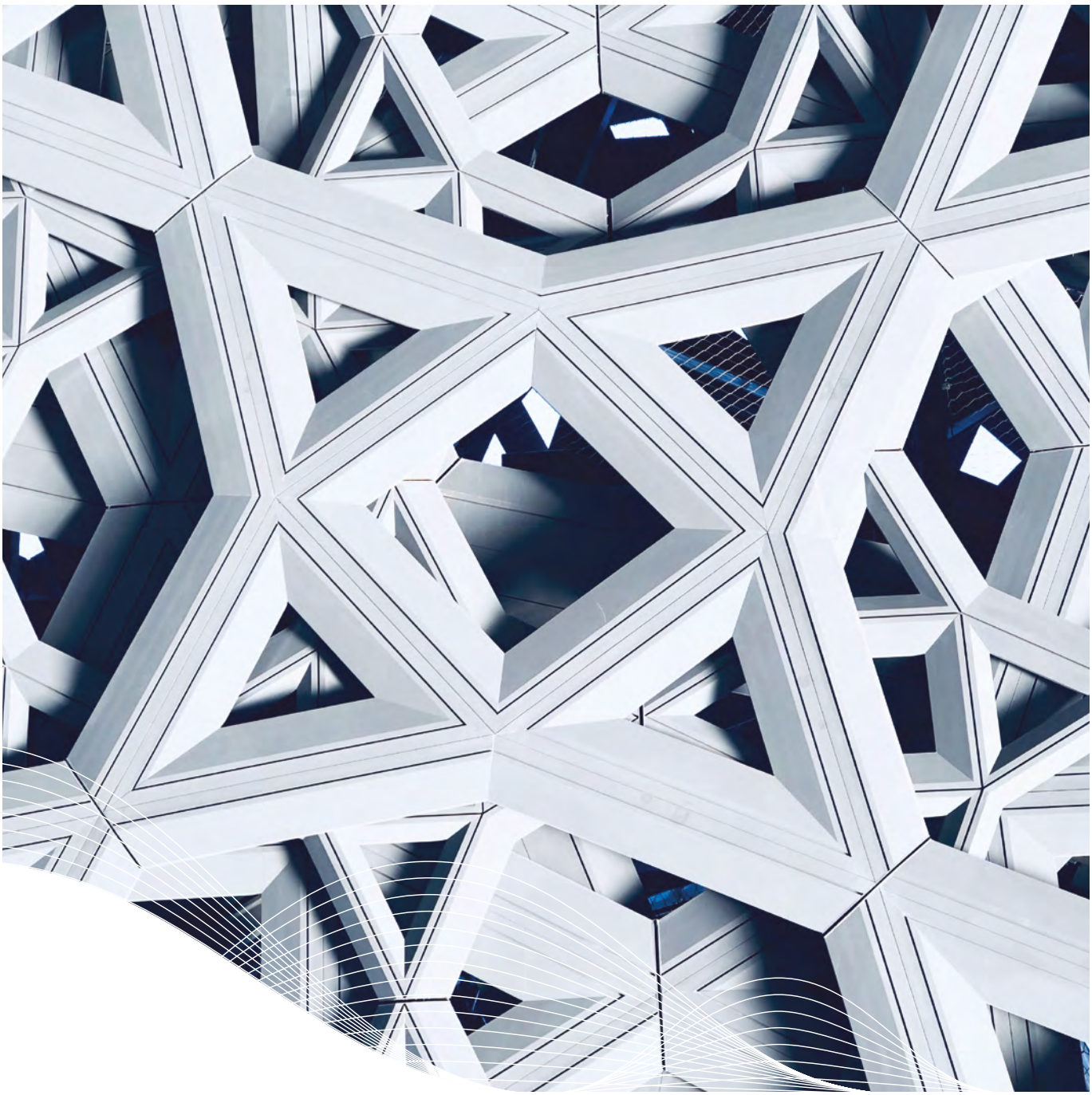

Pensions Ombudsman Round-up

AUGUST 2020

DLA PIPER

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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 and Deputy Pensions Ombudsman.

In this edition we look at determinations covering issues including:

- pension increases;
- transfers; and
- failure to pay contributions.

In the statistics section we provide a breakdown of the overall outcome of the determinations for February and March 2020 and the range of awards made for distress and inconvenience.

In this newsletter references to:

"**TPO**" mean the organisation The Pensions Ombudsman;

"**the PO**" mean the Pensions Ombudsman; and

"**the DPO**" mean the Deputy Pensions Ombudsman.

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 Megan Sumpster. Contact details can be found at the end of this newsletter.

Pension increases

Background

In this case, PO-26878, Mr L complained about the Trustee's decision to exercise its discretion to change the index used for future increases on pensions in payment. Mr L argued that: (i) the Trustee did not have sufficient power under the Scheme's Trust Deed and Rules (the Rules) to change the index from the Retail Prices Index (RPI) to the Consumer Prices Index (CPI); and (ii) his retirement letter contained the words "*in accordance with the rules of the Scheme*" and the Rules at that time did not contain any provisions for the subsequent change to CPI.

The Rules defined Index as, "*the Government index of retail prices for all items or any other index selected by the Trustee, subject to Registered Status not being prejudiced.*"

Mr L left pensionable service in August 2005 and, in October, he received a certificate in respect of his deferred benefits (the Certificate) that stated, "*Your pension, in excess of the GMP, is guaranteed to increase during retirement by the rise in the RPI subject to a maximum increase of 5% per annum.*"

Shortly before his retirement in July 2014, Mr L received information setting out his options for retirement (the Retirement Pack). One option was a pension increase exchange offer, which Mr L accepted. The Retirement Pack stated that Mr L's pension would increase "*in line with price inflation*" but contained a caveat that Mr L's benefits were "*not guaranteed*" and *"in the event of any change … would be recalculated.*"

In 2018, in response to financial pressures, the Scheme's Principal Employer asked the Trustee to exercise its power to change the basis for calculating pension increases from RPI to CPI. The Trustee agreed. Mr L complained to TPO about the "*Company's unilateral decision*", arguing that the Certificate had referred to RPI and, that as his Certificate was a contractual document, it took precedence over the Rules.

Conclusions

The PO rejected Mr L's complaint. The PO considered recent case law, in particular, the cases of *Qinetiq* and *Arcadia*, in which it was held that where a scheme's provisions give the trustees the power to select or change the index, the trustees could exercise that power in relation to periods both before and after the change without infringing section 67 of the Pensions Act 1995. The PO was of the view that the definition of Index in this case would allow the Trustee to change from RPI to CPI in a similar manner to the cases of *Qinetiq* and *Arcadia.*

Mr L also contended that the Certificate was contractual in nature, taking precedence over the Rules and, therefore, the Trustee was estopped from going back on its alleged promise in the Certificate to provide increases in line with RPI. The PO disagreed, noting that the Certificate simply stated the position in respect of pension increases at the time it was issued and that there was nothing akin to an undertaking in the Certificate that RPI would be retained indefinitely. Further, in the absence of any reference to RPI in the Retirement Pack, the PO was not persuaded that it was reasonable for Mr L to have assumed that RPI would survive in perpetuity. The PO was of the view that, if the rate of pension increases was indeed a core element of Mr L's retirement decision-making process, he should have queried the position before taking his pension. Nor was there any evidence that Mr L had suffered any financial loss as a result of his alleged reliance on the Certificate. Finally, the PO was of the view that the Trustee had directed itself correctly in the law and the decision it arrived at, that is, to switch from RPI to CPI, was reasonable in the circumstances.

Pension increases

Background

In this case (PO-21816), Mr N was a member of the Scheme, which was set up following the privatisation of the water industry. In 1992, Mr N was offered membership of a new scheme (the WP Scheme) but opted to remain in the Scheme. In 2007, Mr N took early retirement from the Scheme and in April 2011, he learnt that future pension increases would be linked to CPI rather than RPI. Mr N complained to TPO that his pension had been increased by reference to CPI, rather than RPI, since 2011 and that he was given misleading information about pension increases in 1992 (the 1992 Information), which he relied upon to his detriment. Rule 7 of the Scheme's Rules sets out the basis for pension increases under the Scheme. It provides that, "*the Pension (Increases) Act 1971 ... shall be deemed to apply to the pension ... to the same extent as these provisions would apply to any similar benefits which would be payable ... to or in respect of a local authority under those Acts.*"

Conclusions

The Adjudicator was of the view that there were two elements to Mr N's complaint: (i) the use of CPI, instead of RPI, under Rule 7; and (ii) the 1992 Information.

The Adjudicator noted that Rule 7 did not refer specifically to RPI. Instead, it provided for pensions to be increased in the same way as under the Local Government Pension Scheme, that is, by reference to the Review Orders issued under the Pension (Increases) Act 1971. From 2011, the Review Orders provided for pension increases in line with CPI. Therefore, Mr N's entitlement under Rule 7 was to pension increases in line with CPI. In order to receive increases in line with RPI after 2011, Mr N would need to establish a right to such increases by estoppel.

The Adjudicator agreed there were a number of references to the use of RPI in the 1992 Information but noted that other information accessible by Mr N referred to pension increases being calculated "*under the Review Orders*". In addition, the 1992 Information was clear that it was intended to provide a summary of the Scheme benefits. In the Adjudicator's view, there was not a clear and unequivocal statement regarding the application of RPI that it would be unconscionable for the Company to go back on and, therefore, estoppel by representation could not be established. For an estoppel by convention to arise, there had to be a common assumption expressly shared by Mr N and the Company that pension increases would be linked to RPI regardless of any future legislative changes. In the Adjudicator's view, there was no evidence of this.

Mr N also argued that he had relied on the 1992 Information to his detriment. TPO's position is that a scheme is not bound to follow any incorrect information; however, TPO would provide redress if it could be shown that financial loss flowed from any incorrect information. Mr N highlighted references in the 1992 Information to pensions increasing "*automatically by the percentage increases in the Retail Prices Index*". The Adjudicator conceded that these statements might not be a completely accurate reflection of Rule 7. However, the Government's decision to switch to CPI could not have been foreseen in 1992 and, therefore, the 1992 Information, when read in context, was reasonably accurate at the time. In considering whether Mr N relied on the information to his detriment, the Adjudicator noted Mr N's assertion that the linkage to RPI was a major factor in his decision to remain in the Scheme and not move to the WP Scheme. She noted, however, that the Scheme still provided for protection against inflation, albeit at CPI, and moreover, there was no cap on the rate of increases, unlike the WP Scheme, which capped increases at 5%.

The PO reiterated: (i) Mr N is entitled to pension increases under Rule 7, that is, under the Review Orders; (ii) the 1992 Information was adequate and reasonably accurate at the time; (iii) it could not have been foreseen that the Government would switch to CPI for the Review Orders; (iv) even if the 1992 Information had contained a more detailed summary of Rule 7, it is unlikely that Mr N would have acted differently; (v) Mr N would have assumed that any reference to an inflationary index meant RPI as CPI did not exist; and (vi) it is not clear that Mr N has acted to his detriment because there is no cap on pension increases under Rule 7, unlike that which applies under the WP Scheme.

Transfers

PO-20134

In this case, TPO yet again confirmed that the benefit of hindsight should not be applied to pension transfers and that it is the circumstances at the time of transfer that are important.

Mr R had a personal pension plan with Aegon and in late 2012, Portland Wealth Associates (Portland) wrote to Aegon to say that Mr R had given it authority to request pension discharge forms and details of his current pension plan. Aegon then wrote to Portland with details of the transfer value available and enclosed the transfer discharge forms. Later that month, Marley Administration Services (Marley) wrote to Aegon and said it was acting as administrator of the Scheme and enclosed the transfer authority from Mr R requesting a transfer be paid to the Scheme. Marley also said the Scheme was authorised by HMRC and enclosed a copy of the Scheme's registration document. On 28 December, Aegon paid a transfer value of £12,722.08 to the Scheme.

Mr R complained that Aegon failed to carry out sufficient due diligence before the transfer and failed in its duty of care to him. Mr R argued that a number of warning signs were ignored. For example, Portland was not authorised by the Financial Conduct Authority, whose website records that Portland, "*is a firm that we have been told is either operating regulated activities without the correct authorisation or is running a scam*". Mr R also argued that Aegon should have enquired why Mr R was joining an occupational scheme and whether he was actually working for the Scheme employer.

Aegon responded by saying that, when dealing with Mr R's transfer request, it carried out such due diligence as was fair and reasonable, given industry standards at the time. Aegon further noted that the transfer of Mr R's pension took place before the Pensions Regulator's scorpion guidance was issued in February 2013. As set out in the *Hughes* TPO determination, Mr R could not apply current levels of knowledge and understanding of pension scams or present standards of practice to the past. Finally, Aegon pointed out that Mr R had a statutory right to transfer under section 93 of the Pension Schemes Act 1993, which it had no right to refuse.

The PO did not uphold the complaint. At the time of transfer, he noted, there were no signs that the Scheme was a pension liberation arrangement and, as Aegon pointed out, the transfer was processed before the Regulator published its scorpion guidance. The level of due diligence required at the time was simply to check that a scheme was registered with HMRC and did not appear on any warning lists. Further, the High Court judgment in Hughes held that the statutory right to transfer trumped any concerns about pension liberation (although it is not obvious from the determination that Aegon had any such concerns). Whilst the PO sympathised with Mr R, he found that his comments were made with the benefit of hindsight and so it would not be reasonable for him to uphold the complaint.

PO-26700

In this case, Mr S complained that Standard Life refused to transfer his pension benefits in the Plan to another provider. Mr S completed a transfer Application in 2018. In this Application, he stated that the receiving scheme was both an occupational scheme and a personal pension. He also showed himself as the scheme administrator. Standard Life wrote to Mr S asking him to provide a screenshot of HMRC's online services showing the scheme name, PSTR number and the scheme administrator. Mr S provided a screenshot without the name of the scheme administrator. Standard Life also asked Mr S to provide a copy of the scheme deed and rules. Mr S responded by saying that the scheme was established by contract, was not regulated and therefore all that applied was HMRC rules. Standard Life requested a copy of the contract but Mr S failed to provide it.

Section 95(3) of the Pension Schemes Act 1993 requires that a cash equivalent is transferred to either an occupational or personal pension scheme. Due to the lack of documentary evidence available against which Standard Life could make an objective assessment of whether the legal requirements were met, the PO's view was that Standard Life was entitled to refuse the transfer. The complaint was not upheld.

These cases reveal the difficulty trustees can face when considering whether to carry out a transfer.

Failure to pay contributions

Background

The complainants in these two cases were employees of BSSL and members of the Plan, a defined contribution scheme administered by Scottish Widows. In each case, the PO made an award of £3,000 for exceptional distress and inconvenience and reported BSSL to the Pensions Regulator.

PO-26563

Mr S complained that his pension contributions had not been paid into his Plan. Mr S became a member of the Plan in 2012. Shortly after joining the Plan, his employer, BSSL, began to fail to pay pension contributions to Scottish Widows. In 2017, Scottish Widows conducted a basic calculation showing that the Plan held £1,929.25 less than it should have done. In March 2018, after agreeing with BSSL that it could pay the overdue contributions by the end of June 2018, Mr S wrote to BSSL informing it that he intended to retire from 1 June 2018. After a number of months with still no action from BSSL, Mr S contacted TPO's Early Resolution Service (ERS). BSSL did not respond to ERS's requests or correspondence and so the matter was passed to TPO.

PO-25138

Mr N complained that pension contributions had not been paid into his Plan. In 2009, Mr N received a "Statement of Main Terms of Employment" from BSSL (the Terms). This said that BSSL would make a financial contribution of 8% of Mr N's pensionable salary into the "Scheme", BSSL's occupational scheme at the time. In 2012, Mr N joined the Plan. Shortly after joining the Plan, his employer, BSSL, began to fail to pay pension contributions to Scottish Widows. In March 2018, BSSL issued a letter to Mr N. It said that, due to the recession, it had not been possible to maintain the employer contributions. It also noted that it had not kept up to date with employee contributions, which at that point were fully paid up to January 2016. The employer contributions were fully paid up to September 2014. BSSL said that employee contributions would be brought up to date with a portion of the employer contributions by the end of June 2018 and regular contributions would recommence thereafter. On 18 September, Mr N wrote to BSSL and asked for a breakdown of all the employee and employer contributions paid into the Plan and asked BSSL to ensure that any outstanding payments would be paid into the Plan by his final day of employment, 26 October 2018. Mr N then contacted the ERS to try to resolve his complaint. ERS contacted BSSL and, in response, BSSL issued a letter to Mr N that said it had paid all employee and "statutory" employer contributions. It explained that regular employee and employer contributions had recommenced. On 30 November, ERS received information from Scottish Widows about the payments it had received from BSSL. It was clear that the employer contributions had not been made in accordance with those required under Mr N's employment contract. In fact, it appeared that approximately £8,000 in employer contributions had not been paid into Mr N's Plan. The complaint was then passed to TPO.

The information from Scottish Widows demonstrated that contributions were made late, with the majority being significantly delayed. From July 2015 to October 2018, employer contributions were either missing or significantly reduced. According to the Terms, BSSL should have made 8% employer contributions. So, it appeared that approximately £8,000 in employer contributions had not been paid into Mr N's Plan.

Conclusions

In both cases, the PO found that maladministration had occurred and that financial and non-financial loss had occurred as a result. More specifically, contributions had been either significantly delayed or missed entirely; BSSL had impeded an early reconciliation and resolution of the matter; and the complainants had suffered an exceptional level of distress and inconvenience as a result of BSSL's errors and inaction. The PO determined that, within 28 days of his Determination, BSSL should pay the missing contributions to Scottish Widows and make any additional payments so that each complainant's Plan reflected the units that would have been bought had the payments been made on time. In addition, BSSL was ordered to pay to each complainant £3,000 in recognition of the exceptional distress and inconvenience suffered.

Statistics

February 2020

NUMBER OF DETERMINATIONS		17
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		17
Scheme type	Public service scheme	2
	Private sector scheme	15
Outcome	Upheld	1
	Partly upheld	4
	Not upheld	12
Awards for distress and inconvenience*	Lowest award	£500
	Highest award	£2,000

March 2020

NUMBER OF DETERMINATIONS		52
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		49
Scheme type	Public service scheme	15
	Private sector scheme	37
Outcome	Upheld	10
	Partly upheld	12
	Not upheld	30
Awards for distress and inconvenience*	Lowest award	£500
	Highest award	£3,000

* 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 to the applicant or one respondent is directed to make payments to more than one person in the same case.

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