



Pensions Ombudsman Update – December 2022

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Failures to pay into schemes remain at the top of the Pensions Ombudsman's (**the Ombudsman**) pile, appearing to constitute the most commonly heard, and most frequently upheld, determinations in recent months. Indeed, the Pensions Regulator (**TPR**) has recently remarked upon the prevalence of automatic enrolment errors, prompting it to issue a **warning to employers** and a further recent **blog**.

Having addressed some auto enrolment issues in both our **May** and **September** Ombudsman Updates, here we turn our attention to other key issues for schemes:

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Mr H – making a decision on discretionary increases when scheme was in deficit

The Ombudsman did **not uphold** a complaint that a discretionary bonus should be paid in relation to a scheme that was in deficit.

Facts

Mr H joined The Growth Plan (the **Plan**) in 1976. He became a deferred member in 1990, with all his contributions invested in ‘Series 1’ of the Plan. Various Plan documents were sent to Mr H over the years which had included reference to the potential ‘declaration’ of bonuses to increase benefits. No such bonus was ever declared.

Mr H wrote to TPT Retirement Solutions (**TPT**) in March 2018 complaining about the lack of bonus, and claiming that he should receive an increase to his pension in payment even if no bonus were awarded. TPT in response explained the bonus and increase systems, the different treatment of different sections (‘Series’) of the Plan, and the Plan’s current deficit.

Mr H raised a formal dispute under the Plan’s IDRP. TPT rejected the complaint at both stages, noting that Series 1 had not been able to afford to award any discretionary increases since 2002, that Series 1 was in deficit, increases were discretionary and would need to be funded by the employer, and such additional funding was not mandatory under the rules of the Plan.

Mr H contacted the Ombudsman. He alleged TPT was using a ‘loophole’ to avoid paying increases to Series 1 members while applying them to Series 2. He objected to not receiving cost-of-living increases, which had caused him a significant loss over a prolonged period, and did not match his expectations when he joined the Plan.

The determination: Mr H (CAS-33253-W9R0)

Decision

The Ombudsman did not uphold Mr H’s complaint: there was no requirement for a discretionary payment to be made. Under the rules, any bonus was to be determined at the trustee’s discretion, after obtaining actuarial advice. Forecasts were not guarantees and whilst there had been an intention for bonuses to be paid where possible, as the Plan was running on a deficit, the trustee had to ‘consider the impact that paying bonuses would have on the ongoing solvency’.

Trustees are ‘required to have regard for the employer’s ongoing financial viability’. Here, the employer was making deficit reduction contributions to fund existing liabilities. Increasing the costs on the employer when there was an existing funding deficit was likely to adversely affect them. Trustees are also required to manage their schemes for the benefit of all members. Here, the award of discretionary increases would be likely to increase the Plan’s deficit, and in turn adversely impact the other members.

Increases to pensions in payment applied to Series 2 of the Plan in compliance with legislation (the Pensions Act 1995) for those in active service after 1 April 1997; this was not a ‘loophole’. Further, Series 1 was not being used to fund any other section of the Plan.



The Trustee’s main responsibility is to meet the funding requirement of its contractual liabilities... not to award discretionary bonuses which are ordinarily paid out of a surplus.

Impact

In the current economic climate, schemes are naturally facing requests to consider discretionary increases. For advice on the proper exercise of the decision-making process in this context, see our **September** Ombudsman briefing (Mrs R). Schemes should also have regard to TPR’s guidance on **granting discretionary benefits**, which sets out similar factors to this case (albeit in the context of transfer values).

Liaising with the scheme sponsor is vital. Here, the Ombudsman is clear that trustees should take into account the scheme’s funding position and the possible adverse impacts of granting increases, taking a holistic rather than short-term view.

Finally, we would remind you that trustees should be careful to record their decisions, along with the reasoning and evidence considered.

The cost-of-living crisis of course raises many other issues, including in relation to member communications, scheme journey planning, and the prevalence of **scams**. Get in touch with the Pensions team to discuss any questions you may have.

Ms R – Dignity and respect: a claim for discrimination, and a minor error creating trouble

The Ombudsman has **confirmed** that where public sector scheme regulations defining a normal retirement age (**NRA**) conflict with state pension age (**SPA**), the regulations took precedence.

Facts

In March 1992, Ms R became a member of the Local Government Pension Scheme (the **LGPS**). She left employment in August 1997 and became a deferred member.

Deferral of Pension

In 2017, Ms R requested deferral of her benefits until age 66 as she needed to work until then. Derby County Council (**DCC**), the administering authority for Ms R's section of the scheme, responded confirming that the pension had to be paid at 60 (ie her NRA) as the applicable governing LGPS Regulations 1995 (the **Regulations**) did not permit deferral beyond this.

Ms R raised a formal complaint. Amongst other things, she argued that the Regulations did not treat men and women equally. DCC rejected her complaint, including on the basis that the rule applied equally to men and women (with the definition of normal retirement date also encompassing men aged 60).

Ms R expanded her complaint at Stage 2, arguing that DCC was contravening equality law and was in violation of the European Convention on Human Rights (**ECHR**). DCC sought clarification of its interpretation of the Regulations from the Local Government Association, but eventually rejected the complaint. They confirmed the Regulations applied equally to both sexes, as the relevant factor was years of service (and not age).

The determination: Ms R (CAS-65170-S1N9)

Benefits statement

In addition to the above, in 2020, DCC issued Ms R with a benefit statement showing a higher yearly pension but lower lump sum entitlement than her 2019 statement had. Ms R complained.

Decision

The Ombudsman did not uphold the complaint.

In respect of the deferral of pension, the Regulations had their own definition of NRA; SPA was therefore not applicable, and did not override. In any event, the provisions in question applied equally to men and women and were not discriminatory. The fact that Ms R did not agree with the Regulations and the change in the SPA did not mean that she had 'not been treated with dignity and respect'. The Regulations were drafted to reward long service and allow members to take a pension earlier than age 65; that the unrelated increase in the SPA meant that Ms R needed to continue working was unfortunate, but unrelated.

It also held that no compensation was required in respect of an incorrect benefit statement. Ms R could not make out financial loss (ie showing direct and reasonable reliance on the misstatement, and that reliance resulting in an irreversible loss). Whilst DCC admitted providing incorrect information amounted to maladministration, the Ombudsman did not consider that an award for significant non-financial injustice was necessary, as they had taken action to rectify the errors in a timely manner.

Impact

Ms R raised a number of potential discrimination claims, including ECHR protection, the McCloud judgment (see page 5), and the Parliamentary and Health Service Ombudsman investigation into the DWP's notice procedures when women's SPA was raised from 60 to 65. It has been relatively rare for discrimination claims to come before the Ombudsman, but recent publicity for the likes of the above cases may bring more to his desk. However, the determination reminds us of some of the limits of the Ombudsman's powers – it can neither 'change or create new legislation' (as Ms R had hoped), nor investigate complaints that relate to the State Pension.

The case also serves as a reminder of how often benefit statement mistakes can cause trouble, even where seemingly minor. Here, erroneous figures over two years added fuel to the fire of an already upset member and gave further grounds for complaint. Where schemes make such an error, they need to be proactive to correct the issue, and to do so as speedily as possible.



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Mr R – Ill health early retirement – correct decision; incorrect process

The Ombudsman has **partly upheld** a member’s complaint regarding early payment on the grounds of ill health due to the poor administration of the process, despite the decision itself being correct.

Facts

Mr R was employed by Denbighshire County Council (**Denbighshire**) from December 2002 until December 2017, when his employment was terminated on ill health grounds. He was a member of the LGPS.

Mr R retrospectively applied for Ill Health Early Retirement (**IHER**) from active status but his application was declined. He complained. The appointed adjudicator found no evidence that Denbighshire had made the decision as required under the relevant regulations (including failing to obtain certification from an independent registered medical practitioner (**IRMP**)). It remitted the decision to Denbighshire to reconsider (having obtained the appropriate medical reports from Mr R’s GP and treating specialists), and in May 2019, D agreed to allow Mr R to apply for IHER from active status.

In July, Denbighshire awarded Mr R a ‘Tier’ 3 IHER, based on the IRMP certification that Mr R was likely to be capable of undertaking gainful employment within the next three years or before his NRA, if earlier.

Mr R raised an IDR Stage 1 in August 2019 on the basis of the length of time it had taken Denbighshire to respond, that no reasons for the decision had been given, and that Denbighshire had not sought clarification of ‘unquantified statements’ in the medical report. The first stage decision concluded that Denbighshire had not properly considered the relevant questions, nor was there evidence the IRMP had assessed their decision against the relevant criteria. Again, the case was referred back to Denbighshire.

Following a new medical report, Mr R was awarded ‘Tier 2’ benefits going forward. Mr R appealed the decision to uphold the original Tier 3 decision, but in October 2020 Denbighshire concluded that its original award had been correct.

Decision

The Ombudsman held that Denbighshire’s failure to instigate the IHER process when terminating Mr R’s employment on the grounds of ill health amounted to maladministration, but concluded that this in itself had not caused Mr R an injustice.

However, aspects of how the claim had been dealt with had caused significant distress and inconvenience:

- Denbighshire appeared to have treated Mr R’s case with ‘no sense of urgency’
- there was ‘a consistent and recurring pattern of delay’ in Denbighshire’s communications and responses. The Ombudsman did not address the point specifically, but Mr R considered the response times particularly problematic in his case, as the ongoing worry and stress had a negative effect on his symptoms
- Denbighshire gave no indication of the reasons for reaching its decision to award Tier 3 benefits
- there was a lack of clarity, both in written and face-to-face communication.

The Adjudicator considered (and the Ombudsman confirmed) these failures amounted to maladministration and awarded £1,000 for serious distress and inconvenience.

Impact

The Ombudsman helpfully sets out that schemes must come to a ‘properly considered decision’ of their own in such cases: a scheme is not bound by the opinion expressed by a medical professional, and the weight to be attached to any evidence is for a scheme to decide. However, it is open to a scheme to accept medical advice it receives unless there is a good reason why it should not.

The determination also reminds schemes that even if the issue in question is historic, the trustee’s process must not be any less thorough. In particular, schemes should ensure they are both following the correct procedure to obtain evidence and also asking themselves the right questions.

As is often the case, letters and records of meetings here were incomplete, undated, and inaccurate – a lack of clarity amounting to maladministration. Careful communication costs little, but can save much later pain.

The determination: Mr R (CAS-58407-X1H0)

Mr Y – A difficult case still requires thorough investigation

The **final determination** contains some useful reminders for schemes regarding good governance, with the Ombudsman making an award for non-financial injustice.

Facts

The Midcounties Co-operative Pension Scheme (the **Scheme**) was established in February 2008.

Mr Y was employed by Oxford & Swindon Co-operative Society Ltd (**Oxford & Swindon Co-op**) from 1978, JD Barclay Limited (which became part of the Oxford Garage Group in 1987) from 1985, and Motorworld Toyota from 1992 until 1997, and was offered membership of their various schemes. JD Barclay, Oxford Garage Group and Motorworld Toyota were franchises of the Oxford & Swindon Co-op. The history is complex, not fully documented, and does not need to be repeated here – but involved various scheme consolidations over the years, ending in the Scheme.

In December 2017, Mr Y's IFA discovered that his benefits seemed to have been calculated using 1992, instead of 1980 as he claimed, as his date of joining the Scheme. Mr Y raised a complaint under the Scheme's IDRPs in February 2018. In April 2018, the IDRPs decision confirmed that the Scheme's records were correct and that consequently Mr Y was only entitled to benefits accrued from 1992 to 1997. Mr Y disagreed and appealed, but in March 2019 he was informed that his Stage 2 IDRPs had also been unsuccessful.



This failure to properly carry out the IDRPs constituted maladministration.

Decision

The Ombudsman reviewed the case.

The trustee of the Scheme held little information about the benefits which Mr Y accrued prior to September 1992 in its records. However, this was partly caused by what the Ombudsman called 'foreseeable difficulties in finding evidence of his membership ... some 30 to 40 years ago', and the relatively complex consolidation history. The trustee was also not responsible for schemes operated by the subsidiary organisations of the Oxford & Swindon Co-op, which had their own trustees and were administered independently. There was consequently no requirement for the Scheme trustee to have full details of Mr Y's membership in his new scheme following his transfers. Although the Adjudicator and Ombudsman empathised with Mr Y's position, that the scheme history was unclear was not sufficient to establish the additional period of pensionable service he claimed.

The Adjudicator and Ombudsman did however note that the trustee had provided the information which Mr Y had requested in a 'fragmented' way. In the Adjudicator's view, the trustee should have been 'more thorough and proactive' in its search for relevant evidence during the IDRPs before notifying Mr Y of its decision. As Mr Y complained, some evidence only seemed to come to light because of the Adjudicator's efforts and Mr Y's perseverance with his case. This failure to properly carry out the IDRPs constituted maladministration. Therefore, although Mr Y had not suffered financial loss as a result of the trustee's management of his case, he had experienced serious distress and inconvenience, and the Ombudsman awarded £1,000.

Impact

TPR's **imminent Single Code** will be shining a brighter spotlight on good governance generally. Scheme processes will need to be up to date, and meet TPR's expectations. Here, the trustee's handling of its IDRPs was criticised. Schemes need to be aware that 'too difficult' is unlikely to be an acceptable response to investigating and collating evidence.

Whilst the Ombudsman didn't find against the trustee on these grounds, the case also highlights the complexity and necessity of good record keeping. With the Single Code on the horizon, schemes should look at their record keeping processes and policies. Careful record keeping also, as the determination points out, needs to be balanced with Data Protection compliance, as schemes cannot not keep personal data for longer than necessary.

From a member perspective, the **forthcoming pensions dashboards** (which will require schemes to thoroughly review their data) may assist with keeping tabs on their pensions through the years. Schemes may also wish to direct members with concerns about missing pensions to the Pension Tracing Service.

Speak to the Pensions team for advice on any of these issues.

The determination: Mr Y (CAS-31321-F4H2)

Ombudsman news:

Following the announcement of Dominic Harris' appointment as the Ombudsman with effect from January 2023, outgoing Ombudsman Anthony Arter was confirmed as one of two **appointments to TPR's Determinations Panel**. The **Panel** is responsible for making formal decisions relating to cases where TPR seeks to use certain powers.

In October, PASA – the Pensions Administration Standards Association – published **Good Practice Guidance on DC Transfers**. Its primary aim is to 'improve the overall saver experience through faster and more secure transfers'.

It is worth noting that while the Guidance is voluntary, PASA anticipates that the Ombudsman will reference it when reviewing complaints as a source of what good industry practice looks like.

Although not relevant in the case of Ms R (see page 2), schemes that may be affected by McCloud and Sargeant age discrimination complaints should note the Ombudsman's **July 2022 factsheet on its approach** to these issues.

Government work on age discrimination in public service schemes, and the McCloud remedy, continues. Most recently, HMRC published **draft regulations and guidance** on the proposed changes to the tax framework in relation to the public service pensions remedy.

For advice on public sector pensions generally or McCloud issues specifically, please speak to our **team**.

Ombudsman publication updates:

- The Ombudsman has updated its **'Determination by the Ombudsman' factsheet**; this includes information on complying with the Ombudsman's directions, and appealing against a determination
- On **'Ombuds Day'**, the Ombudsman published **'A Day in the Life of...'**

Recent and forthcoming from TLT's Pensions team:

- See our **'Key issues for pension trustees' agendas - September 2022'** briefing for current hot topics and expected developments.
- Our recent briefing on TPR's enforcement and prosecution policies discusses **what to expect if you are the subject of enforcement action**

SIPP & SSAS Festival 2023: TLT's SIPP & SSAS team will be hosting its annual conference early in the new year. Look out for a save the date email with further detail.

See also our recent SIPP & SSAS round-up for some recent key Ombudsman determinations in relation to SIPPs and SSASs. These include further cases on the administration of death benefits, and a focus on the need to manage conflicts in decision-making.

TLT's Pensions Litigation Team

Pensions disputes have become a key issue for many employers and trustees. TLT's Pensions Dispute Resolution team are first and foremost pensions lawyers.

We understand the issues facing companies and trustees, and provide clear and realistic solutions based on commercial and practical realities to help clients, whether employers or trustees, achieve the right result.

The team is experienced in dealing with complaints to the Pensions Ombudsman, acting on behalf of individuals as well as employers and trustees.

Disputes involving members and disputes between trustees and employers require careful handling and a pro-active approach.

Most disputes the team have been involved in have not become public knowledge as we pride ourselves on pro-active case management to resolve matters at an early stage, avoiding wherever possible the unwelcome cost exposure involved in full blown litigation.

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“They are the best pensions lawyers I have ever dealt with: they are responsive and practical,” says an impressed source.

Pensions, Chambers

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