

Pensions Ombudsman Update – January 2023

Welcome to our latest regular Pensions Ombudsman Update, designed to help you get to grips with the Ombudsman's thinking, keep track of decisions on individual topics and identify underlying trends. In this edition, we welcome a new Ombudsman and explore the latest developments on some familiar themes, including ill-health decisions, time limits and transfer scams claims.

New Year, New Ombudsman

This month, Dominic Harris [begins](#) his tenure as the sixth Pensions Ombudsman, having previously been a partner in the CMS Pensions team. We wish him every success in his new role!

Transfer regret claims: setting the tone

Determination PO-26616 [Mrs G](#) concerned a member who, in early 2015, sought to transfer her occupational and personal pension scheme benefits to the Quantum pension scheme. The occupational scheme made the transfer but the personal pension provider blocked her request, citing concerns about Quantum. The member, now unable to access her benefits from the Quantum scheme (a suspected liberation arrangement), complained that the administrator of the occupational scheme should also have refused to let her transfer.

The Ombudsman held that as the member's transfer application was not completed until after expiry of the statutory three month deadline, the administrator was under no statutory duty to make the transfer. Even if it believed it was, transferring trustees were only discharged under section 99, Pension Schemes Act 1993 where they had "*done what was needed to carry out what the member requires*". This entailed ensuring that appropriate due diligence was carried out and any warnings or concerns identified, so that the member transferred on a fully informed basis. The administrator had failed to implement processes to achieve this, even using an out of date Pensions Regulator checklist.

In the Ombudsman's view, the risk should have been immediately apparent. The documentation showed that Mrs G was transferring to an occupational scheme sponsored by a geographically distant company for whom she did not appear to work: this was a red flag. It was not appropriate for the administrator to adopt an "*excessively technical reading*" of Regulator guidance to retrospectively justify why its failure to have a proper process in place would have made no difference. The "*overall tone*" of the guidance was that the transferring scheme should engage with the member to understand the transfer.

The member still needed to demonstrate that she would not have transferred if the administrator had engaged with her as it should. The question was finely balanced, with the Ombudsman holding an oral hearing. However, he concluded on the facts that the member was not an "*insistent customer*" willing to transfer in any circumstances, nor had she been motivated to transfer "*at any cost*".

The Ombudsman directed the administrator to reinstate the member's benefits in the transferring scheme and to pay her £1,000 for serious distress. If the Regulator-appointed trustees of the receiving scheme retrieved the member's pension monies, the administrator could recover that amount from the member (to avoid double recovery).

Comment: This is another instructive determination for trustees faced with regret claims. Although the administrator was plainly at fault, the broader suggestion that trustees engage with the "tone", as well as the letter, of regulatory guidance may introduce an unwelcome element of uncertainty for schemes.

Trustees ordered to repay £12.5m

In our last [Update](#) we hailed the dedicated [Pensions Dishonesty Unit](#) (PDU), set up by the Ombudsman to investigate allegations of misappropriation of pension funds and dishonest or fraudulent behaviour by pension trustees. As these cases are typically complex, the team is staffed by experienced members of the Ombudsman's Casework and Legal departments.

In CAS-80110 [Mr E](#), the latest PDU decision, 288 members transferred over £13m of savings to a liberation scheme. The scheme administrator, which was 60% owned by a trustee (Mr C), received £1.3m in "commission" from the scheme, while hired introducers were paid over £600,000. Member funds were invested in high-risk, unregulated, illiquid assets and a number of members accessed funds by entering into loan agreements with related companies on unfavourable terms. There was no evidence of the trustees having conducted investment due diligence or taking professional advice.

The Ombudsman found that the trustees had committed multiple breaches of trust, including failure to comply with their legal duties on investment of assets, and failing to manage conflicts. Mr C also acted in breach of trust by paying scheme funds to third parties, and arranging loans, outside the scope of his powers under the Trust Deed. The other trustees acted unlawfully by charging excessive and unreasonable fees, and failing to report matters to the Regulator once aware of the problems that existed in relation to the scheme.

The Ombudsman directed Mr C to repay the scheme £10.7m, and all three trustees to repay a further £1.8m on a joint and several basis.

Comment: As evidenced by this case - and a similar determination, [Ms E](#), in October - the PDU is beginning to make its mark. With other oral hearings being held last year, we can expect more rulings like this in 2023.

Time limits for bringing complaints

Under the applicable Regulations, the Ombudsman can only investigate an act that took place more than three years before he received a complaint if he is of the opinion that the complainant was unaware of the act; or that it was otherwise "reasonable" for them not to complain in time. In PO-26429 [Mrs D](#) the member knew of an ongoing failure to invest her funds by mid-2015, but did not refer the matter to the Ombudsman until 2019.

The Adjudicator initially assigned to the case upheld the member's claim for financial loss. However, a second Adjudicator later reviewed the file and decided that this aspect of the complaint was outside Ombudsman jurisdiction, as it had not been reasonable not to bring it within three years. The Ombudsman would usually only treat delay as reasonable where it was beyond the applicant's control: for example, where the referral was held up by another organisation's complaint process, or by ill-health or family matters. There were no such "*compelling personal circumstances*" here.

The Ombudsman agreed. The second Adjudicator had acted appropriately by revisiting the jurisdiction point. Mrs D could have sought his assistance earlier, and without cost.

Comment: This determination helpfully outlines the 'reasonableness' threshold for extending the deadline for member complaints. It also flags how an initial decision to entertain a complaint may be looked at again during the course of an investigation.

Ill-health: Ombudsman failed to properly consider redeployment

In PO-28378 [Mr W](#) the scheme offered ill-health retirement under either Tier 1 (member permanently incapable of discharging their own duties) or Tier 2 (being permanently incapable of any regular employment). The member received a retirement estimate of an £18,500 lump sum and £6,200 annual pension. He applied for retirement under both Tiers, and it was granted under Tier 1.

On retiring, the member discovered that his correct entitlement was only to a lump sum of £11,600 and annual pension of £3,900: the original estimate was wrongly based on an inflated pensionable pay figure. Arguing that he had relied on it in opting for ill-health retirement, he sought compensation for financial loss - saying he would have stayed in employment until age 68 if given the right figures.

The Ombudsman rejected Mr W's financial loss claim, saying he would have had to retire anyway: if he was capable of staying in post until age 68, he would not have qualified for ill-health retirement. The Ombudsman also declined to consider reasonable job adjustments that might have been possible under the Equality Act (on account of the member's disability), as that would involve revisiting the Tier 1 decision already made. He added that the fact the member was not awarded Tier 2 benefits meant he was capable of alternative employment. The member appealed.

The High Court [held](#) there was enough evidence to suggest that even if the member received the right estimate, he would have left his employment. However, the Ombudsman was wrong to reject the potential for redeployment to another role in the organisation on the grounds the member still had the option of alternative part-time employment. He should not have equated the possibility of Mr W applying for an alternative job, on a competitive basis, with the possibility of his employer making an alternative job available under its Equality Act duties.

The matter was remitted to the Ombudsman to reconsider whether the member had suffered financial loss on the premise that, by relying on the inaccurate estimate, he refrained from seeking redeployment in another role.

Comment: The facts were complex, but the Court's forensic judgment provides a good summary of the legal tests for considering reliance and redeployment in ill-health scenarios.

What's in store for 2023 and 2024?

The latest Pensions Ombudsman [Corporate Plan](#) reveals that the office has secured additional funding to establish a new team to reduce waiting times. It also confirms the extension of funding for the new PDU until March this year (although the Ombudsman hopes to secure additional funding beyond this date).

The office believes that demand for its service will continue to rise at 10% for both 2022/23 and 2023/24. Its priorities for the next three years are to reduce waiting times; to continue the work of the PDU; and to engage with stakeholders to improve dispute resolution. Note that the Ombudsman's stated three year focus specifically mentions "*influencing industry to adopt a one stage internal dispute resolution procedure*".

Last month, it was [announced](#) that that outgoing Ombudsman Anthony Arter will stay on as part-time Deputy Pensions Ombudsman on an interim basis. This will allow him to complete the PDU cases for which he has held oral hearings; deal with any conflicts the new Ombudsman may have; and ensure smooth transition. We understand that in the spring, the new Ombudsman and the Board will consider the case for appointing a permanent Deputy.

CMS Pensions Law Appraised

We recently launched our new app for iPhones, called [Pensions Law Appraised](#), which offers real-time guidance on the latest legal pensions law developments.

We have called this innovation 'Pensions Law Appraised' because we want as many people as possible to have relevant pensions law issues raised for them in a way that gets to the heart of the matter, with our expert appraisal of the significance of such developments.

It's also a great way to help pension scheme trustees meet their statutory knowledge and understanding duties. To start using it, click [here](#) to download!

And don't forget our LawCasts...

Our CMS Pensions LawCast [video](#) and [podcast](#) series now features new updates on dashboards, case law and the pensions agenda for 2023. We regularly add new content: [subscribe](#) to [Law-Now](#) to stay updated.

CMS and the Pensions Ombudsman

CMS has had a market-leading Pensions Ombudsman Unit for many years, led by Mark Grant who wrote the only text book on the Ombudsman's role. Mark also established the Pensions Ombudsman Liaison Group, an industry body that meets with the Ombudsman to improve understanding, relationships and communications between his office and key stakeholders. CMS partner Laura Clarke is Secretary to the Group.

CMS is also a stakeholder in the Pensions Ombudsman's Legal Forum.

The information in this publication is for general purposes and guidance and does not purport to constitute legal or professional advice. It is not an exhaustive review of recent developments and must not be relied upon as definitive. The Update is intended to simplify and summarise the issues which it covers. It represents the law as at 26 January 2023.