

Pensions Ombudsman Update - January 2024

Welcome to the latest edition of our 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. This special expanded edition is designed to provide a flavour of the new Ombudsman's first year at the helm - and pick out the main takeaways on key topics.

An ever-increasing workload

This month marks the first anniversary of our former colleague Dominic Harris being appointed as Pensions Ombudsman.

Just before Christmas, the new Ombudsman issued his first [Annual Report](#) and [Corporate Plan](#). Together, these scope out a plan for “*evolution rather than revolution*” - whilst outlining the size of the task ahead.

A busy 2022/23 saw a 17% increase in demand (representing over 1,000 additional complaints) and no less than 7,800 complaints were closed (up 49% on 2021/22).

The Ombudsman expects the upward trend to continue over the next three years, with projections for additional demand set at 12% pa. Likely drivers for this include automatic enrolment, pensions dashboards, the pension freedoms and implementation of the public sector age discrimination remedy. However, he also flags the impact of the cost-of-living crisis and current economic climate, which make individuals more susceptible to pension scams.

Future priorities include influencing and shaping industry & government policy and raising awareness of the service in order to increase the proportion of valid complaints that reach the Ombudsman.

Waiting times

Response times are a concern for our trustee clients and for their members. In 2022/23, just under half of complaints were closed within three months and 69% within a year. The Ombudsman acknowledges that waiting times are still too long and that reducing them will “*remain a real challenge*” in light of resources and demand.

According to the Corporate Plan, the Ombudsman's aspiration for 2023/24 is to reduce waiting times to between 5 and 12 months, which he believes is “*stretching but achievable*”. Strategies to achieve this include resolving cases earlier in the office's processes and embedding a new Projects Team.

By 2026, the Ombudsman hopes to reduce waiting times to a sustainable level.

The PDU

The Annual Report also describes how the Pensions Dishonesty Unit (PDU), which deals with more complex cases, concluded investigations into three schemes and progressed six more - with 17 further schemes under investigation (and more being referred ‘regularly’).

For more on the PDU, see our July 2022 [Update](#).

Comment: The Ombudsman's corporate documents often provide useful statements of intent. The new focus on “*evolution*” is intended as a deliberate change of emphasis following the “*transformational changes*” already made by his predecessor in recent years.

Is the Ombudsman a competent court?

You may have seen press coverage of the recent Court of Appeal [decision](#) that the Ombudsman was not a “competent court”. But what does it actually mean for schemes?

The relevant law

Trustees who wish to recoup past overpayments to members from ongoing pension must consider [section 91](#), Pensions Act 1995. This allows them to exercise rights of set-off in respect of pension paid in error. However, if the member disputes recovery, trustees can only exercise their equitable right to recoup where the obligation becomes enforceable by order of a “*competent court*”.

Following High Court dicta that the Office of the Pensions Ombudsman was not a competent court, the Ombudsman asked the Court of Appeal to rule on the point. He contended that his office was intended to provide an informal, quick and cost-free regime: the High Court had given too little weight to the practical consequences, such as the cost and delay if further proceedings were required.

Despite these arguments the Court of Appeal agreed with the High Court that on the natural and ordinary meaning of the wording, the Ombudsman was not a competent court for the purposes of section 91.

Implications and the Ombudsman's response

The effect of the decision is that even where the Ombudsman has determined the dispute in an overpayment recovery case, trustees need a County Court order stating the amount of the overpayment and rate of set-off. However, enforcement is an administrative matter for a court officer - no new hearing, declaration or order is needed.

Pronouncing himself “[disappointed](#)” by the Court of Appeal decision, the Ombudsman has issued a [factsheet](#) which says that the Government plans to change the law to let the Ombudsman end these disputes without the need for a County Court order. It also confirms that, in the meantime:

- the Ombudsman will provide a certified copy of his Determination to the County Court, and on receipt of the relevant form the County Court will deal with the matter on the papers;
- at IDRPs stage, trustees should ensure that all possible defences to recovery are properly dealt with and “*have turned their minds to what type of schedule of recoupment can be achieved and directed by the PO, in the event any defences are unsuccessful and a Determination is needed*”.

Comment: While not entirely surprising, the Court of Appeal decision creates an extra administrative burden for schemes, at least until the Government acts to correct it. Until then, the factsheet provides guidance and some clarity.

Overpayments: what to look for

Continuing this theme, last month's Determination in CAS-39869 [Mr Y](#) sets out - "for guidance" - the Ombudsman's approach to reducing future payments and recovering past overpayments. This includes his analysis of equitable recoupment and relevant defences.

The member complained that the scheme trustee was recovering overpaid pension (by withholding future increases) even though he disputed its right to do so. The Ombudsman held that as the trustee commenced recovery without the order of a competent court, this breached section 91.

Turning to the dispute itself, the Ombudsman explained that the trustee had to pay the correct benefits under scheme rules and that the starting point was that it was equitable to seek recovery of overpayments, subject to applicable legal defences. Trustees were entitled to exercise the self-help remedy of equitable recoupment as long as the approach adopted was not inequitable and otherwise in accordance with the law.

On the facts, the Ombudsman held that the member had 'Nelsonian' knowledge of the overpayments made, being aware he might not be entitled to them but not checking the position. There were no defences to recovery and the Ombudsman directed that the trustee could recoup the £16,000 overpayment via future deductions of £300 per month, although it would first have to apply to the County Court for an order authorising recoupment.

Comment: Trustees and administrators should note this timely primer as to how the Ombudsman expects them to approach overpayment cases and defences.

Transfers: trustees entitled to refer member to MoneyHelper

Determination CAS-95368 [Mr W](#) was the first Ombudsman ruling on the [Conditions for Transfers Regulations](#) which came into force in 2021, introducing a new system of red and amber flags in a bid to clamp down on transfer scams.

The member complained about delay caused by the trustee referring him to MoneyHelper for a safeguarding appointment, following his request to transfer benefits to a personal pension scheme. The referral was made on the basis of the amber flag raised under [regulation 9\(5\)\(d\)](#) where trustees decide a receiving scheme includes "overseas investments". The member said that he would be invested in a UK-based global fund and the flag should not be engaged where the receiving scheme did not directly invest in overseas companies.

The Ombudsman observed that:

- the wording of the Regulations did not align with their intended practical application;
- the pensions industry approach was fragmented, with different views on how to apply the Regulations and a lack of consistency in practice on the level of risk tolerated when applying them;
- on its face, the amber flag restriction applied not just where the transferring member would invest in overseas investments, but where existing members already did.

The Ombudsman explained that the decision whether the receiving scheme included overseas investments was one for transferring scheme trustees to make. He rejected the member's argument that the trustee had incorrectly construed the Regulations - it had taken legal advice, and a literal interpretation was not unreasonable. The complaint was not upheld.

Comment: The decision supports trustees who have chosen to refer all overseas investment cases to MoneyHelper, but it does not follow that the Ombudsman considers other approaches unreasonable. We consider that the Ombudsman's likely focus will be on trustees having followed proper process including appropriate due diligence, following relevant guidance and taking advice as required.

We expect more Determinations on this theme: DWP's [Review Report](#) last year confirmed the Ombudsman has received other complaints on the Regulations, mostly in relation to transfers blocked by a red flag.

Transfers & scams - where are we?

Regret claims

It's been business as usual for 'transfer regret' cases - where a member who had previously transferred to another scheme develops 'buyer's remorse' and claims that the original scheme should not have let the transfer happen. The principle remains that the member needs to show that there has been:

- maladministration by the transferring trustees;
- without which they would not have transferred.

The test for maladministration was illustrated by Determination CAS-37159 [Ms T](#) in which the Deputy Ombudsman found no maladministration in relation to a transfer-out in 2014. The trustee conducted appropriate due diligence in line with industry standards at that time and had been obliged to follow the member's transfer request, however much she might regret it now.

The causation point was shown in Determination CAS-50392 [Mr S](#). The transferring pension provider was guilty of an "appalling omission" in not following the Pensions Regulator's 'Scorpion' scams guidance some 3 years after it was introduced. However, the member had been made aware of warning signs by other pension providers and even if the provider had issued the Scorpion leaflet Mr S was unlikely to have acted any differently.

Scams Code of Practice

The Ombudsman has also set down a useful marker on the industry-wide PSIG [Scams Code](#). In Determination CAS-58624 [Mr H](#) he commented that whilst he encouraged trustees to consider the Code, it was not mandatory and "trustees and providers are entitled to decide upon their own, proportionate due diligence processes". The Deputy Ombudsman repeated this language in a later Determination, CAS-50392 [Mr S](#).

Comment: The consistent approach to regret claims is welcome, as is the Ombudsman's emphasis on whether trustees have appropriately managed the overall process (rather than always treating non-statutory industry guidance as if it were a statutory code).

Don't take all documents at face value

A different type of scam underpinned determination CAS-38681 [Mr N](#). The Ombudsman ordered a SIPP provider to reimburse the member after it transferred £20,000 of his fund to a fraudster who hacked into his e-mail account and gave the provider new bank details. The information given by the fraudster was suspicious and the provider should have taken further steps to ensure the instructions were genuine.

The Ombudsman noted how care was required when dealing with certified copy evidence. If there are concerns, additional steps might include calling the member directly to verify instructions are genuine, or contacting the individual who purportedly certified the relevant document (using any publicly available main switchboard number).

Comment: A useful 'how to' on proportionate due diligence around potentially suspicious documents.

Trustee could pay surplus to employer

Determination CAS-92093 [Mr S](#) concerned wind-up of a section of an industry-wide scheme. The rules gave the trustee a discretion to use a surplus on wind-up to augment benefits; if it did not, the surplus would go to the employer.

A member complained to the Ombudsman about the trustee's decision to pay the £12m surplus to the employer, arguing the trustee had breached its duties and not acted in the best interests of members. The trustee responded that the payment was appropriate as the employer had borne the downside risk in operating the section and paid most of the overall contributions. It should not lose out for having willingly funded the trustee's low-risk investment strategy.

The Ombudsman reiterated that he had no jurisdiction to investigate whether the trustee had complied with the Pensions Act 1995 procedural requirements governing refunds of surplus, which are a matter for the Pensions Regulator. However, he could investigate whether the trustee followed the correct process in making its decision.

The Ombudsman rejected the member's complaint, finding that the trustee had complied with its duties by:

- following the requirements of the scheme rules;
- correctly interpreting the rules;
- taking appropriate factors into account; and
- not having come to an unreasonable decision.

The courts had moved away from the 'simplistic' formulation of "best interests" to a test based on the "proper purposes" principle. A trustee would act for the purposes of the trust where surplus assets were available on wind-up and, having secured benefits in full, it decided to pay them to the employer in accordance with scheme rules.

The ruling is not a one-off: in Determination CAS-94719 [Mr Y](#) the Deputy Ombudsman deployed similar reasoning to reject a complaint that trustees had chosen to pay surplus (in this case, 50% of it) to an employer on wind-up.

Comment: As scheme funding positions improve and more schemes move to buy-out, this is a significant ruling. It confirms the principle that where benefits are fully secured and scheme rules allow, trustees can properly choose to repay surplus to the employer.

Investment: when is a loss not a loss?

We increasingly see IDRs which centre on alleged investment loss. Determination CAS-43661 [Mr Y](#) demonstrates the difficulties in gauging the quantum of loss - or even whether there has been a loss at all.

The member requested a cash transfer from his wrap platform to a SIPP. The SIPP provider gave the platform incorrect transfer instructions, leading to a delay in disinvestment of his holding during which the stocks held fell in value. Mr Y's new SIPP account started with £10,500 less than it would otherwise have done.

The SIPP provider argued that the same downwards market movements which caused the initial loss were more than offset by the corresponding decrease in the cost of the investments Mr Y purchased when he reinvested. Looking at the whole investment sequence, the member had made an overall gain, with his subsequent actions more than mitigating the original loss.

The Deputy Ombudsman thus had to consider whether the extent of the member's loss was crystallised when the cash went into the SIPP - or whether that was only the first step in a pre-planned "fixed point" disinvestment and reinvestment exercise, providing an opportunity for the member to mitigate any loss. On the facts, he found that it was the former and ordered the SIPP provider to pay the £10,500 loss, plus interest.

Comment: It is easy to see the distinction in principle between a discrete investment transaction and a series of related ones. However, it may be harder, on a given set of facts, to identify precisely which analysis applies!

Ill-health decisions in practice

In Determination CAS-46822 [Mr R](#), a member applied for ill-health early retirement. Medical opinions on his prognosis diverged, but ultimately the scheme declined his request. Mr R complained to the Ombudsman, arguing that more weight should have been given to the view of one of the specialists who had examined him.

The Ombudsman held there was no maladministration. The administrator properly considered the application, assessing all relevant medical evidence available at the time.

When considering ill-health complaints:

- the Ombudsman's primary concern is the decision-making process; it is not his role to review medical evidence and come to his own view on member eligibility for ill-health benefits;
- the weight to attach to medical evidence is for the administrator to decide - it can prefer its own advisers' evidence absent a cogent reason to the contrary (such as an error of fact or a misunderstanding of the relevant rules by the medical adviser);
- the decision to give little or no weight to evidence was not the same as failing to consider it.

Comment: Ill-health and incapacity pensions remain a staple of Ombudsman complaints, and in his early determinations on them the Ombudsman has indicated a consistent approach to that of his predecessor. This is likely to be well-received by trustees.

Scheme's error gave rise to estoppel

Determination CAS-50008 [Ms E](#) was a striking case in which the Ombudsman found that the scheme should pay the applicant a survivor pension - even though she did not qualify for one under the scheme rules.

The member, who was terminally ill, was told by the pension provider that there was no need for him to marry his partner (Ms E) in order for her to receive a survivor pension under the scheme. However, when he died - a few months later - it became apparent that the rules did not provide a pension for an unmarried partner.

Ms E complained to the Ombudsman. She did not raise any specific legal argument as to why it was inequitable for the provider to go back on its earlier misstatement. However, the Ombudsman said that given the informal nature of his proceedings, it was necessary for him to suggest potentially available legal causes of action.

As a result, the Ombudsman determined that the conditions necessary to establish an 'estoppel by representation' were met. Had the member been given the correct information, he would have married his partner so that she would receive a pension from the scheme. To remedy the financial injustice suffered as a direct consequence of the provider's maladministration the scheme must pay Ms E the pension she would have received if she had married the member, together with £2,000 for non-financial injustice.

Comment: Successful estoppel claims are rare but this one is a reminder that if a party detrimentally relies on an unambiguous promise of a higher benefit, they may be able to hold the scheme to it.

Non-financial injustice: a record award

Determination PO-28532 [Mr A & others](#) was a complicated case in which the Deputy Ombudsman delivered a damning verdict on the sole trustee of a liberation scheme who took on the role without any pensions experience.

Even though the trustee was unpaid, the Deputy Ombudsman treated him as a "quasi-professional trustee" subject to the higher standards expected of paid trustees. He proceeded to order the trustee to make the scheme good for the lost funds of all 42 members.

After considering the case law on the quantum of awards for non-financial injustice, the Deputy Ombudsman directed the trustee to pay £10,000 to Mr A and £7,000 to each of the other two applicants for "exceptional" maladministration. These are the highest individual distress awards yet made.

Comment: The awards here are outliers (reflecting an exceptional level of fault), but the Ombudsman has recently indicated he may review the current [factsheet](#) setting out bands for non-financial distress awards, which dates from 2018. The case law considered in this Determination will be pertinent to his review.

Distress after death?

CAS-35611 [Estate of the late Mr R](#) helpfully clarified that while the Ombudsman cannot grant awards in relation to distress suffered in the capacity of executor, he can do so in relation to distress suffered by a member before their death.

Comment: This should put the position beyond doubt, following some confusion on this point in the past.

Cyber-breach causes backlog

Last summer, a [cyber incident](#) disabled access to Ombudsman systems including application forms and LiveChat. After working with relevant agencies, including the National Cyber Security Centre, services were restored and the Ombudsman completed a [review](#) of the incident.

The breach - notified to over 17,000 individuals - also led to the Annual Report being delayed by several months.

Comment: Cyber security is a topic of great interest to trustees. Public bodies, just like private sector schemes and employers, must be vigilant. Several of our clients were affected by delays in complaints that arose from the incident - we are pleased it has been resolved.

Former Ombudsman spreads his wings

In the autumn, DWP [extended](#) Anthony Arter's appointment as part-time Deputy Pensions Ombudsman for nine more months from January 2024. Following the untimely [death](#) of former Ombudsman Chair Caroline Rookes in 2023, Mr Arter has now been [appointed](#) as Interim Chair of TPO while the hunt for a permanent Chair is undertaken.

Comment: Mr Arter has certainly shown his versatility - this is his third role at the Ombudsman within 12 months. The new Ombudsman has welcomed the stability that this appointment should provide.

Boosting the volunteer network

The Ombudsman is looking out for more [volunteers](#) to support his work. Last summer, he noted how the volunteer network of 200 pension professionals had helped his Early Resolution Service close 1,390 cases in the previous year.

Comment: As demand for Ombudsman services increases, any expansion of the ranks is positive for members and the industry.

CMS and the Pensions Ombudsman

CMS has had a market-leading Pensions Ombudsman Unit for many years, regularly advising clients on how to manage and respond to complaints brought before the Ombudsman. CMS is also a founding 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 30 January 2024.