

Leaders in Pensions

Pensions Ombudsman Update

Welcome to our second Pensions Ombudsman Update. These quarterly 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. In this edition we look at the Ombudsman's new Annual Report alongside determinations and other developments from the last few months.

The Annual Report

A year of change: On 7 July, Anthony Arter published his [2015/16 Annual Report](#), a snapshot of his first year in charge. During 2015/16, the Pensions Ombudsman Service (POS) handled around 5,000 enquiries (an 18% increase on 2014/15), took on 1,363 cases for investigation (a 6% increase) and completed 1,308 investigations (a rise of some 35%). It completed investigations in an average of 10 months, with a quarter completed within six months (up from 18%) and 27% of completed cases ending in resolution or withdrawal of the complaint (up from 22%).

One explanation for these improvements is that some 63% of cases were resolved informally by adjudicators and only 37% with a formal Ombudsman decision (the respective figures last year were 44% and 56%). The Ombudsman explains that: *"The traditional route of a provisional decision followed by a determination will now only be used where the subject of the complaint is complex, where there is a novel legal point, where there are a number of complainants with the same issue, where the case is almost certainly going to be appealed, or where, in particular circumstances, it is considered to be appropriate."*

The Report acknowledges other recent reforms in how POS does business:

- moving the [application process](#) online: for the first time since the office was created in 1994, applicants do not have to fill out and post a paper application. A secure area planned for the website will allow applicants to share supporting documents and see how their application is progressing;
- a new policy on [privacy](#): since May, complainants are generally anonymised in published determinations, the Ombudsman having the final say in any individual case. This reverses the previous position, under which member details were made public unless the Ombudsman could be persuaded to redact them;
- [publishing adjudicators' opinions](#): POS will now publish such opinions if they are appealed to the Ombudsman or Deputy Ombudsman; or considered to be "of interest".

Issues to watch: In 2015/16 POS received over 200 complaints about suspected pension liberation, accounting for 20% of all completed investigations. There was, too, a marked rise in complaints about personal pension schemes, especially SIPP, which were the subject of 46% of completed investigations (up from 25% in 2014/15). In coming years, the Ombudsman anticipates further complaints triggered by: the use of SSAs as a vehicle for liberation; the ongoing roll-out of auto-enrolment; and GMP reconciliation following the abolition of contracting-out.

A new approach to appeals: Our previous Update referred to the [Hughes v Royal London](#) liberation case, in which the Ombudsman did not participate (and his decision was overturned). Perhaps chastened by this experience, the Ombudsman signals a change of policy towards joining in

High Court appeals: he will be more robust in doing so where this may benefit the wider pensions industry. He remarks that as POS's function is to provide 'unlegalistic justice', where there is legislative uncertainty he may explore the limits of the legislative intention to reach the right outcome.

Comment: Anthony Arter continues to modernise POS, and the Annual Report suggests that his changes are already having a positive impact. However, it is equally clear that the Service faces an upsurge in demand, and cannot afford to rest on its laurels.

The danger of the disclaimer

The facts of PO-5291 [Mather](#) (16 February 2016) go back to 1978, when the member, a teacher, received a refund of contributions for her four years of pensionable service but the Department for Education failed to amend its records to reflect this. The member returned to work and to scheme membership in the 1980s, receiving annual benefit statements based on the incorrect records, which overstated her pensionable service. The error was only spotted by Teachers' Pensions (TP) when the member sought to retire in 2013.

The member claimed that she had no recollection of the refund and that as a result of the incorrect statements she had chosen not to defer taking her pension, and downsized her home on the basis that her pension would cover the lower mortgage payments. TP argued that it was not possible for it to routinely check all members' files about service periods before a retirement application was made. It also referred to a disclaimer on the benefit statements which provided that: *"The figures in this Statement are for illustration only. Every effort has been made to ensure accuracy, however this Statement confers no right to the benefits quoted."*

The Deputy Pensions Ombudsman found that the member had forgotten about the refund, and was unaware of the mistake when she applied for retirement. If it was not feasible for TP to verify each member's record annually, it should not have used the phrase *"Every effort has been made to ensure accuracy"* on the benefit statements: that repeated assurance, which entitled the member to expect that her details were accurately recorded (or, at worst, contained only trivial errors), was *"untrue"*. In the circumstances, it would be unfair to reduce the member's benefits. TP was directed to increase the member's pension as if her service between 1974 and 1978 had been pensionable, and pay arrears from the date of her retirement (plus interest), subject to a deduction for the refund already paid.

Comment: The determination proves the Ombudsman may look critically at the precise wording even of 'standard' disclaimers. TP obviously hoped that the caveat in question might protect them, but in the event, they were hoist with their own petard. Trustees may wish to review any similar wording they or their administrators use!

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Failure to act urgently was maladministration

Under tax legislation, a lump sum arising on a member's death can be paid tax-free within two years of the scheme administrator becoming aware of the member's death. In PO-3753 [Lettman](#) (30 March 2016), the London Pension Fund Authority received notice of a member's death in deferment on 28 November 2008. However, the grant of letters of administration which the Authority required was not issued to the member's family until September 2010 and was only delivered to the Authority on 9 November 2010, less than three weeks from expiry of the two-year deadline.

On 17 November 2010, the Authority asked the member's former employer to decide the recipient of the lump sum, and on 23 November the employer chose the member's mother. Unfortunately, nothing more was done until December, when the Authority wrote to the mother to explain that as the two-year deadline had been missed a 40% unauthorised payment charge would be deducted. The mother complained, pointing out that she had only learned of the two-year limit on 9 November 2010, and argued that the Authority and the employer should have ensured that payment was made on time.

The Ombudsman held that although information about the two-year limit was not scheme-specific and there was "*no duty to disclose it*", either the Authority or the employer should nevertheless have volunteered it. In the circumstances, their failure to do so was maladministration. There had then been unnecessary delay following receipt of the grant on 9 November: the 13 working days that remained gave sufficient time to process the papers and arrange for payment.

Even after the employer took the decision to pay the death grant to the mother on 23 November, there were three or four days to have completed payment. The employer explained that it normally paid by BACS transfer, but did not have the mother's bank details. In the Ombudsman's view, the employer could instead have written a cheque when it realised this. Had a cheque been arranged within three days, payment could have been issued before the time limit expired.

The employer's failure to take urgent action amounted to maladministration and caused financial loss to the complainant. It was ordered to meet the HMRC charge of 40%.

Comment: In our experience, the two-year deadline is a common Achilles heel for trustees, employers and administrators alike, even where they have made concerted efforts to assemble sufficient information in advance of the deadline.

This determination flags that POS is likely to take a tough line in what the Ombudsman describes as "*11th hour*" cases.

Ombudsman warns he must use his resources proportionately

Last year the former Ombudsman, Tony King, found that the Government Actuary's Department had failed to adequately review police and firefighters' scheme commutation factors between 2002 and 2004. The Government compensated affected members with an additional lump sum and interest. In March this year, the Ombudsman [reported](#) that a number of members had complained that the interest paid was inadequate, but that he had decided on public policy grounds not to entertain their complaints.

In a further [statement](#) the Ombudsman observes that there could be thousands of complaints, each requiring him to consider what a member would have done with a sum of money had they received it over a decade ago: in such cases evidence is often scant, and complaints rarely upheld. Even aside from the public interest point, the Ombudsman expresses concern about investigating such complaints, bearing in mind the finite resources available to him: "*As my office is a public body I should act in a way that is proportionate.*"

Comment: The Ombudsman's intervention is not just of interest to the schemes and members involved. It is a reminder that his statutory power to investigate is discretionary, and that he may assess public policy and his own caseload even if this results in individual members losing access to redress which they might otherwise have had.

"Distress and inconvenience" watch

Finally, as mentioned in the last Update, Anthony Arter has overhauled POS policy on awards for distress and inconvenience. The new Annual Report mentions why change was needed: "*the original figure was set 20 years ago and since that time there has been 82% inflation*". Our analysis of determinations since April 2016 confirms that £500 is now the minimum award, where one is made, and that there have been seven further awards of at least £1,000.

Comment: The pattern of higher distress awards is now well established, and should be noted by trustees considering making offers at the IDR stage.

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.

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 19 July 2016.

CMS Cameron McKenna LLP is a limited liability partnership registered in England and Wales with registration number OC310335.