



Pensions Ombudsman Round-Up

DECEMBER 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 misinformation and overpayments.

In the statistics section we provide a breakdown of the overall outcome of the determinations for August, September and October 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.



Misinformation

In CAS-38262-L3K1, Mrs D received an incorrect benefit quotation, upon which she claims she made *“a life changing decision”*.

Mrs D joined the Scheme in 1988 and became a deferred member in 1991. In March 2018, Mrs D asked Aon to provide her with details of the benefits available to her from the Scheme assuming she retired (i) early on her 59th birthday in July 2018; and (ii) at her NRA of 65. Aon sent Mrs D a quotation (the **April 2018 Quotation**) which showed that the estimated main Scheme benefits if she retired on her 59th birthday were a pension of GBP12,474 p.a. or a maximum tax-free lump sum of GBP65,188 plus a pension of GBP9,778 p.a.. Aon also informed Mrs D that it was unable to supply her with a quotation showing the estimated benefits available at her NRA because this was more than 12 months away. The April 2018 Quotation stated, *“The benefits quoted are estimates and are not guaranteed.... In the event of a conflict between the figures we have quoted and your actual entitlement, your benefits will be strictly limited to your entitlement as provided in the governing documentation.”* Mrs D asked Aon on two occasions in 2018 to check the figures in the April 2018 Quotation. Aon told her each time that they were calculated correctly. In October 2018, Mrs D asked WTW, who had taken over the administration of the Scheme, to provide her with details of the benefits available to her if she were to retire early on her 60th birthday. WTW sent Mrs D a quotation (the **March 2019 Quotation**), which showed that she would be entitled to the following estimated benefits from the Scheme if she were to retire early on her 60th birthday: a pension of GBP6,000 p.a.; or a maximum tax free lump sum of GBP31,186 plus a pension of GBP4,678 p.a.. Mrs D asked WTW to explain why its figures were considerably lower than those provided by Aon in the April 2018 Quotation. WTW replied by saying that its figures were correct and that it was Aon that had made mistakes in its April 2018 Quotation.

Mrs D complained to TPO that she was misled by the incorrect benefit figures shown on the April 2018 Quotation and believed that she could (i) retire early at age 60 and (ii) spend her business reserves plus other savings of approximately GBP20,000 to fund herself

until retirement. Mrs D closed her business, missing out on an annual income of GBP46,500, and attended training courses in developing countries at a cost of around GBP5,000.

PO's conclusions

An Adjudicator first considered the possibility of negligent misstatement. In their view, a complaint of negligent misstatement could not be established for two reasons. First, the April 2018 Quotation was not a clear and unequivocal representation of fact as it included a disclaimer, which stated that the benefits quoted were estimates only and not guaranteed and, in the event of a conflict between the figures it had quoted and Mrs D's actual entitlement, her benefits would be limited to her entitlement as provided under the Scheme rules. Second, although Mrs D had acted to her financial detriment based on the belief that the figures were correct, this belief was not reasonable. Even though Mrs D had queried the figures in the April 2018 Quotation with Aon several times, there was no evidence that she had explicitly pointed out the discrepancies with a benefit quotation provided in 2016. Further, the Adjudicator could see no evidence that Mrs D had acted to mitigate any loss she suffered from having closed her business by seeking alternative employment. The Adjudicator was also of the view that a complaint of estoppel would fail on the basis of the lack of a clear and unequivocal representation, as set out above. However, the Adjudicator did consider that Aon's actions constituted maladministration, causing Mrs D severe distress and inconvenience, for which she should be awarded GBP2,000.

The PO agreed with the Adjudicator for the reasons set out above and noted that the starting point in considering such a complaint is that Mrs D was only entitled to the benefits provided by the rules of the Scheme. The PO was also of the view that Mrs D should have investigated the figures in the April 2018 Quotation further by asking her IFA to investigate. The PO agreed that Mrs D had suffered severe distress and inconvenience, for which GBP2,000 would be an appropriate award. He ordered Aon and the Trustee to pay GBP1,000 each to Mrs D within 21 days of his Determination.

Overpayments

In PO-23848, Mrs S complained that Teachers' Pensions (**TP**) was seeking to recover an overpayment of her widow's pension under a TPS regulation (the **Regulation**), which provided for a spouse's pension payable after the member's death to cease on subsequent cohabitation. The Regulation has since been revoked but it remains in place in relation to pensions paid by reference to members who were in pensionable service before 2007. Mrs S's late husband was a member of the Scheme from 1968 to 1999 and, therefore, Mrs S's benefits under the Scheme were not affected by the revocation. Mrs S argues that TP should not have sought to recover the overpayment on various grounds:

- although she was living with someone, she was not cohabiting for the purposes of the Regulation, as there was no financial dependency or inter-dependency between them, so TP should not have ceased the payment of her pension under the Regulation;
- the cessation of her pension on subsequent cohabitation was in breach of the age discrimination requirements as it only affected older widows whose husbands accrued pension before the amendment to the Regulation;
- the cessation of her pension on subsequent cohabitation amounted to indirect sex discrimination because women are affected disproportionately by the Regulation;
- the cessation of her pension was in breach of the Human Rights Act 1998 (**HRA**) because it amounted to an infringement of her right to a family life and a deprivation of her property;
- she has a defence to recovery of the overpayment on the grounds of change of position and/or estoppel and/or limitation;
- TP should not have ceased her GMP or offset the GMP due against the overpayment; and
- there was maladministration by TP in relation to the steps taken to seek to recover the alleged overpayment.
- cohabitation generally means "*living together as husband and wife*" and does not necessarily involve financial dependency or inter-dependency and that TP was able to conclude that Mrs S was cohabiting on the basis of her initial notification to TP in her form;
- TP was therefore required to cease Mrs S's pension on being notified of her cohabitation;
- it did not amount to age discrimination to cease Mrs S's pension on being notified of her cohabitation because the accrual period of her late husband's pension pre-dates 1 December 2006 i.e. when the regulations prohibiting age discrimination came into force;
- it did not amount to direct sex discrimination to cease Mrs S's pension following cohabitation as the Regulation would have treated a male surviving beneficiary in the same way and it did not amount to indirect sex discrimination as females tend to live longer and, therefore may receive a pension for the same length of time before cohabiting with a new partner as would a male before dying;
- in line with recent case law and the principles of "no-retroactivity" and "future effects", there was no infringement of her right to a family life or deprivation of her property under the HRA because Mrs S's entitlement to the pension arose before the HRA came into force in 2000;
- Mrs S has a defence to the recovery of the overpayment up to the date of cessation of her pension on the grounds of change of position (though not estoppel or contract), because the PO was satisfied that she acted in good faith and relied to her detriment on the overpayment by increasing her standard of living over and above what it might otherwise have been. Therefore, TP is unable to recover any of the overpayment;
- TP should not have set-off the arrears of GMP against the alleged overpayment because this was in breach of Section 91(6) of the Pensions Act 1995 and Section 159 of the Pension Schemes Act 1993 and amounts to maladministration.

The PO ordered TP to pay Mrs S the arrears of her GMP and not to take any steps to recover the past overpayments of pension in relation to which he found there to be a change of position defence. He also ordered TP to pay GBP500 in respect of non-financial injustice.

PO's conclusions

The PO partially upheld Mrs S's complaint against TP and found in her favour on some of the points of law she referred to him. In particular, he found the following:

Misinformation

In (CAS-33317-H3P1), Mr S was previously employed by Manweb and a member of an affiliated scheme from 1986. In 2001, Mr S's employment was TUPE transferred to Alstom. In 2002, Mr S's employment was TUPE transferred again to Cegelec (now **Quartzelec**) and he became a member of the Cegelec 2002 Scheme (the **2002 Scheme**). In June 2004, an announcement (the **Announcement**) was issued by Quartzelec to members of the 2002 Scheme that Quartzelec had decided to establish a new pension scheme (the **New Scheme**). The New Scheme would provide benefits for members (including Mr S) in relation to their future service from July 2004. The Announcement gave members two options: (i) transfer their preserved benefits in the Alstom Scheme and the 2002 Scheme (the **Previous Schemes**) to the New Scheme; and (ii) preserve their benefits in the Previous Schemes. In the case of option (i), members were asked to make their transfer request by 30 September 2004.

Mr S claimed he submitted the relevant forms, electing to transfer his benefits from the Alstom Scheme to the New Scheme, by the relevant deadline. The Trustee claimed that they had no record of the transfer request and, therefore, Mr S was only entitled to benefits from the New Scheme from July 2002 to the date he became a deferred member of the New Scheme. However, subsequent benefit statements issued in 2006 stated that Mr S had pensionable service in the New Scheme of 15 years and 189 days up to July 2005 and 15 years and 186 days up to July 2006. In May 2007, Mr S left Quartzelec. He was subsequently sent a deferred benefit statement in respect of the benefits he had accrued in the New Scheme. In relation to transferred in service, the statement showed N/A.

A dispute ensued between Mr S and the New Scheme administrator as to whether Mr S had elected to transfer his benefits from the Alstom Scheme to the New Scheme. In 2014, the New Scheme administrator wrote to Mr S that, as there was no evidence that he had rescinded his right to transfer, his total service would be included in its calculation of his benefit entitlement. In 2017, the New Scheme administrator told Mr S that, since the bulk transfer of Alstom benefits to the New Scheme had been delayed, he was entitled to a top-up to ensure he was not disadvantaged. In 2018, the Trustee confirmed that Mr S had not signed a transfer

request and, as a result, he was only entitled to receive his benefits in accordance with the rules and his accrued service in each scheme.

Mr S made a complaint under the New Scheme's IDR. He disputed that he had not elected to transfer benefits from the Alstom Scheme to the New Scheme and requested a guarantee that, if the bulk transfer were not completed by his retirement date, he would receive the top-up. Further, he believed that his pension at retirement should be calculated by applying his final salary to his aggregate pensionable service from both schemes. In addition, he contended that the 16 year delay to the bulk transfer of benefits from the Alstom Scheme to the New Scheme was proof that the Trustee had not acted with a reasonable duty of care. He states that he will incur a financial loss of an approximate 40-50% reduction to his pension. The Trustee rejected the complaint.

PO's conclusions

The PO partly upheld Mr S's complaint. He concluded that there was insufficient evidence that Mr S transferred his benefits from the Alstom Scheme to the New Scheme. On the basis of the benefit statements received by Mr S up to 2007, the PO considered that it was reasonable for Mr S to have believed that his benefits from the Alstom Scheme had been transferred; however, the correspondence Mr S received between 2014 and 2017 was misleading and confusing and the PO was of the view that Mr S should have queried the matter with the Trustee upon receipt of the deferred benefit statement in 2007, which showed transferred-in service as N/A. The PO held that Mr S had not suffered actual financial loss, rather, he had experienced a loss of expectation. The PO also concluded that Mr S was not entitled to the top-up as this was a discretionary employer benefit. The PO then considered whether Mr S had a claim for negligent misstatement. He was of the view that the representations contained conflicting information and, therefore, they could not be considered clear and unequivocal representations. The PO considered that the Trustee had not shown sufficient care in the provision of correct information to Mr S, which resulted in maladministration, a loss of expectation and severe distress and inconvenience. The PO ordered the Trustee to pay GBP2,000 in compensation.

Overpayments

In PO-22206, Mr S complained that the Department of Finance (the **DoF**) miscalculated his pension benefits, leading to an overpayment, which it sought to reclaim.

Mr S was a member of the Principal Civil Service Pension Scheme (Northern Ireland) (the **Scheme**). Upon reaching 20 years of service in 1995, Mr S opted to increase the rate of widows' and dependants' contributions he paid, from 1% to 3%, to cover additional service. He ceased these additional contribution payments in 1997. In 2009, Central Pay Branch wrote to Mr S saying that, as he had stopped increasing his widow's and dependants' contribution rate, there may be a shortfall in contributions. It said a deduction would be taken from his lump sum at the point of leaving or retirement to cover this. Shortly after, Mr S requested that the contributions be re-started. In 2012, Mr S applied for his retirement benefits on a voluntary early redundancy (**VER**) basis and he was sent a statement confirming the pension he would receive from April 2012: a net pension of GBP17,704; a lump sum of GBP107,771; and an additional service payment of GBP10,255.

In 2016, Mr S wrote to the DoF in relation to the contributions he had made, asking whether a refund was due to him where he had over 45 years' service. The DoF replied saying that the part of his award he had queried had been calculated correctly. However, errors had been identified in the original calculation of his "**Formal Retirement**" and the additional service payment lump sum resulting in overpayments totalling approximately GBP5,688, which the DoF would seek to recover.

Mr S complained under the Scheme's IDRP that he was due a refund of his widow's and dependants' contributions. The DoF explained that, although his pension was calculated on the basis of 45 years' service, he had only paid contributions for 43 years and 41 days. This meant he had been paid too much pension and lump sum. The DoF apologised for the error, noted that VER benefits were particularly complex and offered to pay Mr S GBP1,000 in recognition of the distress and inconvenience caused by its error, which it said would be offset against the overpayment. Mr S complained to TPO, requesting that his overpayment be written off on the grounds that the error had been caused by the DoF

and that he had spent the overpayment in good faith on various things, including a motorbike, cars, holidays and house renovations. The DoF reiterated that Mr S must pay the overpayment but that it could recover the overpayment from Mr S's future benefit payments.

PO's conclusions

The PO rejected Mr S's complaint, agreeing with the Adjudicator. It was noted that the DoF's primary recovery plan was to recover the overpayments by reducing future benefit payments, that is, equitable set-off. Equitable set-off operates in a similar way to equitable recoupment but equitable recoupment was not open to the Scheme as it was a statutory unfunded scheme and not established under trust. Where there is an overpayment in a statutory scheme, it could be said that there are two cross-claims between the members and the manager of the scheme, which can be off-set. Specifically, Mr S's pension entitlement is a statutory debt owed to him by the Scheme and is liable to be offset against the overpayment, which is a debt owed to the Scheme by Mr S. Therefore, subject to any defences to the claim that Mr S may have, it was inequitable that Mr S could insist on his full entitlement under the Scheme without allowing the claim for the overpayment to be satisfied and the DoF could rely on equitable set-off as the basis for recovery. The PO also noted that, in line with the judgment in *Burgess & Ors*, equitable set-off, like equitable recoupment, was not subject to a six-year limitation period. However, had the DoF agreed a repayment plan that had not involved reducing Mr S's future pension payments, the Limitation Act would have applied. Although equitable set-off was not Mr S's preferred method of recovering the overpayment, as it was not subject to the Limitation Act and, therefore, less favourable to him financially, the PO believed it was a decision for the DoF and he could find no wrongdoing in the DoF choosing this method of recovery. In relation to the change of position defence, the PO noted that the overpayment was too small a proportion of Mr S's overall pension to affect his spending decisions materially and, therefore, Mr S had not detrimentally changed his position on the basis of the overpayments. The PO agreed that the DoF's offer of GBP1,000 for distress and inconvenience was appropriate and, therefore, he made no further award.

Statistics

August 2021

NUMBER OF DETERMINATIONS		13
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		11
Scheme type	Public service scheme	3
	Private sector scheme	10
Outcome	Upheld	2
	Partly upheld	3
	<i>Not upheld</i>	8
Awards for distress and inconvenience*	Lowest award	GBP500
	Highest award	GBP1000

September 2021

NUMBER OF DETERMINATIONS		24
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		18
Scheme type	Public service scheme	8
	Private sector scheme	16
Outcome	Upheld	2
	Partly upheld	7
	<i>Not upheld</i>	15
Awards for distress and inconvenience*	Lowest award	GBP500
	Highest award	GBP2000

Statistics

October 2021

NUMBER OF DETERMINATIONS		11
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		10
Scheme type	Public service scheme	5
	Private sector scheme	6
Outcome	Upheld	1
	Partly upheld	2
	Not upheld	8
Awards for distress and inconvenience*	Lowest award	GBP250
	Highest award	GBP1000

* 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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