



Pensions Ombudsman Update – September 2022

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Mrs R – decision not to award discretionary increase was properly taken

The Pensions Ombudsman (the **Ombudsman**) has **rejected** a member’s complaint that they should have been awarded a special increase, finding that the decision was properly reached.

Facts

Mrs R was an employee of Lloyds Banking Group (the **Bank**) and a member of the Lloyds Banking Pension Scheme Number 2 (the **Scheme**). In April 2016, Mrs R became aware that other members of the Scheme had received a ‘special increase’ to their pensions.

In April 2018, Mrs R wrote to the scheme administrator, Willis Towers Watson (**WTW**), complaining that she met the qualifying criteria for the special increase as set out in a 2015 Special Pensions Information Sheet (the **Criteria**). One condition was that a member had reached the age of 65 between 1 April 2014 and 31 March 2015.

WTW informed Mrs R that she did not meet the Criteria because she had reached age 65 on 15 April 2018. The Bank had suspended discretionary pension increases since 2016 in anticipation of the outcome of the (now-famous) series of cases relating to **GMP equalisation**, after which it said that it would be better placed to consider the application of special increases again. It assured Mrs R that she would be informed if she became eligible in the future.

Mrs R complained to Lloyds Banking Group Pension Scheme Trustees Limited (the **Trustee**) under the Scheme’s IDR, but as ‘special increases’ were awarded solely at the discretion of the Bank, the Scheme’s dispute process was not relevant here. Mrs R complained to the Ombudsman on the grounds that the Bank had a duty of care to provide equal benefit entitlements to all ‘lower paid’ members (and not only those who met the qualifying criteria), and that the Bank had now had ample time to consider the impact of the GMP court case, an issue which Mrs R also argued should be distinct from the consideration of special benefits.

Decision

The Ombudsman did not uphold the complaint. There was no requirement for a discretionary payment to be made to Mrs R. The Bank had exercised its discretion reasonably in suspending special increases while waiting for the outcome of the court case, given the potential impact on funding. Mrs R did not meet the Criteria, and the Trustee, Bank and WTW had ‘consistently and appropriately’ informed Mrs R that she was not entitled to a special increase on her pension.

The determination: Mrs R (CAS-46341-T0B3)

Impact

Amid rising inflation rates and the cost-of-living crisis, trustees are likely to find themselves under increasing pressure to consider discretionary increases in coming months as schemes’ current increase caps fail to keep pace.

While the decision in question here was outside of the Trustee’s remit, schemes faced with a discretionary increase decision should check their rules to determine what is permitted. Although trustees must fulfil any obligation set out in their rules to consider discretionary increases, they would not be obliged to grant one.

In decision-making, both trustees and employers need to ensure that they have followed a proper process, considering all relevant factors, disregarding irrelevant ones, and reaching a reasonable decision in the circumstances. The weight to attach to any piece of evidence is for the decision-maker to determine. See our **May 2022 Ombudsman Update** (Mr F) for further discussion on exercising discretions.

In this case, communication was key. Schemes should ensure that their members are clearly, ‘consistently and appropriately’ informed of any qualifying criteria, their process, and the outcome of discretionary decisions.



Trustees are likely to find themselves under increasing pressure to consider discretionary increases

Mrs NiR – lengthy and avoidable delay to payment of death benefits was maladministration

The Ombudsman has **found** that delayed payment of a death benefit constituted maladministration, and held the respondents liable for the resulting tax charges.

Facts

Mr D was a member of The Railway Pension Scheme Greater Anglia Section (the **Scheme**), for which Railways Pension Trustee Company Limited (**RPTCL**) was trustee. Railpen was responsible for the day-to-day administration of the Scheme. Mr D died in June 2018 and did not appear to have left a will or completed a Nomination Form.

Abellio East Anglia Ltd (the **Employer**) was first contacted in June 2018 by Mr D's ex-spouse, who noted her daughter was next of kin and the sole beneficiary to any life policies. The Employer was also contacted by Mrs NiR, Mr D's eldest daughter. In order to obtain Mr D's death certificate, the Employer tried to also contact Ms N, Mr D's apparent current spouse, until August 2018 after which time it ceased its efforts.

Railpen was notified of Mr D's death in June 2018, but other than chasing the Employer for the notification of death, it did not follow up the matter until October 2019. Further issues arose in obtaining the documents and forms required, with the case also complicated by the family history, untraceable potential beneficiaries, and changes of name. As a result, on 28 June 2020 the two year period for the (tax free) payment of the death benefit by the trustee expired. On 2 November 2020, the lump sum was paid with 45% tax deducted. Mrs NiR complained on behalf of Mr D's estate that the trustee's and Employer's unreasonable delay had caused the estate to incur an increased tax bill.

Decision

The Ombudsman upheld Mrs NiR's complaint.

It is a trustee's responsibility to ensure that benefits are paid in a timely manner to the correct beneficiaries, but the Ombudsman found no evidence here that RPTCL was ever made aware of Mr D's death. Railpen had ignored its responsibilities as administrator by failing to take appropriate action until October 2019, an avoidable 15 month delay, and the Employer's failure to contact potential beneficiaries who it had been informed might hold the required documentation amounted to maladministration.

The Ombudsman determined that while some responsibility for the delay lay with Mr D's next of kin, potential beneficiaries and representatives of his estate, this did not absolve the Employer or Railpen of their share. It directed Railpen and the Employer to each pay Mr D's estate £17,506.48, representing one third of the tax charge.

The determination: Mrs NiR (CAS-55335-N3F2)



It is a trustee's responsibility to ensure that benefits are paid in a timely manner to the correct beneficiaries.

Impact

Schemes need to be aware of where tax charges can arise on the payment of a benefit outside certain limits. Where maladministration causes a delay, schemes could find themselves liable to pay a proportion of the resulting charge.

Trustees must be alive to their responsibilities in paying death benefits in a timely manner to the correct beneficiaries. For more information on the considerations for exercise of discretion in relation to death benefits, see also the recent case of **Mr Y**.

Schemes should progress matters proactively – while remaining sensitive to the fact that such cases come at a difficult time for the families involved (here, a persistent but fruitless line of questioning caused distress). Good communication, as ever, is key.

Schemes must ensure that they have proper processes in place to deal with the payment of death benefits – including being clear about where responsibility lies, to ensure the right parties are informed and involved. Trustees should then review these processes periodically, particularly in light of experience – what lessons has the scheme learned, and what could be done differently? In circumstances where normal processes are not proving effective, schemes should explore alternative options.

Mr N – restriction on switching of funds was reasonable

The Ombudsman has **rejected** a member’s complaint that they should be compensated for investment loss which they argued was attributable to a decision to suspend fund switching.

Facts

Mr N was a member of the Network Rail Defined Contribution Pension Scheme (the **Scheme**). In July 2016, Network Rail Pension Trustee Limited (the **Trustee**) informed members that the NRDC Property Fund, which was invested with Aviva, was experiencing a rush of investors wanting to sell units and in response Aviva was applying a 12-month restriction on divestments from it (the **Restriction**). In November 2017, Aviva announced that it was also applying a rolling 12-month deferral period to switches, running from the date of an investor’s request.

In August 2018, Mr N submitted a switch request and was informed by the administrator, Capita Employee Solutions (**Capita**), that the Restriction was still in place. Mr N submitted further switch requests and in response Capita informed Mr N that his request was queued and would be on hold until the Restriction had been lifted. In September 2019, Capita confirmed Mr N’s holding in the Fund had been divested.

Mr N complained that Capita had not kept him properly informed of the Restriction and that the Restriction was not permitted to be in place for this length of time. Capita apologised and offered Mr N £200 for his inconvenience. Mr N then complained to the Trustee that he had lost out on investment returns due to the time taken to divest his holding in the Fund. The Trustee responded under both stages of the Scheme’s IDRPs holding that Capita’s ex-gratia payment was reasonable, and that it was not responsible for any financial loss because the Restriction on switching was not under its control. Mr N complained to the Ombudsman.

Decision

The Ombudsman did not uphold Mr N’s complaint. Although Capita had provided ‘inadequate’ updates to Mr N and had not properly explained the queuing system or provided updates at the end of the original Restriction period, the offer of £200 was sufficient in the circumstances.

The Ombudsman determined that it was reasonable for Aviva to take the action it did because it had a responsibility to protect the interests of all investors in the Fund. Neither the Trustee nor Capita had any say in the measures taken, and so the delays in the divestment of Mr N’s holdings were not within their control and they could not be held responsible for Mr N’s financial loss.

The determination: Mr N (CAS-49215-L8W8)



It is crucial that good communication is maintained with members.

Impact

Suspension of the ability to sell (or ‘gating’) property investment funds was common practice in the wake of Brexit. Where funds impose measures to restrict or suspend switching and trustees have no control over such decisions, they are unlikely to be held responsible for any financial loss suffered by members. The decision on the part of a fund to restrict switching is likely to be found to be reasonable in circumstances where the decision protects the interests of investors, and particularly in circumstances of economic uncertainty. However, schemes should take advice as to their obligations if such circumstances arise.

Trustees should also be mindful that members must be regularly and proactively informed of any restrictions on their investment options, and kept updated if any conditions in relation to them change. While trustees may not be responsible for the decision to restrict fund switching (or similar) or the length of restriction, it is crucial that good communication – including keeping to any promises made as to regularity – is maintained with members throughout.

Miss S – automatic enrolment notifications may be emailed – but must be correct

The Ombudsman has **rejected** a complaint that an emailed automatic enrolment notification was invalid and therefore that the member's contributions should be refunded.

Facts

Miss S began employment with Office Angels Limited (the **Employer**) in September 2019 and was automatically enrolled into the NOW: Pensions Trust (the **Scheme**) in December 2019. On 3 January 2020, NOW: Pensions (**NOW**), the Scheme administrator, sent an email to Miss S notifying her of her enrolment and informing her of the opt-out process.

In February 2020, Miss S complained that she had not received the notification email from NOW and so had missed the chance to opt out. She argued that an email was not a valid form of notification, and that she was therefore entitled to a refund of her contributions (rather than becoming a deferred member). Miss S stated that she had provided a new email address to the Employer on 4 October 2019 and noted that this email address should be used for any future communication.

NOW considered Miss S's complaint under the Scheme's IDR but did not uphold it. Miss S complained to the Ombudsman.

Decision

The Ombudsman did not uphold the complaint.

It determined that Miss S had been validly notified of automatic enrolment. As set out in the Pensions Regulator's guidance, email is an acceptable communication method for such notifications.

The evidence suggested that the Employer failed to pass on the details of Miss S's new email address, and this amounted to maladministration. However, Miss S had not suffered any financial loss as a result, as the contributions had not been

lost but were invested (or could be transferred if so wished). Furthermore, there was no requirement to obtain prior member consent to automatic enrolment. Therefore Miss S had been correctly auto-enrolled into the Scheme.

The determination: Miss S (CAS-58165-P0N1)

Impact

While various aspects of the determination are reassuring for trustees (notification by email being approved; consent to enrolment not being required; maladministration not being compensated unless it has caused financial loss), schemes must be careful to ensure automatic enrolment communications are timely, appropriate, and correct.

In another recent complaint, the Ombudsman ordered an employer to refund a member's automatic enrolment contributions: **Mr S** had argued that his employer provided an incorrect date of birth and National Insurance number when enrolling him, and therefore his automatic enrolment scheme held the wrong details on his file with the result that he could not prove his identity when he requested to opt out. The Ombudsman held that these errors constituted maladministration and ruled that Mr S's contributions should be refunded with interest (although no award for distress and inconvenience was made).

It is worth also noting the recent First Tier Tribunal case of **Moan**, where an employer's failure to supply correct

auto-enrolment information extended a member's opt-out window. The Tribunal found that the employee had received an email from the employer (and deleted it, believing it to be junk) – but containing incorrect auto-enrolment information. It held that, had the information been accurate, the email would have successfully "given" notice to the employee. As the time period for opting out ran from the date on which the required enrolment information was "given", it could not start to run until the correct information had been provided.

The cases should also serve as a reminder that trustees and scheme administrators should have clear and regular processes in place for members to update their contact and personal information – to protect against the risk that a member does not receive relevant scheme notifications, and to help ensure a scheme's data generally is as up to date and complete as possible.

Ombudsman news:

The Work and Pensions Committee (WPC) has **confirmed the appointment** of Dominic Harris as the new Pensions Ombudsman and the PPF Ombudsman, from 16 January 2023. He replaces Anthony Arter, whose extended term as Ombudsman will end on 15 January.

The Ombudsman has published its **Corporate Plan for 2022-2025** and latest **Annual Report and Accounts**.

Its key goals for the period include reducing waiting time for customers, continuing the work of the Pensions Dishonesty Unit, and working with the industry to improve dispute resolution (before complaints reach Ombudsman stage).

In 2021/22, it closed 74% of pension complaints within 12 months. It received over 6,000 new pension complaints, with the most common topics being transfers, retirement benefits and misquotes/misinformation.

Forthcoming from TLT's Pensions team:

See our **'Key issues for pension trustees' agendas - September 2022'** briefing for current hot topics and autumn's expected developments.

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.

The Ombudsman recently **published a new factsheet** on its approach to McCloud and Sargeant age discrimination complaints.

The **Government intends** to respond to its consultation on age discrimination in public service pension schemes, along with new draft regulations implementing the McCloud remedy, later in 2022, with a consultation on further aspects in 2023.

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

Ombudsman publication updates:

- Schemes may like to consider attending its webinar on **'How to Avoid the Ombudsman'**, to be run on 14 September 2022 in conjunction with Pensions Awareness Week
 - The Ombudsman has updated its **FAQs** for customers; it is working on updates to its stakeholder advice on the **How to Avoid the Ombudsman webpage**
 - New **case studies** on the Ombudsman's website includes Mr S (PO-11134), as reported in our **February 2022 Update**.
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SIPP & SSAS Winter Festival 2022: TLT's SIPP & SSAS team will be hosting its annual conference soon. Look out for a save the date email with further detail.

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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