



# PENSIONS OMBUDSMAN ROUND-UP

MAY 2016

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# 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 March and April 2016.

The first and second cases concern the provision of incorrect information, although the outcomes of the complaints were different. The first case demonstrates how costly the provision of incorrect information can be if the member has changed his position in reliance on the information. Whilst in the second case the PO did not think that the member would have acted differently had the correct information been provided, an award of £1,000 was made for distress and inconvenience and the PO noted the factors which were taken into account in setting compensation at this level.

The third case considers whether a scheme could validly be amended to close the final salary section to future accrual when a guarantee was in place about benefits for certain members who had transferred in from another scheme in 1988 as a result of a scheme merger.

The fourth case relates to a lump sum death benefit paid outside of the relevant two year period meaning that it was an unauthorised payment and whether the employer and administrator had taken appropriate steps when dealing with the payment.

We also report on some other recent developments from the Pensions Ombudsman Service including an update in relation to cases concerning the review of commutation factors in the firefighters' and police pension schemes.

Finally, in the statistics section we provide a breakdown of the overall outcome of the March and April determinations.

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

## FACTS

The Applicant in this case (P0-86) joined an occupational pension scheme in 1986 and began making additional contributions in 1996 in order to purchase nine additional years' pensionable service. In 2000 the Applicant transferred to a new employer but stayed in the scheme without any break in pensionable service. When his payroll details were set up by his new employer, it did not arrange for the deduction of the additional contributions. However, throughout the period from 2000 to 2012 the Applicant received annual benefit statements showing a full nine years' additional service.

Scheme records indicate that in 2003 the scheme was aware that the additional contributions had not been made since 2000. However, it did not inform the Applicant at this point. It was not until 20 January 2012, following a data reconciliation exercise, that the trustee wrote to the Applicant to inform him that the additional contributions had not been paid since May 2000 and that £17,472 was outstanding in respect of employee contributions. After some discussion, the Applicant agreed to pay around £35 per week over ten years in respect of the arrears in order to purchase around seven years' additional service but he ceased the arrangement in respect of future contributions from March 2012.

The Applicant accepted a voluntary redundancy package in January 2014 which also allowed him to take early retirement. He was informed that the remaining arrears could be paid as a lump sum or deducted from his pension instalments.

## DPO'S CONCLUSIONS

The respondents (the trustee and the employer) accepted that failing to set up the payroll records correctly in 2000 and failing to notify the Applicant of the error in 2003 was maladministration. The respondents argued that the Applicant should have noticed that deductions were not being made for the additional contributions. However, the DPO accepted that the Applicant did not notice because: (i) payslips from the new employer were in a different format and as he never received a payslip from it showing the separate

deduction of the additional contributions, he did not necessarily appreciate that they were not included in the pension contributions that were shown; (ii) he was paid weekly and received a number of allowances meaning that his wages fluctuated and therefore it would have been difficult for him to notice that the additional contributions were not being deducted; and (iii) he was receiving benefit statements which indicated that he was continuing to pay for the additional years.

Whilst the DPO accepted that the usual principle is that the member cannot take a benefit which has not been paid for, she noted that in some circumstances where the member has acted in reliance on an unequivocal statement, the maker of the statement may be prevented from going back on it. The DPO concluded that the Applicant had changed his position irrevocably in reliance on the benefit statements – he spent the additional earnings he had as a consequence of not paying the additional contributions on general household expenses over a period of around ten years, and by the time he was notified of the missing contributions he was 55 years old with a normal retirement age of 60, had dependent children and had moved to a new house with a mortgage. She concluded that it would be inequitable to allow the scheme to go back on the representations that the benefits were accruing at the original rate or to seek to recover the missing contributions past the point at which the Applicant retired.

The DPO made directions so that the Applicant will receive a pension with the additional service credit based on his original accrual rate up to the point of his redundancy (that is, 7 years and 343 days) but will only be liable for contributions between 20 January 2012 and his last day of service. Each respondent must pay the Applicant £250 in respect of distress and inconvenience.

This case shows how costly the provision of incorrect information can be, with the directions also providing that the employer has to pay the shortfall to fund the additional service. It also demonstrates the importance of setting up payroll correctly and following up any potential issues with members as soon as they are discovered.

# PROVISION OF INCORRECT INFORMATION

## FACTS

The complaint in this case (PO-3885) relates to the provision of incorrect benefit statements. The Applicant left employment in relation to the relevant scheme in 1993. He reached his normal retirement age of 62 in May 2006 but deferred taking his benefits. The determination details a number of benefit estimates which had been provided to the Applicant since 2002. An estimate provided on 22 October 2010 reflected the benefits brought into payment in November 2010 of a lump sum of £534,053 and a reduced pension of £80,083.

In February 2012, new administrators reviewed the Applicant's benefits and it was discovered that too high a revaluation rate had been applied to the benefits in excess of the GMP. The correct benefits were a lump sum of £395,941 and a pension which, by that point, had risen to £62,133.

This meant that there had been a total overpayment of around £155,000 – £138,112 related to the lump sum and £17,196 related to the pension. In October 2012 the Applicant repaid £138,112 but he disagreed with the way that the £17,196 had been calculated. The Applicant stated that his complaint is not a defence against the trustee's right to recover the overpayment but rather that maladministration has caused him financial loss for which he seeks compensation. He argues that had he known his true entitlement, he would not have left his paid employment or triggered the pension when he did, but would have continued to work until August 2013 by which time his pension would have grown to the level quoted in October 2010. The Applicant's estimate of his loss totals over £1 million.

## PO'S CONCLUSIONS

The PO stated that, generally speaking, even when a member has been provided with misinformation, they are only entitled to their correct benefits from the scheme. However, where misinformation has been provided and it was reasonable for the member to have relied on it, the PO seeks to place members back into the position they would have been in, had they never received the misinformation.

In considering this, the PO stated that he must assess to what degree the member relied on the information and how they might have acted differently if they had been aware of the true situation.

Ultimately the claim failed because the PO considered that, on the balance of probabilities, the Applicant would have retired at the same point had he been given the correct information. The PO was more persuaded by the trustee's argument that the Applicant's decision to retire was predicated by his employment situation and not the reverse. A letter from the Applicant dated 8 May 2010 stated that he was *"soon to retire from two of my principal remunerative activities, and therefore will wish to trigger my pension during the next few months"*; and a letter dated 12 October 2010 stated that he had now retired from these activities and wished to trigger his pension. These letters therefore show that the Applicant was planning to leave and then had left employment before his final entitlement from the scheme was confirmed. The PO's analysis included considering negligent misstatement and estoppel by representation but he concluded that the relevant criteria were not established.

However, the PO did conclude that the provision of inaccurate statements was maladministration and directed the trustee to pay £1,000 in respect of distress and inconvenience. The PO stated that, in deciding the amount of compensation, he took into consideration the "aggravating factors" of the number of incorrect statements received and the duration over which they were issued.

This determination demonstrates that, when considering member complaints in relation to incorrect information, it is important to analyse what the member would have done had the correct information been provided. Even though the difference between the incorrect statements and the correct benefits was relatively large in this case (which can sometimes be a factor leading to a successful claim) the complaint failed because the evidence indicated that the Applicant would not have acted differently even with the correct information.



# REMOVAL OF GUARANTEE

## FACTS

The original scheme (“**Original Scheme**”) of which the Applicant in this case (PO-4280 PO-4971 PO-4393) was a member was a final salary scheme. The Original Scheme was merged into another scheme (“**New Scheme**”) in 1988. An announcement to members in November 1987 stated that: “*For all existing employees who join the [New Scheme] on 1 February 1988, there is a guarantee that your benefits on retirement at the new retirement age will be at least as good as those which would then have been paid under the [Original Scheme]*”. The guarantee was set out in the rules of the New Scheme. On 30 June 2012 the final salary section of the New Scheme was closed to future accrual and the Applicant joined the money purchase section (on improved terms) for future service.

In summary, the Applicant complains that: (i) she was entitled to benefits of two thirds of her final salary at the normal retirement age; and (ii) that these benefits were wrongly taken away when the guarantee was removed as a result of the scheme being closed to future accrual. The Applicant has been selected as the lead applicant but the determination also consists of comments made by two other members who made a complaint concerning the same matter and binds those members. It is also noted that, following the issue of the PO’s preliminary decision, comments have been sought from other potentially affected members of which there are around 100.

## PO’S CONCLUSIONS

The PO rejected the Applicant’s complaint that she was entitled to benefits of two thirds of her final salary. The rules did not provide for such benefits, but rather stated that benefits would be calculated on a proportionate basis for early leavers. The Applicant had argued that a 1985 booklet set out her entitlement to the two thirds pension, but the PO noted that the booklet stated that in the event of any discrepancy between it and the Trust Deed and Rules, “*the latter will prevail*”. The PO also stated that, even if the 1985 booklet was misleading, a booklet issued in 1986 made the position clear.

As to whether the amendment power was properly exercised in relation to the guarantee, the PO started by noting that the power of amendment gave the Trustee

power, subject to employer consent, to amend the trust deed and the rules and the only restriction was to comply with section 67 (the statutory provision which protects accrued rights). The PO was satisfied that the amendment was not a “regulated modification” for these purposes and therefore the restriction was not infringed. However, the PO went on to state that it is not sufficient for employers and trustees simply to have the necessary powers to carry out the amendment. They must ensure that they act in a manner consistent with their duties and the PO specifically noted that the employer must not, without reasonable and proper cause, act in a way calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. On the facts of this case, the PO concluded that the decision taken does not appear to have been irrational or perverse. Points noted by the PO included that the Applicant was given due warning of the impending changes when a 60 day consultation began in February 2012 and, following the consultation, modifications were made in light of points raised by active members.

Whilst the PO stated that it can be said that the Applicant did have a legitimate expectation that the guarantee would not be unpredictably removed, he went on to state that once the scheme was closed to future accrual, he cannot conclude that the Applicant had a reasonable expectation that benefit accrual would continue into the future given the scheme restructuring. The PO also concluded that there was no suggestion that the guarantee could never have been amended at a future date and noted that the guarantee was taken into account when calculating the Applicant’s early leaver benefits for service prior to the closure to future accrual. The complaints were therefore not upheld.

This case is particularly notable for the conclusion in relation to the exercise of the power of amendment. However, given that this is a complex area and Ombudsman determinations depend on the facts of the particular case, if a scheme has a similar guarantee in place we would suggest that employers and trustees take advice before making any amendments that could remove it.

# PAYMENT OF DEATH BENEFITS

## FACTS

The complaint in this case (PO-3753) relates to a lump sum death benefit being paid outside of the two year period specified in the Finance Act 2004 and therefore subject to a 40% unauthorised payment tax charge. The Applicant is the late member's mother and the respondents are the employer and the administrator that was in place at the relevant time.

The scheme received notification of the member's death on 28 November 2008. Under the Finance Act 2004, this meant that payment of the lump sum death benefit had to be made before 28 November 2010 in order for it to be an authorised payment. The lump sum payable was around £21,000.

In a letter dated 9 December 2008 the administrator told the Applicant that a lump sum was payable and said that in due course it would give details on receipt of letters of administration. A letter dated 6 May 2009 stated that the administrator needed to see Grant of Letters of Administration ("**Grant of LoA**") before payment could be made. The administrator chased for this document on four occasions between October 2009 and April 2010. However, the Applicant was not informed of the two year time limit in which payment had to be made for it to be an authorised payment.

The Grant of LoA was issued by the High Court on 15 September 2010. The Applicant hand delivered it to the employer on 9 November 2010. The last working day for the payment to be made before the two year period expired was 26 November 2010 but it was not paid in time.

## PO'S CONCLUSIONS

The PO stated that information about the two year time limit is factual information rather than advice, and that even though it is not scheme specific information and there is no duty to disclose it, either the employer or the administrator should have volunteered it. In the circumstances, the failure to do so amounts to maladministration.

The PO noted that the member's affairs were not straightforward and the Applicant has explained why it took time for the Grant of LoA to be obtained. He stated that the Applicant's argument seems to be that it is irrelevant how long it took her to obtain and send the Grant of LoA if there was still sufficient time for the payment to be made within the two year limit. The PO therefore considered whether there was any unnecessary delay after 9 November 2010 and whether the employer and administrator took appropriate action.

There were 13 working business days between 9 November 2010 and 26 November 2010. The determination sets out the procedure that was followed which included: (i) the employer sending the Grant of LoA to the administrator which it received on 12 November; (ii) the administrator responding on 17 November and providing a list of potential beneficiaries; and (iii) the employer taking the decision on 23 November to make the payment to the Applicant. The usual payment method is BACS but the employer did not have the Applicant's bank details and ultimately the payment was not made in time. The PO saw merit to the Applicant's argument that a cheque could have been issued, and stated that had a cheque been arranged within three days, payment could have been issued in time. He concluded that the employer should have taken urgent action and the failure to do so amounts to maladministration.

The amount of the lump sum less the tax charge has already been paid. The PO directed that an amount equal to the balance (£8,438) should be paid from the fund plus interest. He also directed the employer and administrator to each pay the Applicant £250 in respect of distress and inconvenience.

Lessons from this case include the importance of identifying situations where time is tight and ensuring that appropriate steps are taken to make the payment.

# OTHER NEWS

## COMMUTATION FACTORS – FIREFIGHTERS’ AND POLICE PENSIONS

In May 2015 the then Pensions Ombudsman issued a determination in relation to a complaint (which was the lead of a number of complaints on the same issue) against the Government Actuary’s Department (GAD) concerning the review of commutation factors in the firefighters’ and police pension schemes.

In summary, the previous PO concluded that there was maladministration by GAD when it changed from instigating reviews to waiting to be asked to do so. The outcome of this case essentially means that members affected by this issue will receive an additional lump sum payment and an interest payment.

On 10 March the current PO issued a statement reporting that a recent theme arising from enquiries is that individuals may claim that interest is inadequate compensation. For example, individuals may claim that had they received the higher lump sum at retirement, they would have purchased an asset to produce income and achieve significant capital growth. The PO’s statement reports his decision, the premise of which arises from public policy considerations, that he will not investigate complaints about this theme.

## OTHER DEVELOPMENTS FROM THE OMBUDSMAN SERVICE

Two other developments from the Pensions Ombudsman Service (POS) in April are also worth noting.

- On 12 April the POS launched two new videos – available on its website – which are designed to provide information to members of the public who are thinking of making a complaint. The videos each consist of staff from the POS explaining the process interspersed with footage illustrating the customer journey and complaints process.
- On 27 April the POS announced that complaints can now be submitted online via a form on the POS website which it states means that it is now much quicker and easier to complete an application. The POS reports that this is the first phase of a project that will ultimately deliver a secure area for the website so that future applicants can share supporting documentation more easily and create a profile allowing them to login to see how their application is progressing.

# STATISTICS

## MARCH

<b>NUMBER OF DETERMINATIONS</b>		11
<b>SCHEME TYPE</b>	Public service scheme	4
	Private sector scheme	7
<b>OUTCOME</b>	Upheld	3
	Partly upheld	2
	<b>Not upheld</b>	6
<b>AWARDS FOR DISTRESS AND INCONVENIENCE*</b>	Lowest award	£250
	Highest award	£1,000

## APRIL

<b>NUMBER OF DETERMINATIONS</b>		2
<b>SCHEME TYPE</b>	Public service scheme	2
	Private sector scheme	0
<b>OUTCOME</b>	Upheld	0
	Partly upheld	2
	<b>Not upheld</b>	0
<b>AWARDS FOR DISTRESS AND INCONVENIENCE*</b>	Lowest award	£2,000
	Highest award	£2,000

\* 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. There was only one case in April in which an award was made for distress and inconvenience, and therefore the same amount is recorded as the lowest and the highest award.



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