorised payment is exempt from being scheme chargeable if it is being made to comply with the order of a court or a person or body with power to order the making of the payment. Whilst the DPO thought that this provision could save the scheme from exposure to a tax charge, she concluded that it does little to assist because it would not make the payment authorised and it would therefore still be caught by the prohibition in the scheme rules. It was also concluded that whilst the Applicant will not receive her benefits in the way that she wants to, she will still receive her correct benefits from the scheme and therefore cannot demonstrate a direct financial loss. However, the DPO stated that there was a "*serious loss of expectation*" as to how the Applicant was to use her savings in her retirement. The Adjudicator and the DPO also concluded that this case warranted a higher payment for distress and inconvenience than had been offered. The DPO stated that the record keeping failure, failure to recognise the initial instruction to deal with the IFA and the delay meant that the Applicant has "*suffered a wrong which cannot now be righted*" and that correspondence from the administrators stating that the transfer was progressing elevated her expectation that the transfer would be made. The administrators were therefore directed to make a payment of £2,000 in respect of the significant distress and inconvenience.

TRANSFER VALUES

BACKGROUND

The legislation in relation to transfer values for occupational pension schemes provides that, in certain circumstances, trustees may reduce cash equivalent transfer values (CETV) to reflect the funding situation of the scheme. In order for this to be possible, trustees must have an insufficiency report from the scheme actuary about the funding of the scheme.

In September 2016 the Applicant in this case (PO-17096) applied for a CETV. In order to help them decide whether or not they could continue to pay CETVs in full from the scheme, the trustees requested an insufficiency report from the scheme actuary. The actuary's report included that: (i) the funding level of the scheme as at 30 September 2016 calculated using the agreed CETV basis was 84.9% which meant that the maximum reduction that could be applied to a CETV was 15.1% which was equivalent to a 45% reduction to the part of the CETV in excess of Pension Protection Fund (PPF) levels of compensation; and (ii) when making their decision on whether or not to reduce CETVs the trustees should also bear in mind a number of other matters including the recovery plan, the strength of the employer covenant and whether the employer would be prepared to pay additional funds so that unreduced CETVs could be paid.

The trustees decided to apply a 45% reduction to that part of the Applicant's CETV in excess of PPF levels of compensation. In November 2016 the trustees sent the Applicant a statement showing a CETV of £967,934.83. The reduction that had been made meant that the CETV quoted was £223,043.51 less than it would otherwise have been and the statement sent to the Applicant informed him of this. The Applicant's complaint relates to the reduction of the CETV.

CONCLUSIONS

An Adjudicator at TPO's office concluded that no further action was required by the trustees. The Adjudicator stated that, in accordance with the legislation, the trustees obtained an insufficiency report from the actuary which showed that the scheme had a deficit using the CETV basis and a reduction could therefore be applied. The Adjudicator also stated that: (i) the Pensions Regulator has suggested that trustees should not rely solely on the insufficiency report itself as a reason to reduce CETVs and recommends that, in addition, trustees should take other factors into account such as the level of underfunding, the strength of the employer covenant and the structure of any recovery plan; (ii) the actuary's report recommended that the trustees take these factors into account; (iii) there was no reason to doubt that the trustees gave serious consideration to the contents of the actuary's report including these recommendations before making their decision; and (iv) the trustees ultimately decided to reduce CETVs in order to protect the benefits of members remaining in the scheme because the circumstances of the scheme indicated that this was necessary. The Applicant had stated that he had little choice but to accept the reduced CETV. However, the Adjudicator stated that the Applicant could not claim for a loss that he could have mitigated and that he did not have to proceed with the transfer.

The DPO agreed with the Adjudicator's opinion and concluded that the evidence is clear that the trustees have fully complied with the criteria in the legislation to reduce CETVs and there has not therefore been any maladministration on their part. The complaint was not therefore upheld. It is also worth noting that the Applicant had raised some points about funding and investment of the scheme but the DPO stated that these are a matter for the Pensions Regulator, not TPO.

This case provides a useful reminder for trustees to ensure that the requirements of the legislation are followed and other relevant factors are considered when deciding whether or not to reduce CETVs in order to minimise the risk of successful complaints about the decision.

ILL HEALTH PENSIONS

PO-17191

In October 2013 the Applicant applied for ill health retirement from deferred membership of a public service pension scheme. The decision in relation to ill health early retirement rested with the employer but, before making a decision, it had to obtain a certificate from an independent registered medical practitioner (**"IRMP"**). On 31 October 2014 an IRMP (**"First IRMP"**) gave his opinion that the Applicant did not meet the criteria for ill health retirement and was not permanently incapable of discharging efficiently the duties of her former employment. The employer's ill health panel (**"Panel"**) refused the application and the Applicant appealed through the scheme's internal dispute resolution procedure (IDRP). As part of stage one of the IDRP the First IRMP was asked to clarify his opinion. The appeal was rejected. At stage two of the IDRP the complaint was upheld with the conclusions including that the First IRMP's opinion was not sufficiently detailed. Following this, the employer sought the opinion of another IRMP (**"Second IRMP"**) and reviewed its decision, the outcome of which was that the application for ill health retirement was refused.

Whilst the complaint in this case was not upheld by the PO, it is notable that the Adjudicator's opinion (with which the PO agreed) comments on the fact that the Panel did not directly review any medical evidence in coming to its initial decision but relied solely on the report provided by the First IRMP. The employer had also stated that the IDRP decision-makers did not read the medical reports provided by the Applicant's GP, physiotherapist or any other consultants or specialists. The employer stated that this is normal practice but the Adjudicator stated that it "*is not good practice*". The Adjudicator went on to state that whilst the Panel and the IDRP decision-makers may have no medical background, "*they should review the medical evidence to ensure that there has been no error or omission of fact by the IRMP and that the IRMP's opinion is not inconsistent with the available evidence*" and that "*A difference of opinion between the medical advisers would not necessarily mean that the Panel should not accept the IRMP's view but it may warrant it seeking further clarification*". However, in this case, the Adjudicator and the PO concluded that there was no reason to find that the employer should not have accepted the Second IRMP's opinion and therefore the complaint was not upheld.

Whilst no issues were identified with the Second IRMP's report in this case, the Adjudicator's comments nevertheless demonstrate that, where the decision-maker obtains a report from its own medical adviser, reviewing the other medical evidence can still be important in order for decision-makers to satisfy themselves that there are no errors, omissions or points for clarification.

PO-18280

This case also demonstrates the importance of considering and seeking clarification in relation to medical reports. The Applicant's application for ill health retirement was rejected and she appealed through IDRP. The stage two IDRP decision-maker identified issues with the initial IRMP's report but thought that a second IRMP's report was comprehensive and had been prepared in accordance with the statutory guidance for the relevant public service scheme. However, an Adjudicator at TPO's office disagreed with this assessment of the second report. It was noted that the report mentioned treatment options that the IRMP considered might improve the Applicant's condition but the Adjudicator stated that this did not go far enough. The requirements for ill health retirement under the scheme meant that the expected improvement had to be sufficient to mean that the Applicant would be capable of efficiently discharging her duties before age 65 but the IRMP's report did not specifically say this and neither did it explain why the IRMP believed that the suggested treatments would improve the Applicant's condition to that extent. It was concluded that the employer should have asked for clarification rather than accepting the report. The PO agreed with the Adjudicator's opinion and the complaint was upheld, with the employer directed to pay £500 for non-financial injustice, seek clarification from the IRMP and review its decision.

STATISTICS

JANUARY

NUMBER OF DETERMINATIONS		23
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		19
SCHEME TYPE	Public service scheme	15
	Private sector scheme	8
OUTCOME	Upheld	6
	Partly upheld	1
	Not upheld	16
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£500
	Highest award	£2,000

FEBRUARY

NUMBER OF DETERMINATIONS		48
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		46
SCHEME TYPE	Public service scheme	25
	Private sector scheme	23
OUTCOME	Upheld	9
	Partly upheld	5
	Not upheld	34
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£500
	Highest award	£2,500

* 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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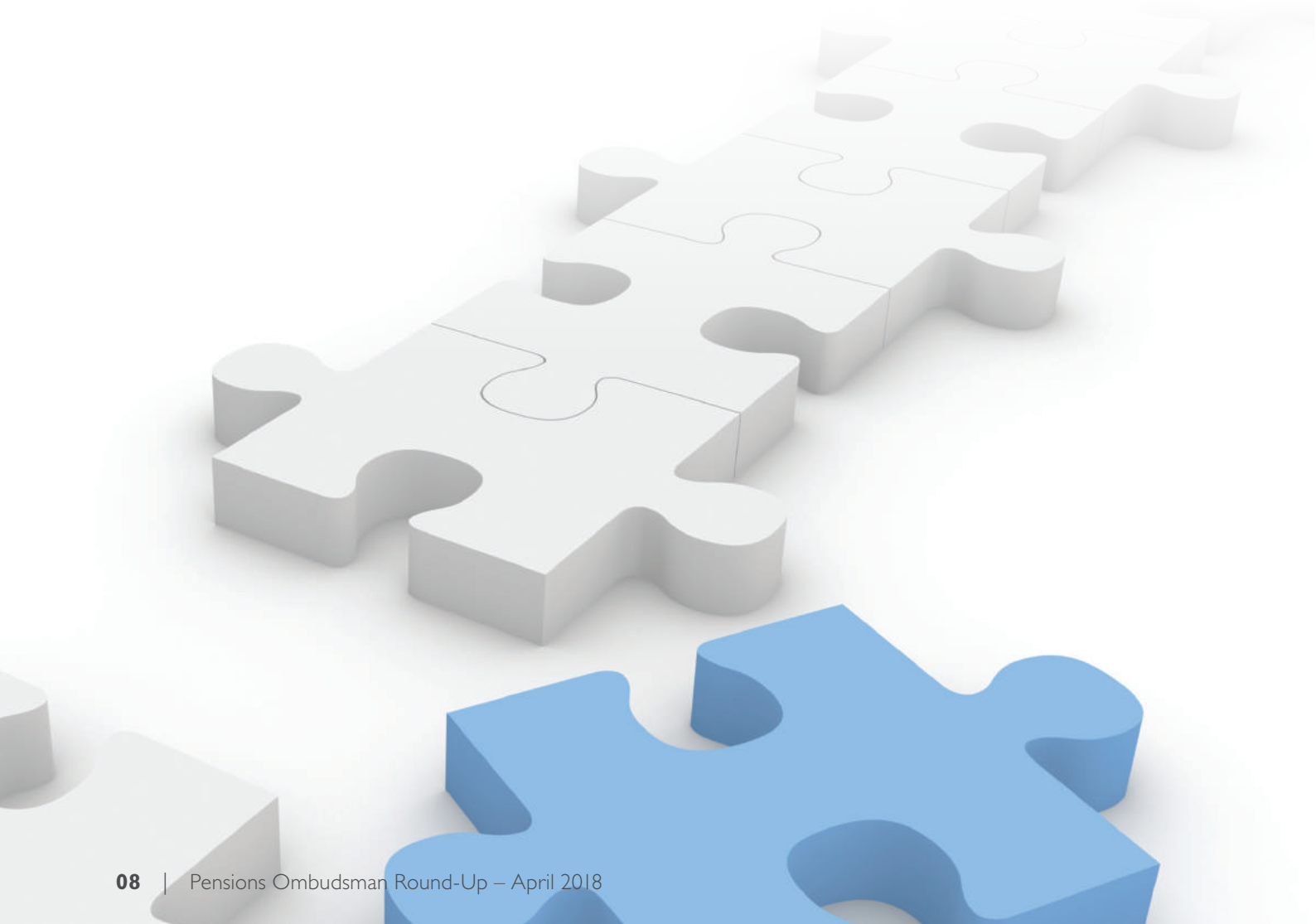

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