PENSIONS OMBUDSMAN ROUND-UP

JANUARY 2017

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INTRODUCTION

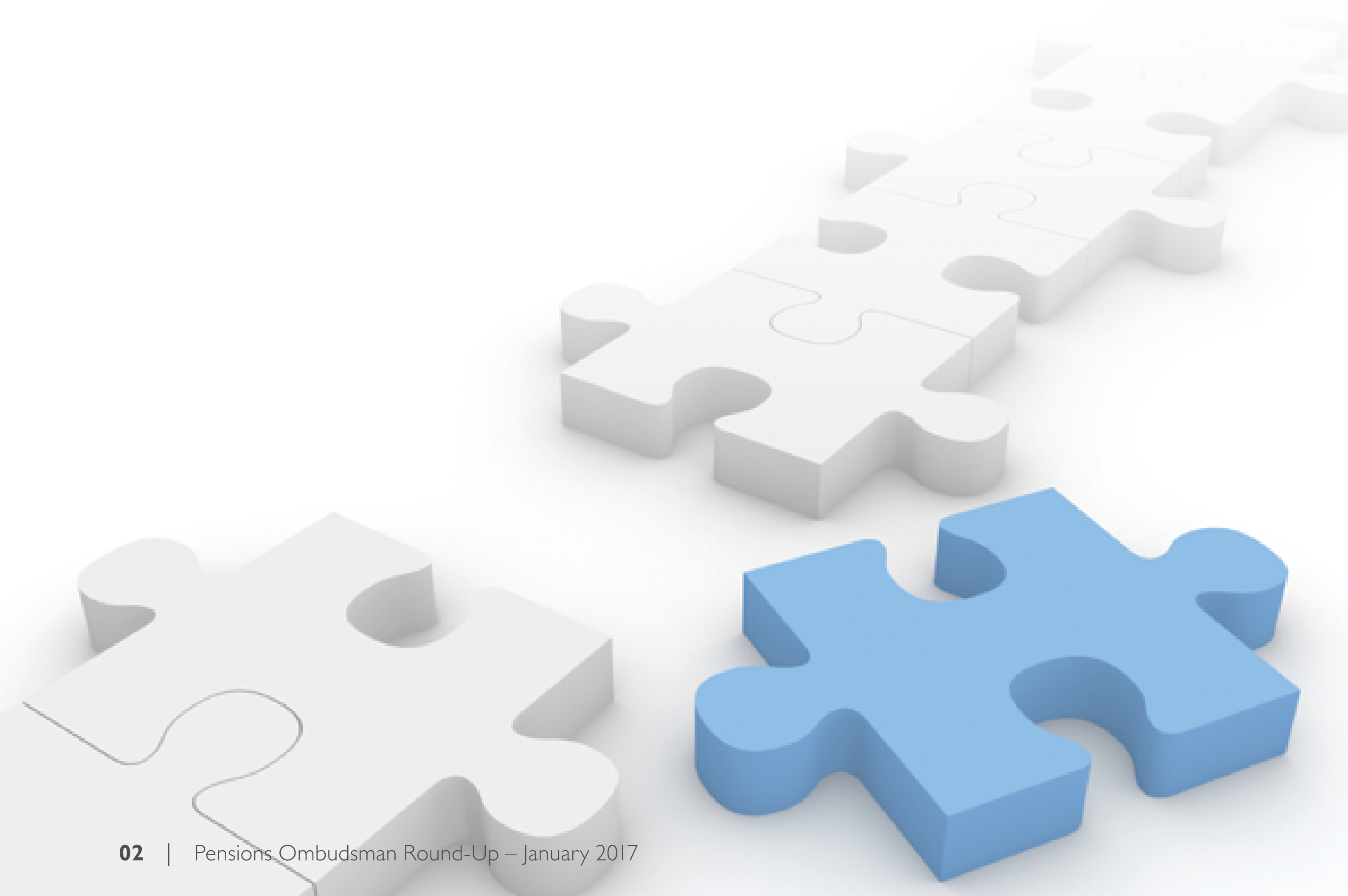
Welcome to DLA Piper's Pensions Ombudsman Round-Up publication in which we report on recent determinations made by the Pensions Ombudsman (**"PO"**) and Deputy Pensions Ombudsman (**"DPO"**).

In this edition we look at determinations from November and December 2016 which cover the following issues.

- A case concerning whether, when underpaid benefits were corrected, the member should have been paid an additional amount in respect of the underpaid lump sum or if it was sufficient to deal with the underpayment by an increase to the pension.
- A complaint about a reduction in a cash equivalent transfer value.
- A case in which the Applicant claims that her benefits are not being calculated in line with information provided to her.
- Overpayment cases where the complaints were upheld on the basis that the members had changed their position.
- Cases where the respondents to the complaints offered compensation in relation to distress and inconvenience but the PO regarded the offers as insufficient and made higher awards.

In the statistics section we provide a breakdown of the overall outcome of the November and December 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.



CORRECTION OF BENEFITS

FACTS

The Applicant in this case (PO-12248) started to receive his benefits in December 2012 and elected to receive a pension commencement lump sum (**"PCLS"**) (the name given in the tax legislation to the tax free lump sum) and a reduced pension. In May 2015 the Applicant was informed that his benefits had been underpaid. The underpayment arose because it had been thought that when the scheme closed to future accrual in 2005, the link to final pensionable salary had been broken. However, a review of the Scheme's benefits that commenced in 2011 discovered a number of issues on which Counsel's legal opinion was obtained, and at the end of the review in March 2014, it came to light that the link to final pensionable salary had to be maintained until the member actually retired. In order to address this, the Applicant was informed that his pension would be increased from the end of May 2015 and that he was due a back payment of £9,393. The reason given for not offering the Applicant the option of receiving an additional PCLS was that, under tax legislation, paying the lump sum more than 12 months after retirement would be an unauthorised payment resulting in a tax charge on the Applicant and on the trustees.

PO'S DECISION

The PO agreed with an Adjudicator's Opinion on this matter and upheld the Applicant's complaint against the trustees' decision not to pay him a further PCLS. The PO concluded that it was maladministration that the Applicant was paid lower benefits than those to which he was actually entitled. He accepted that the trustees tried to put matters right in May 2015 and therefore his decision focused on what they need to now do in order to fully remedy the injustice. The PO's view was that paying the additional PCLS by way of an equivalent pension is "*only a partial remedy*" and that the Applicant should be given the opportunity to fully reconsider his early retirement options as if they had been correctly calculated at the time of his retirement in December 2012. The trustees had argued that they should not have to pay for any personal tax liabilities applicable to the Applicant as a result of paying an additional PCLS as this would be inequitable to other scheme members and the ongoing funding position of the scheme. However, the PO thought it unreasonable of the trustees to say that the Applicant should pay a tax liability when the mistake was directly caused by their misinterpretation of the scheme rules.

In relation to the potential tax charge, the PO drew the trustees' attention to a provision of the tax legislation which states that an unauthorised payment is exempt from being "scheme chargeable" (that is, subject to a scheme sanction charge on the trustees) if it is being made "*to comply with an order of a court or of a person or body with power to order the making of the payment*". He also stated that it is likely that an exemption may apply that relates to payments made on the ground that a court, person or body is likely to order the making of the payment (or would be if asked to do so). The PO also stated that, as he understands it, there is no evidence that HMRC will impose a penal tax charge on the scheme or the Applicant and that it is possible that HMRC will "*make a concession to allow for the fact a genuine mistake occurred in calculating the original PCLS in 2012*".

Directions were made for the additional PCLS and accrued interest to be calculated (with the cost of the re-calculation to be met by the trustees) and for payment to be made if the Applicant is happy to proceed. The PO also directed that if the pension has to be re-calculated and any overpayments of pension have been made since May 2015 that a "*mutually agreeable arrangement*" should be reached with the Applicant as to how to deal with them. The PO also directed that if any future tax charges are applicable to the Applicant personally resulting from the maladministration that these must be paid by the trustees.

This case is notable in showing that the PO's focus was on whether the member had been financially disadvantaged as a result of the maladministration and that he rejected arguments from the trustees that the proposed remedy goes against legislation and that the scheme rules state that they do not confer a right to an unauthorised payment. It is also a useful reminder that there are some circumstances in which an unauthorised payment may be exempt from certain tax charges.

TRANSFER VALUE

FACTS

The complaint in this case (PO-13558) relates to a reduction in the Applicant's cash equivalent transfer value (CETV). In March 2015 the Applicant was provided with a CETV of £73,765 which was guaranteed for three months until 25 June 2015. On 19 June the administrators sent a reminder that the CETV was about to expire. However, the discharge form from the receiving scheme was not received until 9 July 2015, having been signed by the Applicant on 2 July. As this was outside the three month guarantee period, a new CETV was issued on 22 July 2015. Following actuarial advice the calculation of CETVs had changed since the March CETV had been issued to the Applicant. The CETV on the new calculation basis was £57,078. The Applicant decided to proceed with the transfer (which completed in September 2015) but then complained to the trustees and administrators asking that the original CETV of £73,765 be reinstated or that he be paid compensation of £16,686 (the difference between the two CETVs). The Applicant states that his complaint is not simply about missing the deadline of 25 June 2015 but, more fundamentally, is about whether the trustees can suddenly make such a significant reduction to the CETV. He questions how this can be possible and challenges the timing of the change which coincided with the introduction of the DC flexibilities.

DPO'S DECISION

The matter was first considered by an Adjudicator who concluded that the complaint should not be upheld. The Adjudicator's findings included that: (i) there is no evidence that the trustees or the administrators were at fault for the transfer being delayed beyond the guarantee date; and (ii) at the time the changes took effect from 1 April 2015, the administrators did not have to inform the Applicant about the reduction because he had already been given a CETV that was guaranteed and valid until 25 June 2015. The DPO agreed with the Adjudicator's Opinion and also added some further points about the CETV including the following.

- The transfer legislation requires the cash equivalent to be calculated on an actuarial basis reflecting the amount which is required to make provision within the scheme for a member's accrued benefits, options and discretionary benefits.
- The trustees are legally required to monitor and review the appropriateness of the assumptions and actuarial factors used in the calculation of transfer values. This is not limited to interest rates, age and life expectancy factors. Another consideration could be the possibility of an increase in transfer value requests due to changes in legislation where it is thought that the calculation of transfer values on the existing basis would mean members would be paid transfer values that are too high and detrimental to those who remain in the scheme.
- The new CETV was significantly lower than that provided in March 2015, but the trustees have a duty to take into account the financial interests of all scheme members, including those who remain in the scheme, provided that it is in accordance with the trust deed and rules.
- Ultimately it is a matter for the trustees to decide, based on their actuary's advice and recommendation, how the scheme transfer values should be calculated. The actuarial profession is regulated by the Institute and Faculty of Actuaries. It is not within the DPO's remit to direct the trustees on the appropriateness of actuarial factors and assumptions that should be used to calculate transfer values.

This case is a helpful reminder of the need to keep factors under review, and provides useful confirmation of the factors that trustees can take into account in those reviews. The trustees in this case were not unusual in not announcing changes to the factors and this case provides confirmation that this is an acceptable approach.

INFORMATION ABOUT BENEFITS

FACTS

There are two aspects to this complaint (PO-5148) both of which relate to claims by the Applicant that her benefits will not be calculated in line with information provided to her.

Revaluation: The Applicant became a deferred member of a DB scheme in 1993. Information that she received in 1993 and 2002 referred to revaluation of benefits (excluding the Guaranteed Minimum Pension) by reference to the Retail Prices Index (RPI) subject to a maximum of 5%. However, in 2011, she was informed that revaluation would be calculated by reference to the Consumer Price Index (CPI). The Applicant states that she was never warned that RPI could be replaced by an index providing smaller increases and she used the information provided to her to evaluate whether to transfer her benefits to another arrangement and to plan for her retirement.

Retirement date: The 2002 letter to the Applicant also made reference to benefits being further increased between age 60 and 63, although this sentence was incomplete as it referred to benefits "*for the period from 1 December 1989 to*" but did not specify an end date. In 2011 the Applicant was informed that this sentence should have been removed from the letter as it is not applicable to her and her unreduced benefits are not payable until age 63. The Applicant claims that the 2002 letter implied that she would receive a full pension from age 60, with increases until age 63, and this was a significant factor in her decision not to transfer her benefits to another pension arrangement.

PO'S DECISION

The PO agreed with the Adjudicator's Opinion and did not uphold either aspect of the complaint.

Revaluation: The Adjudicator stated that: (i) the scheme rules refer to revaluation in line with the legislation and therefore the change from RPI to CPI was consistent with the rules; and (ii) the 1993 letter stated that "*At retirement … the benefits will be paid in accordance with the Rules of the Scheme*" and case law has established that a scheme's trust documentation usually prevails over explanatory literature in the event of inconsistency between the two. In addition, the Adjudicator was not convinced that the Applicant's decision not to transfer out of the scheme was based mainly on the mistaken understanding that revaluation would always be in accordance with RPI. It was also noted that the Applicant had suggested that any transfer she made would most probably have been to a DC scheme, and the Adjudicator stated that there was no guarantee that, had a transfer been made, it would ultimately have produced a more generous pension than the scheme. The PO also noted that, as there is no guarantee of receiving RPI increases under a DC arrangement, that weakens the argument that the Applicant's decision whether to transfer turned on whether the scheme would provide RPI or CPI increases.

Retirement date: The Adjudicator stated that both the 1993 and 2002 letters made it clear that the Applicant's Normal Retirement Date (NRD) was her 63rd birthday. The incomplete sentence in the 2002 letter about an increase between age 60 and 63 would have been appropriate for a member whose NRD had been changed from 60 to 63 but this was not applicable to the Applicant. The retention of this incomplete sentence was incorrect and amounted to maladministration but the Adjudicator did not think that the drafting error had caused the Applicant any injustice as it was unreasonable to rely on the incomplete sentence. He thought that the missing date should have alerted the Applicant to the fact that something was wrong with the wording.

The PO's conclusions also note that the Applicant has suffered a loss of expectation (not an actual financial loss) because of the 2002 letter and that an offer of £500 compensation was reasonable.

This case demonstrates two key barriers to a successful claim that benefits should be paid in line with explanatory information: (i) references to benefits being payable in accordance with the rules; and (ii) the nature of the information meaning it was not reasonable for the member to rely on it.

CHANGE OF POSITION

In this section we report on two overpayment cases (relating to two different schemes) where complaints were upheld on the basis that the members had changed their position.

PO-12659

In this case the Applicant was provided with incorrect benefit statements for more than 30 years. In 1981, following a request from the Applicant's employer, the scheme provider set up new policies for all members and transferred units across from existing policies. However, in the case of the Applicant, the provider transferred the units into the new policy but failed to cancel the units in the original policy. The Applicant was therefore provided with annual statements showing benefits both in the original policy (in October 2013 the transfer value was £6,326) and in the new policy (£13,832). In summer 2014 the Applicant commuted the original policy into cash. He spoke to the provider and was told he would have to wait a further year before he could access the new policy as cash. In April 2015 the Applicant purchased a new kitchen under a finance agreement which was interest free if repaid by April 2016 but, if not, interest of £3,393 would apply. Having realised the error, in July 2015 the provider sent the Applicant a benefit quotation showing the value of the new policy as £7,984. The Applicant states that he would not have made the decision to update his kitchen under the finance agreement had he been aware of the correct position. The provider made an offer to pay the Applicant £1,500 compensation for distress and inconvenience and to pay half of the £3,393 interest.

Agreeing with the Adjudicator's Opinion, the DPO upheld the complaint and directed the provider to pay £1,500 and the full amount of the interest on the loan for the kitchen. The provider had argued that the Applicant would have purchased a kitchen in any event and will recoup the cost following the sale of his house. However, the DPO thought that this argument overlooks the fact that the kitchen was bought on credit. The DPO concluded that: (i) the provider built up the Applicant's expectations for more than 30 years; (ii) when the original policy was commuted in 2014 the provider failed to pick up on the error, while again building up his expectation that he was entitled to nearly £15,000 in the middle of 2015; (iii) it was not unreasonable that the Applicant took this into account and decided to make improvements to his property on credit which was interest free in the short term; and (iv) the Applicant is having to service a debt as result of the provider's failures and this should be recognised.

PO-10128

In this case the lump sum the Applicant received on retirement was overpaid by £838.20. The Applicant's benefits had been put into payment in January 2014 but, following an internal dispute resolution procedure, in October 2014 backdated ill health retirement was agreed and the benefits were recalculated. The pension under the recalculated benefits was higher than that originally paid but the lump sum was lower. The administrators state that this arose because cost of living increases had been overpaid. The Applicant states that she used the lump sum for refurbishments to her home to provide for her disability.

The Adjudicator concluded (and the PO agreed) that the overpayment was received in good faith – it arose because of the way in which the benefits were revalued by the cost of living and this is not something which a lay member could be expected to know.
The Adjudicator stated that the evidence supports the Applicant's explanation that she used her lump sum to refurbish her home and that it also indicates that the Applicant stayed within the funds which she thought were available to her. It was therefore concluded that, had the Applicant received the lower lump sum, it was likely that she would have adjusted her expenditure accordingly. The amount which the Applicant would not otherwise have spent was calculated as £377.31 which is the difference between the amount she did spend and the correct lump sum. However, the PO directed that the administrators are able to seek to recover the remainder of the overpayment. The PO also directed that the administrators should allow the Applicant to submit a hardship claim in the first instance but, if that is not successful, she should be allowed to repay the remaining overpayment over the same period as it arose, which is nine months.

COMPENSATION PAYMENTS

It is useful for trustees dealing with IDRP cases to have information about the PO's awards for distress and inconvenience. In the last edition of Pensions Ombudsman Round-Up we reported on cases where no award was made or amounts lower than £500 were considered appropriate. In this section we report on some recent cases where respondents offered compensation in relation to distress and inconvenience but the offers were regarded as insufficient by the PO and higher awards were made.

- In PO-13267 the Applicant wanted to transfer his benefits out of a master trust into a SIPP. In March 2016 he was provided with a pension benefits statement which understated the contributions made. On 2 April he raised a formal complaint and also stated that the valuation was inconsistent with the contributions made in previous years. Following further correspondence from the scheme on 11 April (which included confirmation that the transfer quotation did not take into account the missing contributions), the Applicant contacted the scheme on several occasions and, as he did not receive any acknowledgements or responses, raised further complaints. On 4 May the scheme informed the Applicant of the total value of the contributions, and he completed the necessary transfer form the following day. In its IDRP response the scheme increased its initial offer of £100 compensation to £250. The PO concluded that the errors and poor service amount to maladministration, as a result of which the Applicant suffered delays to his transfer request. The PO did not think that £250 was adequate compensation in respect of the poor service and the errors made. Given the circumstances of the case and "*the numerous opportunities … to treat [the Applicant] with better care and attention, the level of distress and inconvenience suffered … cannot be said to be inconsequential*". The PO therefore directed that £500 be paid.
- PO-13235 related to a transfer of a SIPP to a new provider. The PO concluded that there was no maladministration by the transferring provider in processing the actual transfer. However, the issue arose with the provision of misinformation. On 24 August 2015 the Applicant telephoned the transferring provider for an update on his transfer and was informed that the transfer should have been actioned on 20 August and that he would be "*reimbursed for any loss and that the sale date would be backdated to 20 August*". This information was incorrect as the transfer did not have to be actioned on 20 August and therefore the Applicant was not reimbursed and the sale was not backdated. The provider did not acknowledge that there had been maladministration and therefore regarded a payment of £250 as sufficient compensation. The PO disagreed. He thought that the provision of misinformation in this case is maladministration, and that the provider unduly raised the Applicant's expectations and that it must have been "*extremely distressing*" for him to then discover the correct position after the remedial action was to have taken place. The PO therefore directed that the provider pay an additional £250 in compensation.
- In PO-12355 the respondent had made an offer of £400 in relation to maladministration (losing some forms which led to delays in lifting restrictions on trading activity on a scheme's account and failures to return telephone calls). An Adjudicator considered that £600 should be paid with regard to the maladministration and the effect on the Applicant in his particular circumstances. The respondent stated that it was unsure why the Applicant's poor health and age had been taken into consideration. The PO noted that his guidance on assessing awards for non-financial injustice states that he will take into account the particular circumstances of the individual as well as the wider situation, and the Applicant's poor health and advanced age are therefore valid considerations. The PO also stated that the respondent's questioning of the relevance of individual circumstances has served to prolong the matter and the inconvenience. The PO's conclusions included that: (i) the loss of the forms was more significant because the respondent did not even know that it had received and lost the forms; (ii) the time taken to process a co-signatory mandate was "*rather lengthy*"; and (iii) the respondent has acknowledged that there were several occasions when it promised to telephone the Applicant but failed to do so, but it had not fully appreciated the extent of the inconvenience this would have caused to the Applicant who has had to juggle responding to this complaint around hospital appointments. The PO exceptionally decided to increase the compensation and directed that £750 be paid.

STATISTICS

NOVEMBER

NUMBER OF DETERMINATIONS		32
Number of these determinations which are Ombudsman decisions following an appeal from an Adjudicator's opinion		30
SCHEME TYPE	Public service scheme	9
	Private sector scheme	23
OUTCOME	Upheld	13
	Partly upheld	4
	Not upheld	15
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£250**
	Highest award	£1,500***

DECEMBER

NUMBER OF DETERMINATIONS		15
Number of these determinations which are Ombudsman decisions following an appeal from an Adjudicator's opinion		14
SCHEME TYPE	Public service scheme	8
	Private sector scheme	7
OUTCOME	Upheld	8
	Partly upheld	2
	Not upheld	5
AWARDS FOR DISTRESS AND INCONVENIENCE*	Lowest award	£250
	Highest award	£1,000

* 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.

** The Respondent had already paid £250 to the Applicant. The direction was that a further £250 should be paid.

*** The Respondent had already offered £1,500 to the Applicant and the DPO thought this was fair and reasonable. The next highest award for distress and inconvenience made in November was £1,000.

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