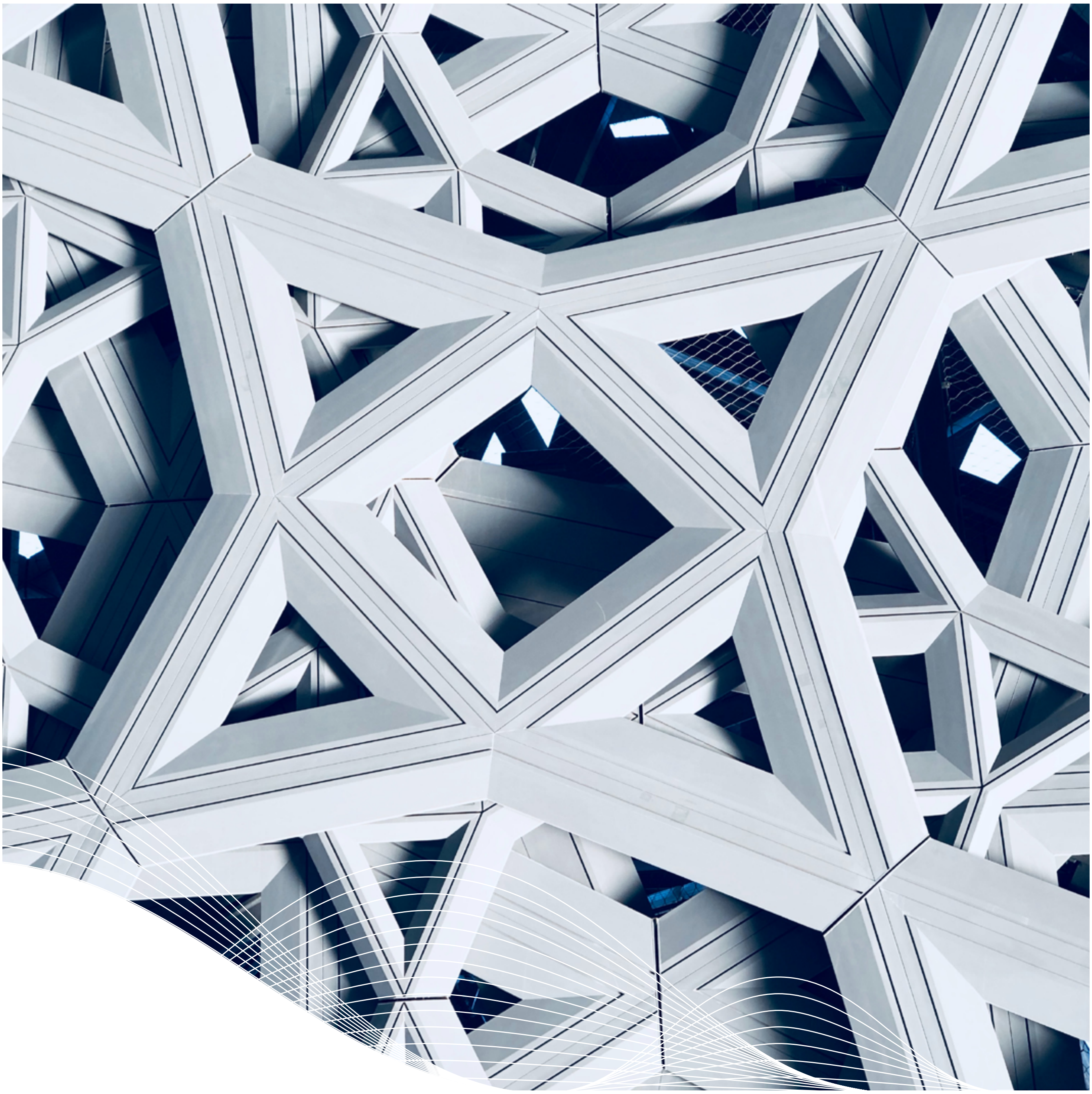

Pensions Ombudsman Round-Up

JULY 2021

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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:

- transfers;
- scheme changes; and
- ill-health retirement.

In the statistics section we provide a breakdown of the overall outcome of the determinations for January, February, March and April 2021 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.

Transfers

In PO-24554, Mr R was a member of a group personal pension administered by Aegon (the GPP). In January 2013, Mr R requested a transfer from his GPP to the [Mr R] Ltd Pension Scheme (the Scheme), a small self-administered scheme administered by Greenchurch. On 13 February, Greenchurch signed Aegon's transfer discharge form, indicating that it was an unsecured scheme. Aegon received this form on 14 February and, on the same day, Greenchurch sent a letter to Aegon confirming that it had registered the Scheme with HMRC. On 14 February, the Regulator published its pensions fraud guidance, known as its "Scorpion guidance". The Scorpion guidance identifies warning signs in relation to pensions fraud, one of which is the receiving scheme being only recently registered with HMRC. On 15 February, Aegon transferred GBP21,461, Mr R's total transfer value, to Greenchurch's bank. This was returned to Aegon following an administrative error and the payment was remade on 19 March 2013. Four years later, Mr R complained to Aegon that, among other things, it had not conducted sufficient and appropriate due diligence before his transfer took place.

Aegon disagreed that it had acted incorrectly. Further, Aegon was of the view that, in signing the transfer discharge form, Mr R had agreed to the transfer and its payment was a full discharge of Aegon's liability under the GPP. Aegon also noted that Mr R's transfer request was already being processed when the Scorpion guidance was issued. Had Aegon suspended all transfers whilst considering the requirements of the new guidance, transfers would have been delayed and transfer values potentially altered or even diminished. Finally, Aegon referred to several TPO complaints that considered transfers and the required levels of due diligence around this time. These cases, Aegon noted, identified the Scorpion guidance as a *"point of change"* but that it was reasonable to allow providers a short time of around three months in which to implement new processes. With this transfer, the due diligence checks were completed and payment made by 15 February 2013, just one day after the guidance was issued and well within the three month period.

PO's conclusions

The PO held that 19 March 2013 was the effective date of the transfer. Although Aegon might have considered that it could proceed with the March transfer (the actual transfer) in the same manner that it had the February transfer (the attempted transfer), Aegon had potentially become subject to different regulatory obligations in respect of the due diligence during this time. The PO also said that, were he to find that Aegon were obliged, at the time it processed the transfer, to comply with the Scorpion guidance, this would have indicated some matters for potential concern (for example, the Scheme having only recently been registered); nonetheless, the transfer could not have been refused since there is no indication (following the High Court judgment in *Hughes v Royal London*) that Mr R did not have a statutory right to the transfer.

The PO also referred to the previous TPO determinations identified by Aegon, which stated that providers should be allowed a period of three months to implement the measures required by the Scorpion guidance. The PO agreed with Aegon that he and his predecessor had consistently stated that a period of grace was appropriate for providers to review their processes following the publication of the Scorpion guidance; however, he noted that he was not bound by previous determinations and each case should be assessed on its individual facts. Having re-evaluated the evolving regulatory position, the PO considered that a period of approximately one month would, in fact, be sufficient for a provider to put in place new processes as a result of new guidance published by the Regulator. The PO was also of the view that, should this timeframe not be met by a provider, he would expect the provider to consider temporarily suspending transfers whilst making the necessary arrangements.

The PO considered that the delay to the actual transfer payment was simply an administrative error; no new information had been received to raise concerns about the transfer and, therefore, it would not be reasonable to have expected Aegon to have updated its transfer processes and then revisit Mr R's transfer on that date. As the transfer was completed within one month initially (and administratively re-sent shortly after), Aegon was not required to carry out enhanced due diligence in line with the Scorpion guidance; the due diligence it did carry out was sufficient and Aegon was not negligent in allowing the transfer. The complaint was not upheld.

Transfers

In another case relating to pensions transfer processes (PO-28256), Mr R complained that L&G failed to carry out sufficient due diligence before transferring his benefits. Mr R claims that he suffered financial loss as a result of the transfer and he should be compensated accordingly.

In 2014, Mr R received an unsolicited approach from a financial adviser working for First Review, a firm not regulated by the Financial Conduct Authority. The adviser recommended that Mr R transfer his benefits from his L&G personal pension plan (the Plan) to a SSAS to take advantage of wider investment opportunities. On 2 May, First Review sent Mr R's signed letter of authority to L&G and asked it to provide details of Mr R's benefits under the Plan. L&G responded accordingly.

The Lydsey Close 1969 Limited Pension Scheme (the Scheme) was established as a single member occupational scheme by a trust deed dated 24 July 2014. The Scheme was to be administered by Cantwell Grove (Cantwell). The Scheme's sponsoring employer was Lydsey Close 1969 Limited, the sole director of which was Mr R and Mr R was appointed as sole trustee of the Scheme.

On 7 August, Cantwell sent a letter to L&G enclosing Mr R's signed request to transfer from the Plan to the Scheme. Mr R had also signed a letter confirming that he was aware of pension liberation issues and had carefully considered his decision to transfer. A copy of the letter from HMRC confirming the registration of the Scheme was enclosed, together with the Scheme's trust deed and rules. Cantwell stated that it had sent the Scorpion guidance to Mr R and that Mr R had confirmed that no cash inducement or other incentive had been offered and that early access to the pension was not being sought. An attached Q&A document stated that two investments were being considered, including a commercial property investment, possibly involving overseas investment. Cantwell asked L&G to complete and return the transfer form and make the transfer payment to the Scheme bank account.

L&G sent the paperwork to Mr R on 12 August. Its covering letter (the Letter) referred to the Regulator's Scorpion guidance and noted several concerns, including that Mr R may not have received advice from a financial adviser authorised by the FCA, the Scheme's trust deed stated that a proportion of Scheme investments may be made outside the UK and any overseas investment would not be protected by the Financial Services Compensation Scheme. On 26 August, Mr R signed a discharge form and a declaration form supplied by L&G. This confirmed that Mr R, having read the Letter, still wished to proceed with his request. L&G informed Mr R and Cantwell on 1 September that it had paid cash equivalent transfer values, totalling nearly GBP36,000, into the Scheme. It is understood that most of the money was subsequently invested in hotel accommodation in Cape Verde.

On 14 November 2018, having seen a Panorama programme exposing pension scams and having been contacted by a claims management firm, Mr R complained to L&G on the basis that L&G had allowed Mr R to transfer out "*without undertaking the due diligence advised by [the] regulator*". Mr R sought full re-instatement in the Plan and argued that L&G should have engaged verbally with him and informed him of the risks of transferring.

PO's conclusions

The PO noted that the questions he needed to consider were: first, whether L&G gave sufficient warnings to Mr R; second, whether L&G carried out sufficient checks on the Scheme; and third, if L&G had given any further warnings to Mr R, whether he would not have proceeded with the transfer. The PO noted that L&G had raised specific concerns about the Scheme with Mr R in the Letter. Further, Mr R had signed letters confirming, among other things, that he was aware of pensions liberation issues, had carefully considered his decision to transfer and would not hold L&G responsible for any losses or seek compensation. Cantwell had also sent Mr R the Scorpion guidance. Whilst the PO sympathised with Mr R's position, he found that L&G did provide him with sufficient information through warnings contained in its Letter and the Scorpion warning for him to be aware of the possibility of pension liberation but that Mr R chose to disregard them. Mr R did have to take some responsibility for his actions. Further, the PO was not persuaded that, had L&G telephoned Mr R, he would not have gone ahead with the transfer. The PO did not uphold Mr R's complaint.

Transfers

In (PO-24361), Mr Y was a deferred member of the Fund. Mr Y asked BW, the administrator of the Fund, for a CETV quotation in December 2017. BW provided Mr Y with a CETV of approximately GBP69,600, which had a guarantee end date of March 2018. BW informed Mr Y that, should he wish to transfer his pension overseas, he should let them know immediately. On 6 March 2018, Mr Y's financial adviser submitted completed transfer forms but, shortly after, BW informed the receiving scheme, a personal pension in Jersey, that it would need overseas specific transfer forms. On 20 March, the IFA and the receiving scheme returned the completed forms to BW. BW confirmed that the CETV had been secured as all the relevant documents had been received in time for the March cut off. On 2 May, BW wrote to Mr Y asking for confirmation of his residency. BW also wrote to the receiving scheme to request information, including a full copy of the receiving scheme's Declaration of Trust (the Declaration). The receiving scheme noted that it had never had to provide this to a scheme before. On 14 August, BW asked the receiving scheme for extracts of the Declaration, among other documents, and the receiving scheme emailed them that day. On 18 June, Mr Y wrote to BW to say that he had carefully considered the scheme and realised and accepted the risks associated with it. He also said that he was losing patience with the length of time the transfer was taking. BW responded by saying that the delay was owing to the need to ascertain whether the receiving scheme was a QROPS.

Following further requests for updates, Mr Y complained to BW about the time taken to transfer his benefits. Mr Y reiterated that he had transferred benefits to the receiving scheme before and there was no issue with HMRC not recognising it as a QROPS. On 19 July, BW informed Mr Y that the Fund Trustee had decided not to approve the transfer on the basis that the further due diligence required would be disproportionate, although the Trustee would be prepared to reconsider the matter should Mr Y bear the cost of further due diligence. Mr Y formally complained to BW on 24 July and then again on 18 September. The Trustee rejected both complaints. Mr Y's pension was subsequently transferred to a UK scheme on 14 March 2019 and, at a later date, to the Jersey-based receiving scheme.

PO's conclusions

Mr Y alleged BW's due diligence was excessive and erroneous, in particular, in respect of its request for information regarding the receiving scheme's ill-health provisions and a copy of the Declaration. However, the PO was of the view that BW's requests were reasonable as they allowed the Trustee to establish whether the receiving scheme satisfied the legal requirements of a QROPS. Further, the PO considered that the request for the Declaration did not delay the transfer. The PO found that BW's request for Mr Y's proof of residency, although reasonable, could have been requested sooner and, therefore, this constituted an undue delay. In relation to the Trustee's transfer refusal, the PO noted that the Trustee had to decide whether the receiving scheme was a QROPS in order for there to be a statutory right to transfer. In this case, the Trustee claimed that it was not possible to ascertain whether or not the receiving scheme was a QROPS. As a result, it used its discretion to refuse the transfer. The PO considered that the Trustee was not entitled to use this discretionary power where there was a statutory right to transfer. Further, the Trustee's decision to refuse Mr Y's transfer on the basis that "*HMRC would not guarantee that a scheme appearing on the list of ROPS was a QROPS,*" amounted to maladministration. The PO was also of the view that the Trustee should not have suggested carrying out further due diligence at Mr Y's expense. When considering whether any injustice had occurred, the PO considered it possible that Mr Y may have experienced a financial loss with regard to his investments. Moreover, if the Trustee had accepted the transfer request, Mr Y would not have incurred the costs of acquiring further CETVs, reports and/or financial advice. The PO found that Mr Y suffered serious distress and inconvenience. The PO partly upheld Mr Y's complaint. He directed that the Trustee pay Mr Y GBP1,000 in compensation and decide whether or not the receiving scheme is a QROPS. In making this decision, the Trustee should not consider the possibility that HMRC might withdraw QROPS status from the receiving scheme in the future. If the Trustee were to decide that the receiving scheme is a QROPS, further directions applied: (i) in relation to interest; (ii) in relation to any costs Mr Y believes he would not have incurred had the Trustee made this decision in July 2018; and (iii), what the investment performance of the GBP69,600 would have been from July 2018 to 14 March 2019.

Scheme changes

This complaint (CAS-27382-Q6L3) relates to the Trustee's decision to change the accrual rate of the Pilots National Pension Fund (PNPF). During a Trustee meeting in 2018, it was noted that members who joined the PNPF after 2002 (Post-2002 Members) were subsidising the benefits of those members who joined before 2002 (Pre-2002 Members), as all members were paying the same contribution rate but Post-2002 Members were on an accrual rate of 1/70th, whereas Pre-2002 Members were on an accrual rate of 1/60th. At another Trustee meeting shortly after, this issue was raised again. The minutes of the meeting showed that the Trustee weighed up competing factors when considering this problem, including: the disparity between different members paying the same contribution rate; the legal concerns in reducing benefits; the concern around improving benefits from an underfunded scheme; the annual allowance issues facing a material proportion of members; and the cost and complexity of different solutions. The Trustee agreed that it would be preferable in terms of costs and logistics to keep all members on the same accrual rate. In order to determine whether this should be 1/70th or a blended rate, the Trustee agreed to gather the opinions of ten PNPF members. Another Trustee meeting was held, during which it considered their opinions. It was noted that the most frequent concerns among members were the affordability of the accrual rate and the disparity between members in terms of the benefits being accrued. The Trustee was also given actuarial advice to move all members onto an accrual rate of 1/70th. The Trustee decided to carry out a consultation before reaching a final decision. As such, the Trustee wrote to all PNPF members to inform them of the proposal to move Pre-2002 Members onto an accrual rate of 1/70th, so that all members would be on the same accrual rate. The Trustee emphasised that this change would result in lower contributions for all members and it invited feedback. At a Trustee meeting at the end of the year, the response to the consultation was considered. It was ultimately agreed that all PNPF members would be put on an accrual rate of 1/70th, with a reduction in contribution rates. The Trustee confirmed in writing to members that this decision had been made for the following reasons: first, to ensure consistency between members; second, to ensure contributions were affordable; and third, to address members' feedback from the previous consultation.

In 2019, the Applicants (all Pre-2002 Members) raised a complaint regarding the changes. They complained that: first, the Trustee did not consider feedback from PNPF members before changing the accrual rate; second, in considering those members who were approaching their Lifetime Allowance limit, the Trustee acted in favour of higher earners; and, third, they have suffered a loss and they should be compensated with the option to retire at age 60, without reduction.

PO's conclusions

The PO did not uphold the complaint, agreeing with the Adjudicator's opinion. The PO first noted that the PNPF is a defined benefit scheme and, as with many defined benefit schemes, it is in deficit. Further, it is the Trustee's responsibility to address such a deficit. The PO considered it unfortunate that the Applicants had experienced a number of changes to PNPF during their membership but there is no evidence that the Applicants were entitled to accrue benefits at a certain level until they retired. As such, they have not suffered a loss for which they are entitled compensation. Moreover, the Applicants' request to receive compensation would negate the purpose of the Trustee's decision: asking for compensation is akin to requesting that they still receive higher benefits.

The PO also determined that the Trustee had reached its decision to change the accrual rate in a proper manner in line with the *Edge* principles. First, the PO was satisfied that the Trustee had directed itself properly in law, in accordance with the PNPF rules and having sought actuarial advice. Second, the PO was satisfied that the Trustee had considered all relevant factors. The Trustee provided minutes of its meetings and it was clear that it had discussed all suggestions and comments raised during the consultation process. Third, the PO had not placed any weight on any irrelevant factors. Its decision was not based on the potential tax savings its decision would have for higher earners. Rather, the decision was made to address the inconsistency in the contributions being paid and benefits received by members. Fourth, the PO was satisfied that the Trustee did not reach a decision that was perverse. The PO did not uphold the complaint.

Ill-health retirement

Background

In (PO-39957), Mrs L complained about her employer, HBOS's, refusal to pay her an ill-health retirement pension (IHRP). Mrs L was a member of the HBOS Final Salary Pension Scheme (the Scheme), which was administered by an in-house pensions team (Group Pensions).

In 2009, Mrs L suffered an accident, which led to chronic sciatica. Following an MRI scan, Ms Myles, a neurosurgeon, reported that Mrs L would not benefit from decompressive surgery and recommended that she consider pain relief. In late 2016, HBOS announced a restructuring and Mrs L and other employees were required to apply for new posts. If not selected, employees would be at risk of redundancy. In January 2017, Mrs L was told that she had not been successful in the selection process and would be made redundant if she could not be redeployed. Mrs L went on sick leave in March 2017. In June 2017, Mrs L was sent for another MRI and Ms Myles reported that exploratory surgery to remove scar tissue and flatten the disc bulge was a possibility but that there would be no guarantee of improvement. Ms Myles also noted that surgery might not prevent future recurrences of sciatica. Mrs L then advised her line manager that she wished to apply for an IHRP. Group Pensions acted as the decision maker on behalf of HBOS. On 12 July, Group Pensions referred Mrs L to an occupational health practitioner, HML. Whilst on sickness absence, Mrs L left HBOS through compulsory redundancy on 31 July 2017. In August, HML issued a report stating that Mrs L was experiencing significant symptoms and could not carry out her previous contractual duties. It added that BCERTA had been appointed by the Trustee to assess Mrs L's condition and was solely responsible for deciding if her condition was "permanent" for IHRP purposes.

In its report, BCERTA concluded that it could not support Mrs L's application for an IHRP as her condition *"could not be considered as permanent because there remained the possibility of surgery which on the balance of probabilities, had the potential to resolve or improve her symptoms."* On 30 March, HBOS wrote to Mrs L rejecting her application for an IHRP. In its letter, HBOS said that, under Rule 4.4 of the Scheme rules, HBOS may allow a member who leaves service before Normal Retirement Date (NRD) because of "Total or Partial Incapacity" to choose an immediate pension but that that Mrs L did not meet the criteria.. There remained the possibility of surgical treatment that, on the balance of probabilities, had the potential to resolve or alleviate Mrs L's symptoms and, therefore, they were not of a permanent nature, as required by Rule 4.4. Mrs L appealed the decision, which was then rejected by Group Pensions.

In March 2019, Mrs L complained to TPO. Among other things, she complained that: HBOS blindly followed advice from BCERTA and did not ask her medical consultants for their opinion; HBOS did not engage her in the process and she was never asked to submit evidence to support her application; and there was no appeals process as the decision was made by HBOS and not the Trustee.

PO's conclusions

The PO considered that Rule 4.4 required HBOS to make two decisions: first, whether Mrs L met the Partial or Total Incapacity definitions (a finding of fact); and second, whether it should allow her to opt for a pension (a discretion). These were to be considered alongside the test in the Finance Act 2004. The PO considered that HBOS could not reasonably discount the possibility of surgery when considering the assessment criteria, even though there are considerable risks involved with spinal surgery. He also noted that the Trustee was correct not to consider Mrs L's complaint as, under the Scheme rules, the decision was solely the responsibility of HBOS. The PO concluded that HBOS complied with the Scheme rules, the Finance Act 2004 test and its application process. The PO also found that BCERTA's report did not differ significantly from the views of Mrs L's own doctors and he did not consider it necessary for HBOS to request further medical evidence from Ms Myles or other specialists. HBOS was entitled to reply on the recommendation it received from BCERTA. Nevertheless, throughout the process, HBOS made some administrative errors, which, the PO found amount to maladministration. The PO partly upheld the complaint and awarded GBP500 to recognise Mrs L's significant distress and inconvenience.

Statistics

January 2021

NUMBER OF DETERMINATIONS		16
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		14
Scheme type	Public service scheme	5
	Private sector scheme	11
Outcome	Upheld	1
	Partly upheld	2
	Not upheld	13
Awards for distress and inconvenience*	Lowest award	GBP400
	Highest award	GBP1000

February 2021

NUMBER OF DETERMINATIONS		11
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		10
Scheme type	Public service scheme	2
	Private sector scheme	9
Outcome	Upheld	1
	Partly upheld	2
	Not upheld	8
Awards for distress and inconvenience*	Lowest award	GBP1000
	Highest award	GBP1000

Statistics

March 2021

NUMBER OF DETERMINATIONS		18
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		15
Scheme type	Public service scheme	5
	Private sector scheme	13
Outcome	Upheld	1
	Partly upheld	1
	Not upheld	16
Awards for distress and inconvenience*	Lowest award	GBP250
	Highest award	GBP500

April 2021

NUMBER OF DETERMINATIONS		9
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		9
Scheme type	Public service scheme	3
	Private sector scheme	6
Outcome	Upheld	1
	Partly upheld	3
	Not upheld	5
Awards for distress and inconvenience*	Lowest award	GBP500
	Highest award	GBP1400

* 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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