

# Leaders in Pensions

## Pensions Ombudsman Update – January 2020

Happy New Year and welcome to our latest CMS Pensions Ombudsman Update. Our regular Updates are designed to help you get to grips with the Ombudsman's thinking, to keep track of decisions on individual topics and to identify underlying trends. This month we look at new determinations of interest, the latest High Court appeals, and the Ombudsman's Corporate Plan.

### Another scammed member reinstated

In our October 2018 [Update](#) we examined the Ombudsman's decision to [order](#) a pension scheme to reinstate a former member who had transferred to a pension liberation vehicle. Lightning has now struck twice, with determination PO-21489 [Mrs H](#) (28 August 2019).

Mrs H was a deferred member of the Local Government Pension Scheme (LGPS) who transferred to a suspected liberation scheme in November 2013. It was now likely that all or most of the transferred funds were lost. She complained that the Council should not have let her transfer out of the LGPS.

The Council claimed that it had no choice but to follow the member's request, but the Ombudsman analysed the situation differently. The statutory transfer right only applied where a member would receive "transfer credits" in the new scheme, meaning rights relating to an "earner". In fact, when the transfer took place Mrs H was living off state benefits and had no employment earnings. The [Hughes v Royal London](#) case in 2016 held that earnings from any source (not just employment under the receiving scheme) could make a member an "earner". However, the Court did not hold that there was a statutory right where the member was not in receipt of earnings at all.

The Council had therefore wrongly construed its discretion to allow a transfer as an obligation to do so. In the Ombudsman's view the Council had suspected a scam at the time, and in light of the member's circumstances it should have been aware there was an 'earnings' problem and made further enquiries. The Ombudsman was satisfied that, were it not for the Council's maladministration, the member would not have transferred out. He was unmoved by the Council's contention that the transfer happened "*in the fairly early days of pension scams*": the issue of Pensions Regulator Scorpion guidance in February 2013 had marked a point of considerable change in the due diligence required of transferring schemes.

The Ombudsman directed the Council to reinstate the member in the LGPS, allowing for the lump sum she had received from the liberation scheme but adjusting for post-transfer revaluation.

*Comment:* Schemes should not treat deferred members as having a statutory transfer right in circumstances where they cannot be satisfied the member has 'earnings' from any source. In our experience, it may be ambitious to assume that administrators universally took this approach as far back as 2013!

### Trustees justified in response to member's climate change requests

In PO-27469 [Mr D](#) (15 August 2019), the member sought disclosure of a number of documents about how the scheme (whose employer was a prominent oil company) was dealing with climate change issues.

The trustee chair and the secretary to the Investment Committee met with the member to discuss the subject. The trustees disclosed the scheme actuarial valuation, statement of investment principles and responsible ownership policy, but did not agree to the member's request to provide him with their investment strategy, risk management framework, employer covenant monitoring framework or internal management processes.

The Deputy Pensions Ombudsman held that there had been no maladministration or breach of law. The trustees had explained that only 1% of fund assets were invested in companies associated with fossil fuels, confirmed their acceptance that climate change was one of the biggest risks the scheme faced, and considered the wider impact of climate change on investment strategy. The scheme had provided far more information than was required by the Disclosure Regulations and the trustees had taken relevant legal factors into account including confidentiality, commercial sensitivity and resource.

*Comment:* This determination attracted attention following a [press release](#) by campaigners ClientEarth, who argued that the Deputy Ombudsman failed to adequately engage with the complaint. It supports trustees who reach a reasoned conclusion on how far to accommodate these types of member request.

### GP locum not in 'pensionable employment' between bookings

[Sanderson v NHS Business Services Authority](#) [2019] EWHC 2900 (Ch) was a High Court appeal from PO-20156 [Mr N](#) (30 January 2019). The Ombudsman had held that the member, a GP locum practitioner who died over her Christmas break, did not die during "pensionable employment" as defined in the relevant Regulations. As a result, the claimant widower would only receive the less generous benefits payable on death in deferment.

The Regulations provided that a locum was in pensionable employment only when engaged under a relevant contract for services. The judge held that a locum was not engaged under such a contract simply because she had bookings for future sessions: being 'engaged' connoted more than a contractual obligation to perform future work.

Here, the Ombudsman had made no finding that the member was occupied under any contract at the time of death, whether by directly performing her duties or carrying out ancillary activities. She was on a break of over two weeks during the holiday season. The "*well-earned rest*" she was taking when she died could not be characterised as anything other than a break from engagement under the contracts to which she had been (and was still) committed.

*Comment:* While it is hard not to feel sympathy for the applicant, the takeaway from the case is that it is for Parliament to amend the law: the Ombudsman and courts cannot interpret away any perceived unfairness.

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## Court criticises Ombudsman factsheet

In [Cunningham v Pensions Ombudsman and others](#) [2019] ScotCS CSIH\_48 a member wanted to appeal the Deputy Pensions Ombudsman's rejection of his complaint in the Scottish courts. However, he failed to comply with the Court of Session Rules requirement to apply for a stated case within 14 days of the determination. Some months later, he brought these proceedings, asking the Court to let him appeal out of time.

The original determination was accompanied by the Ombudsman's standard appeals [factsheet](#). After referring to the 28-day appeal period in England & Wales, it said: "Different time limits apply in Scotland and in Northern Ireland and local advice should be taken." The judge, Lord Brodie, described the information provided in the factsheet as 'exiguous' and commented that the member might have been better served "had the factsheet crisply stated that he had 14 days to appeal".

The Ombudsman argued that the efficiency of the statutory Ombudsman framework depended on parties meeting time limits (although he did confirm that his office was planning to amend the offending factsheet).

The Court accepted that a more prudent member would have promptly taken, and acted on, competent advice to appeal in time. But the complaint had taken 3 years to reach a final determination and in some cases the window for appealing an Ombudsman determination was "impracticably short". The judge granted the application, saying that the prejudice to the member in being denied his appeal would outweigh that caused to the Ombudsman and trustees in allowing it.

*Comment:* This is not the first time the Ombudsman's office has faced criticism over the standard factsheet as it relates to appeals in Scotland (and Northern Ireland). The hint that the factsheet is under review is welcome.

## Ill-health pension application had to meet rules requirements

[Speed v Teachers' Pensions](#) [2019] 10 WLUK 431 concerned a member granted an ill-health pension in 2002. In 2005, the scheme decided that the member was no longer incapacitated and suspended his pension. When he sought to challenge this decision he was told that it was also still open to him to make a new application for ill-health pension and, in an e-mail to the scheme in 2013, the member said: "It seems I should reapply as well as appeal".

When the member subsequently complained about the failure to reinstate his pension the Ombudsman held - in PO-6847 [Mr D](#) (10 June 2016) - that the 2013 e-mail was not a formal "application for his pension to be reinstated" under the relevant rules. These required a written application, accompanied by the medical evidence needed to determine whether his ability to work had been impaired by more than 90%. As no such application had been made, Teachers' Pensions had no case to answer.

The High Court agreed. The member's 2013 e-mail was merely an acknowledgment that it was open to him to make a reinstatement application: the Ombudsman was entitled to take the view that the member had not actually done so.

*Comment:* This is an unfortunate example of how a simple misunderstanding can spawn a lengthy legal wrangle. It may not be over: at the time of writing, we understand the member was seeking permission to appeal to the Court of Appeal.

## New Corporate Plan unveiled

The Ombudsman's [Corporate Plan 2019-2022](#) explains his strategic aims over the next three years.

The focus is on resolving disputes as early as possible without sacrificing quality. This is to be achieved through an ongoing digitalisation programme (a major website overhaul and new online portal for completing forms and uploading supporting documents); a casework reorganisation with an enhanced triage process, allowing customers to track the progress of cases; and by expanding the Ombudsman's current quality framework.

The document notes that office headcount has almost tripled from 40 in 2015 to a planned 111 by March 2020, as well as 240 volunteer experts. Salary spend has risen accordingly, driving a total planned increase in expenditure from £4.5m to £8.9m between 2017/18 and 2021/22. The Plan suggests that the Legal and Corporate Service teams are to be reorganised, which will also involve recruiting extra staff.

As set out in previous Corporate Plans, the Ombudsman will continue to use his decisions to influence and shape policy in the pensions industry. He will also continue to consider earlier intervention in disputes and "communicating with a view to influencing industry to adopt a one stage IDR".

*Comment:* Although changes promised by DWP last year (see our October 2019 [Update](#)) are yet to appear, the Plan makes the Ombudsman's own priorities clear. It also reveals how, even in the absence of new law, there has been a striking expansion of the Ombudsman's office in recent years!

## CMS and the Pensions Ombudsman

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

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

*The information in this publication is for general purposes and guidance only 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 giving definitive advice. The Update is intended to simplify and summarise the issues which it covers. It represents the law as at 15 January 2020.*

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