Pensions Ombudsman Update

MARCH 2023

For what comes next

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Contents

As we noted was the case in our Winter edition, non-payment of contributions complaints show no signs of slowing – remarked upon by the Pensions Ombudsman (**TPO**) itself in its newsletters, and increasingly picked up on by industry and the national press. The Pensions Regulator (**TPR**) continues to seek to **educate employers on their automatic enrolment duties**.

Recent determinations also suggest a rise in discretionary increase complaints (see our **September** and **December** Ombudsman Updates for more on this topic). We also note that failures on the part of respondents to engage with TPO continue to attract criticism and high penalties.

In this edition, we examine a key case on transfer processes – and look at other recent determinations that raise interesting points:

Mrs G – keep your transfer processes up to scratch

The Ombudsman upheld a complaint that a scheme's transfer process was deficient.

Facts

Mrs G complained that Teachers' Pensions (**TP**) did not undertake sufficient due diligence when transferring her benefits from the Teachers' Pension Scheme (**TPS**) to the **London Quantum Pension Scheme** (**LQPS**). LQPS used high risk unregulated assets and Mrs G was unable subsequently to access her benefits.

Mrs G requested a transfer to the LQPS in January 2015, having signed a pro forma letter from a financial adviser which included an acknowledgement that she had read the 'Scorpion leaflet' and was not taking any form of pension liberation. The transfer from the TPS was completed in February 2015. In April that year, Friends Life (with whom Mrs G held other pensions) wrote to her flagging concerns and stating it was unable to proceed with transfers of those pensions to LQPS. Mrs G then complained to TPO, arguing that had TP flagged similar concerns, she would not have transferred her TPS pension.

Decision

TP claimed that Mrs G was exercising her statutory right to transfer, and therefore it was keen to proceed within the relevant timeframes. However, TPO noted that Mrs G's transfer application fell after expiry of the statutory deadline (in force at that time), meaning that the scheme was no longer under a statutory duty to make the transfer. TP had prioritised processing the transfer quickly, partially because it had been criticised for delays in other cases. But while the demands of making transfers within statutory timeframes and with sufficient due diligence may compete, one should not mean the other fails. In TPO's view there was a difference between 'being dilatory and being diligent', and TP had had sufficient time to undertake proper due diligence.

Even had it been a statutory transfer, TP was still under a duty to carry out sufficient due diligence. Schemes are only discharged where they have undertaken an appropriate review of a transfer application, taking into account the law and regulatory guidance. Here, TP had failed to implement effective procedures. It was using out of date guidance and checklists, and had not issued proper warnings to Mrs G. In TPO's view, the risks of this transfer should have been immediately apparent: TP should have spotted the 'clear red flag' that Mrs G had applied to transfer to a scheme sponsored by a geographically distant company for which she did not work.

TPO felt that TP's actions showed a 'surprising' lack of understanding of TPR's clear expectations regarding proper transfer processes to protect members, particularly given that the risks were 'well known throughout the industry'. TPO found TP had 'considerable time to put in place robust and compliant procedures' and therefore its failures amounted to serious maladministration.

Following an oral hearing TPO held that, had TP had proper processes to identify potential scam arrangements, and properly warned Mrs G of the risk posed, Mrs G would have been unlikely to have proceeded with the transfer. TP was ordered to reinstate Mrs G's accrued benefits in the TPS, and pay £1,000 to reflect the serious distress and inconvenience suffered.

Impact

Of course, all transfer cases are fact specific (see for example the November 2022 determination in the **case of Mr N**, where no maladministration was found), but this lengthy determination usefully walks through what TPO (and TPR) expect. Key is that schemes must stay on top of new legislation or changes to guidance on scams (see our **February 2022 update** for more on this), and keep pace with general industry practice in this area. On this note, schemes should stay abreast of developments under the **'new' transfers regime**, including the outcome of the DWP's imminent review of the regulations.

One point worth noting is that TPO remarked that it was not appropriate for a scheme to adopt an 'excessively technical reading' of guidance, but to consider its 'overall tone' (here, the 'tone' of the guidance was that a transferring scheme should engage in a dialogue with members looking to transfer out, to understand the transfer and more easily spot any issues). Whilst this is understandable, it also leave schemes having to weigh up legislation, guidance (which already may not precisely match), and 'intention'. Take advice: ensure you understand the up to date position – and the complexities.

The determination: Mrs G (PO-26616)

Mr N – a lack of coordination was maladministration

TPO made an award for serious distress and inconvenience sustained as a result of an uncoordinated approach to administering members' claims.

Facts

The detail of the case is complex, and includes claims for miscalculation of benefits, negligent misstatement and estoppel that were not accepted, and various elements that were either out of time, outside TPO's jurisdiction, or introduced at too late a stage and so could not be heard. However, the case contains some learning points in relation to the administration of claims for (for example) ill health benefits.

Mr N was a member of the Principal Civil Service Pension Scheme. He applied for injury benefit, ill health early retirement (**IHR**), and Early Payment of a Preserved Award in 2018. Civil Service Pensions (**MyCSP**) administered the scheme and Mr N's applications. The process was drawn out, complex, and problematic, and Mr N complained.

Decision

Whilst Mr N's case was complicated by the fact that he was applying for three separate benefits, each of which having steps that needed going through, TPO held that the process as a whole became a series of administrative mis-steps, including:

- The time taken from first application to Mr N's receipt of benefits was over 2.5 years;
- Following a delayed response from Mr N's employer in relation to the injury benefit application, MyCSP asked Mr N to complete another application form as it claimed the first was now 'out of date'. There was nothing, however on the form he had received to indicate it was time limited in any way;
- Mr N had to complete a minimum of five forms, and provide the same information on more than one occasion;
- MyCSP itself delayed in providing missing details relevant to the application;
- The scheme medical advisor refused to cross-reference GP consent forms across the various applications, and then closed an element of the case because of missing details;
- MyCSP had asked Mr N's employer for a severe ill health certificate before processing his quotation, which had not been required and which had delayed Mr N's eventual award.

In addition, the determination notes various basic governance errors, including poorly kept records.

After a stage 1 IDRP hearing, MyCSP had apologised and offered Mr N £500 as an ex-gratia payment. The Adjudicator had recommended a further £500 be paid, but MyCSP argued for a lower award.

TPO held that there had been a 'complete lack of coordination' around Mr N's case. While MyCSP were not responsible for all of the delays, it had been best placed to ensure that due process was followed with minimum stress for Mr N at what was already an extremely stressful time for him. 'Instead, it appeared to have adopted a rather passive approach and acted in the manner of a post-box'.

The delayed consideration of one application was not 'significant', but together with the issues faced during the other two applications, it became so - the 'rather chaotic approach' taken warranting this higher level of award in line with **TPO's guidance**. TPO therefore ordered MyCSP to pay Mr N the recommended further £500 for the serious distress and inconvenience he sustained as a result of its uncoordinated approach to administering his claims.

Impact

This determination is a reminder for schemes to ensure that their governance processes are up to scratch – here, including record keeping, member communications, claims processes for benefits, and dispute procedures. The best procedures will not only be thorough and technically correct, but efficient, practical, and causing least additional stress to members. Good channels of communication and liaison between parties such as employers and medical advisers and the scheme should also be established and maintained to smooth the processes.

Schemes should in addition be sensitive to the fact that claims for ill health and death benefits, for example, generally come at a stressful time for the people involved, and so they should consider how to avoid unnecessary work for claimants and delays in these processes.

> It appeared to have adopted a rather passive approach and acted in the manner of a post-box.

The determination: Mr N (CAS-57631-L2T8)

Ms N – a failure to consider all relevant evidence

TPO has partly upheld a member's complaint regarding an application for ill health early retirement (IHR) due to the fact that the scheme did not follow a reasonable process when it decided not to exercise discretion and extend the time within which the member could make their application.

Facts

Ms N was a member of the TPS, and on long term sickness absence from the college at which she worked. Her employment was terminated on the grounds of ill health in October 2012. An initial exchange (in July 2012) with her employer about IHR benefits was not progressed. She finally applied in September 2015, at which point Ms N was outside the period in which enhanced ('in service') IHR could be considered.

The Teachers' Pension Scheme Regulations 2010 would have allowed the Department for Education (**DfE**) scope to exercise their discretion to extend the period in which an enhanced application could be made. They declined to do so, holding that the member had not been prevented from or deprived of their opportunity of making the application within the prescribed timeframe. Ms N complained.

Decision

The DfE's reasonableness or otherwise in declining to extend the application timeframe turned on the specific facts of the case.

The Adjudicator concluded that Ms N's state of health during the period concerned should have been a relevant consideration given the nature of her case. 'Where the exercise of discretion concerns an application for IHR, a reasonable course of action would be for the decision maker to consider the relevance of any medical evidence'. Ms N had argued she was 'gravely ill' during the potential application period. 'The DfE restricted itself considering whether Ms N has been misadvised and therefore did not consider all relevant evidence, constituting a procedural failure – and therefore maladministration.'

The DfE was directed to make a new decision, supported by appropriate evidence, on whether to exercise its discretion to extend the application period – but TPO could not and did not direct which way the decision on this was to go.

Ms N was awarded £500 for the 'significant' distress and inconvenience she had suffered as a result of the maladministration, delays and uncertainty.

The determination: Ms N (CAS-36953-V4C6)

Impact

The case contains some useful reminders on the exercise of discretions:

- It is not for TPO to agree or disagree with a scheme's decision. TPO can only intervene if the scheme has taken into account an irrelevant factor, ignored a relevant one, otherwise misdirected itself (eg failed to ask the correct questions, or failed to construe and follow the relevant rules or regulations correctly) or reached a 'perverse' decision. TPO's role is to consider whether the procedure a scheme followed was reasonable, and it cannot overturn a decision merely because it might have acted differently (see as a contrast the **recent case of Mr R**, where no maladministration in decision-making was found).
- There are well-established principles which a decision-maker is expected to follow. Amongst these, it must consider and weigh all the relevant evidence, but the weight (if any) to attach to any piece of evidence is for the decision-maker to determine. The requirement is that the evidence is considered; a decision to give little or no weight to any evidence (within the bounds of reasonableness) is not the same as failing to consider it.
- The decision-maker must consider the particular merits of a member's case rather than applying a blanket policy. While it is reasonable for a decision-maker to have regard to any established or published policies, it should not be fettered by them (unless the relevant rules or regulations expressly allow for this).
- Decision-making policies and procedures should be regularly reviewed, along with any policies relating to specific benefits. Schemes may wish to consider taking discretionary decision-making training to ensure that their standards are up to scratch.
- In addition, the scheme in this case was asked to ensure Ms N was notified of its decision, with a detailed and reasoned explanation of how it had been reached – essential practice in all decision-making cases.

Dr R – trying to explain the (nearly) inexplicable

The final complaint is a reminder of the complexity of pensions and how difficult this can be to convey to members.

Facts

Dr R's complaint concerned the decision of the Trustee of the JPMC UK Retirement Plan (**the Plan**) not to allow him to transfer a proportion of his benefits from the scheme.

The Plan was a defined contribution scheme. Some of Dr R's benefits were subject to an underpin (**the Underpin Benefit**), as he was contracted out of the State Earnings Related Pension Scheme at the time that he accrued his benefits. The value of the Underpin Benefit was therefore to be used to provide a Reference Scheme Test (**RST**) pension on retirement. (An underpin is in effect a promise to top-up benefits where they do not reach a certain level – a guarantee as to a certain level of payment).

The cost of providing the RST pension from the Plan was estimated at £50,174 (with the CETV for the Underpin Benefit, £41,676).

The Trustee informed Dr R that he needed to take advice before being permitted to transfer from the Plan, because the Underpin Benefit meant that he had 'safeguarded rights'. Legislation requires that members must confirm that they have received advice from an independent financial adviser (**IFA**) where safeguarded rights total over £30,000.

Dr R argued that the Trustee had classified his benefits (as being safeguarded) incorrectly, and that, even were the classification correct, they had calculated the value of this benefit incorrectly. In addition, he argued that he should not need to obtain IFA advice – on the basis of the cost of the advice (several thousand pounds), its limited availability, and his own knowledge levels (having 'expertise…in the finance industry'). He claimed the requirement and that such advice itself coming at a cost had resulted in him 'having to rearrange his financial plans', and made the 'law look ridiculous'. He called the Trustee's categorisation and valuations 'absurd', and requested compensation for both the impact on his financial plans, and for the time and effort spent.

Decision

TPO did not uphold Dr R's complaint, finding that no further action was required by the Trustee or actuary.

TPO agreed with the Plan's analysis that these were safeguarded benefits (and not, as Dr R claimed, 'cash balance benefits'). Regulations set out the calculation basis to be used for such benefits, and there was no evidence that the actuaries had not calculated Dr R's benefits correctly. The actuary used prudence assumptions which applied to the Plan as a whole and not to Dr R specifically. (More favourable HMRC factors which Dr R quoted, and the valuation of a lump sum from a different scheme he belonged to, were also not applicable to this type of benefit). Providing an RST pension was a statutory obligation, and so member consent was not required – a member cannot choose to forego these.

The requirement to take advice was designed to ensure members got a better understanding of the implications of their decisions. Trustees have to check that relevant members have taken advice; if they do not check, they are in breach of the law and liable to penalties. Trustees do not have discretion to waive this requirement.

There was therefore no maladministration. While TPO appreciated Dr R would be disappointed given his difficulties in obtaining advice, it could not direct trustees to act outside the law.

Impact

In this case, the Trustee seems to have done everything correctly. It is nevertheless a reminder that pensions are a very complicated area. Even those members with financial 'expertise' may struggle to understand the finer details of legislation, particularly where changes have been made over the lifetime of their membership in the scheme, where the legislation does not seem to work as it 'should' (eg, here, the definition of defined benefit not forming part of the test to determine what is a safeguarded benefit), or where protective requirements seem to make an individual's life harder.

Acting 'by the book' in terms of legislative requirements, and ensuring communications with members are clear, consistent and kept updated may all go some way to helping.

The determination: Dr R (CAS-53517-H3N1)

Ombudsman news:

Dominic Harris' term as the Ombudsman started with effect from 16 January 2023. TPO subsequently confirmed that outgoing Ombudsman Anthony Arter would **stay on as part-time Deputy PO** for up to 12 months, exclusively dealing with Determinations. He will complete cases for which he has held Pensions Dishonesty Unit oral hearings, deal with any conflicts which the new Ombudsman may have, and ensure a smooth transition.

TPO has noted that it is aware that its Form of Authority (**FoA**) for its Early Resolution Service are out of date. It notes that due to the volume of work it has at present, it may be some months before it makes contact about a complaint. This may mean that FoAs, signed by the complainant, were signed some months previously. 'We would not however want to delay resolution of the complaint any further by seeking a re-signed form. If you have any questions, please let us know at **stakeholders@pensions-ombudsman.org.uk**'.

The latest version of **PSIG's Code of Good Practice**, which has been due an update since the **2021 transfer regime changes**, is due imminently. See the case of Mrs G on page 1 for the importance of staying up to date with transfers guidance, and follow us to keep you informed of key developments.

Following the Pensions Dishonesty Unit's first major success in the **BWFS case** in October 2022, a December press release confirmed that its investigations have now also led to complaints being upheld in relation to the **Optimum Retirement Benefit Plan**. Directions to recover over £12 million have been issued.

Recent and forthcoming from TLT's Pensions team:

- See our **'Pensions – key issues for your trustee agendas – January 2023'** briefing, for current hot topics and expected developments.
- See our December **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.
- SIPP & SSAS Festival 2023: TLT's SIPP & SSAS team will be hosting its annual conference shortly. Look out for further information soon.
- For more detail of key developments for public sector schemes, see our recent **What's coming up in pensions: public sector focus February 2023**

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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