

Pensions Ombudsman Update - December 2024

Welcome to our latest 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 extended year-end edition examines the Ombudsman's caseload, a critical overpayments case, new dishonesty Determinations and a recent High Court appeal.

From evolution to revolution: the Ombudsman shifts gear

"The organisation has been pursuing an evolutionary approach to identify and deliver efficiencies. The scale of the challenge now means we need to switch to a revolutionary approach".

So says the Pensions Ombudsman's latest [Annual Report](#), confirming a step-change in his approach since last year. But why is this gear shift needed?

Another busy year

The Report records, in the year to 31 March 2024:

- over 6,900 fresh pension complaints (24% higher than three years ago), with 6,600 closed (15% down on last year);
- almost 10,000 contacts by phone, LiveChat, e-mail and post.

Specific hurdles faced in "an exceptionally challenging period" included:

- the knock-on effects of 2023's [cyber-incident](#);
- ongoing issues with resourcing, including market challenges in recruiting and retaining skilled staff.

As a result, former Ombudsman Anthony Arter (wearing his Interim Chair hat) is frank that "TPO's performance has not been as we would have wished".

Older and more complex complaints are a particular concern, with a 23% rise in the number of open complaints aged over 18 months, and 400+ outstanding overpayments cases, half of which were over three years old.

Despite this, the Report highlights key successes too:

- delivery of "sector-shaping" Determinations, e.g. on the overseas investment [transfer flag](#) and a [challenge](#) to paying surplus to the employer on wind-up - both covered in our previous [Update](#);
- 'significant' progress in a number of Pensions Dishonesty Unit (PDU) investigations (explored further below).

An uphill road ahead

So what happens next? The 2024-25 [Corporate Plan](#) repeats a now-familiar refrain of capacity outstripped by demand. It reveals that as well as old chestnuts like scams and automatic enrolment, expected complaint themes include:

- fallout from the court cases on GMP equalisation, and discrimination in public sector schemes;

- dashboards - issues arising from data preparation, and members identifying problems earlier;
- more smaller schemes winding up and buying out: buy-ins and buy-outs often identify issues which give rise to complaints.

It is unsurprising, therefore, that the long-term trend of increased applications is projected to persist. This autumn the Ombudsman [noted](#) a volume of incoming complaints some 24% above forecasts!

Comment: The Ombudsman is commendably open about the travails the service faces. In the next section of this Update, we explore his proposals to address them.

Root and branch reform

Since the summer, we've seen roll-out of a 'root and branch' Operating Model Review (OMR) to improve the customer journey, tackle historical caseload and reduce waiting times. The OMR has three main pillars.

Resolution: The OMR tightens conditions for Resolution Team involvement, [requiring most complainants to demonstrate they have exhausted IDR](#) before they can access the Ombudsman service. This change, which effectively restores the office's pre-2018 approach, will require industry stakeholders to 'step up' and take greater ownership of their dispute resolution processes.

Expedition: The Ombudsman is extending the use of short-form decisions and [Expedited Determinations](#) for complaints assessed as having a clear outcome. For example:

- incorrect benefit statements that led to no loss;
- failure to honour CETVs, where the member was responsible for missing the statutory time limits.

Thresholds: The OMR will be exploring the thresholds for accepting complaints (including whether some are better dealt with by other organisations, and whether a de minimis threshold should apply in some circumstances).

There will also be tightened case management (for example, stricter deadlines and fewer extensions to them); and continued use of "lead cases" to drive efficiency in areas which spawn multiple complaints.

The OMR's [ambition](#) is to deliver a 25% improvement in efficiency over three years. The 'revolution' begins here!

Comment: We welcome this campaign to boost complaints handling outcomes, while noting that the Resolution team reforms will inevitably push some of the legwork back to trustees and their IDR procedures.

Section 91 - change is on the way

In January we [looked](#) at trustees' equitable right to recoup past overpayments to members from ongoing pension instalments.

[Section 91](#), Pensions Act 1995 permits this but provides that if the member objects, trustees may only do so if the obligation becomes enforceable by order of a "competent court". The Court of Appeal had [ruled](#) the Ombudsman did not meet that definition, meaning that his Determinations had to be enforced via the County Court.

The [King's Speech](#) confirmed that the new Government's proposed Pension Schemes Bill will reverse this, letting the Ombudsman make binding directions in such cases. The Ombudsman [welcomes](#) the news but notes that until any change comes into force, his guidance [factsheet](#) on County Court enforcement should be followed.

As flagged in our last [Update](#), the same factsheet warned trustees to ensure that all possible defences to recovery are properly dealt with at IDRPs stage. The Ombudsman reinforced the point this summer in CAS-30170 [Mr G](#) (suggesting it was maladministration not to consider the availability of potential defences) and last month told the Association of Pension Lawyers that in 2025 he will release a factual document to send members, containing information about defences to recovery.

Comment: We look forward to delivery of Section 91 reform, which should save time and cost for trustees and members. The King's Speech briefing notes suggest that up to 3,000 cases annually are potentially affected although in our experience few Determinations are yet going up to the County Court for enforcement.

However, with a Bill not anticipated until spring 2025, this is not the instant panacea which was initially hoped for.

When can trustees 'equitably' recoup past overpayments?

Perhaps the most momentous Ombudsman ruling this year was CAS-55100 [Mr E](#), which revisits the recoupment theme and considered weighty matters, as yet untested by the Courts. In what circumstances is it not equitable for trustees to recoup? What defences might apply?

The Ombudsman candidly observes that his Determination in this "important case" was consequently "much longer and more legal... than I would like".

'Right' to recoup not absolute

Mr E was overpaid £91,000 over a 25-year period, which the trustees sought to recoup over a similar timescale following the Court of Appeal holding in 2019 that purported historic pension increases under the scheme were invalidly granted.

The Ombudsman explained that the remedy of recoupment had to be used in a just and equitable manner, and so he had to establish whether it was equitable for the trustees to deploy it. He held that although the legal defences of change of position and estoppel were not available as free-standing defences to recoupment (an equitable remedy) the principles underlying them - in particular, 'unconscionability' - remained relevant.

After considering those principles in some detail, the Ombudsman determined that:

- until members were told of the potential error in 2013, Mr E acted in good faith in receiving the overpaid increases and to his detriment in maintaining a standard of living over and above what it would have been absent the overpayments;
- even after that, trustee communications did not sufficiently spell out that while they had suspended disputed increases going forward, the pension still in payment continued to include pension arising from increases applied prior to 2013;
- however, once Mr E reduced his monthly expenditure in the wake of the Court of Appeal decision, it was no longer inequitable for the trustees to assert their right to recoup.

The Ombudsman therefore concluded that the trustees could not recoup any overpayments built up before 1 August 2019 (when the member adjusted his spending).

Overpayments built up from that date were however recoverable and so the trustees could recoup the remaining overpayment - now just £6,600 - on receipt of a County Court order.

Other points to watch

Trustees should be aware that the Determination flags up crucial Ombudsman analysis of two other areas of law.

Estoppel by representation: In principle an unqualified monthly pension payslip, or even payment of a pension instalment, could amount to a 'representation' to a pensioner member as to the amount of pension payable.

Laches: Mr E would have had a defence based on 'laches' - the trustees' unreasonable delay. They knew of a possible problem with the validity of increases in 2011, yet the matter only reached the High Court in 2018. Given the importance of the issue and its potential implications for members, it should have been resolved much earlier: "*It is just not acceptable for matters to have progressed at that speed.*"

Comment: Equitable recoupment, rather than direct recovery, of overpayments has proved increasingly popular with trustees since High Court dicta that no limitation period applied. At a summer industry Forum, the Ombudsman's office revealed that some 26% of overpayment cases were now 'recoupment' rather than 'repayment', a figure apparently on the up.

There is much to digest in this Determination, which is notable in several ways:

- it makes clear that trustees cannot simply assume that it is 'equitable' to recoup;
- it warns trustees faced with potential benefit correction exercises that they must communicate clearly with members and avoid undue delays (or risk being unable to recover);
- it suggests that payslips and benefit statements, certainly if not caveated, may amount to 'representations' allowing members to rely on an estoppel-based defence.

PDU's progress

Two PDU Determinations were published towards the end of last month, each marking the end of extensive investigations.

PO-16266 ([the 'Ecroignard' Determination](#)) concerned Mr S, sole director of Ecoignard (the trustee for two pension schemes), who invested £13.5m of scheme assets in high risk, overseas investments.

There were serious conflicts of interest as the network of regulated and unregulated individuals who set up the schemes and introduced members to them had a direct economic interest in the eventual investments.

The Deputy Pensions Ombudsman found that the schemes were established with the primary intention of channelling money into specific, predetermined investments. Ecoignard failed to invest funds for a proper purpose and Mr S was a dishonest accessory to multiple breaches of trust. An experienced asset manager, Mr S had completed a number of Trustee Toolkit modules - passing several with distinction - so could be taken to have a reasonable understanding of his duties!

Although Mr S was director of a corporate trustee, the Deputy Ombudsman found that he fell within his office's jurisdiction as constructive trustee, manager and administrator of the scheme and that his dishonesty meant that the Deputy Ombudsman could breach the 'corporate veil'. He [held](#) that Mr S should personally repay £9.8m into the schemes to recompense for loss flowing from his breaches of trust.

In the second Determination, CAS-56320 [Ms Y](#) the Deputy Ombudsman found that individual trustees of 'liberation' schemes had committed numerous breaches of trust and maladministration: including operating a pension liberation arrangement by making unauthorised payments to members in breach of trust and [section 255](#), Pensions Act 2004 (which says that the activities of an occupational scheme must be limited to 'retirement-benefit activities').

The trustees were ordered to restore a total of [over £5m](#) to the schemes. The Deputy Ombudsman directed distress awards of £6,000 (to each of two applicants, whose distress was exacerbated by health complications) and £4,000 (to each of three more).

The Ombudsman says that both Determinations highlight the importance of pension scheme members being cautious when transferring their pensions and being aware of the risks of pension scams and dishonest behaviour.

Comment: PDU cases are specialised and time-intensive, invariably requiring an oral hearing into the bargain: between them, these two Determinations run to over 300 pages.

It is positive to see progress in the fight against errant trustees, but it remains to be seen whether substantial recoveries can be made.

Cohabitation: applying the proper test

In more recent years the flow of appeals from Ombudsman decisions to the Courts has dwindled - but we had one a few weeks ago, when the High Court overturned the Ombudsman's decision in CAS-92836 [Mr S](#).

On the member's death, Mr S applied for a survivor's pension under the Local Government Pension Scheme Regulations. The Council refused, deciding that he did not qualify as a "cohabiting partner" under the relevant definition. The Ombudsman subsequently rejected Mr S's complaint.

The High Court [allowed](#) Mr S's appeal. The Council's decision not to award a survivor pension rested on two reasons: firstly, that Mr S and the member did not live together as husband and wife (which the Ombudsman rejected), and secondly that there was insufficient evidence of financial dependency or interdependency.

However, in relation to financial dependency, the Council had failed to interpret the Regulations accurately: it had wrongly suggested the member needed to have been financially dependent on Mr S, "*which was precisely the wrong way around*". This was sufficiently clear maladministration to make the Ombudsman's finding (that there had been no maladministration) wrong in law.

The judge remitted the matter to the Council to reconsider, noting that:

- it must apply the correct test, which did not involve Mr S showing the member was financially dependent on him;
- as Mr S had lived with the member at her home, freeing up his own flat to produce rental income, that might support the contention he was financially dependent on her.

Comment: The underlying facts were not entirely straightforward but the High Court's approach reinforces the basic tenet that trustees, managers and Ombudsmen alike must apply the correct legal tests in discretion cases. The judgment canvasses some helpful thoughts on factors to take into account.

A new Deputy in town

Camilla Barry, another former pensions lawyer, has been [appointed](#) as Deputy Pensions Ombudsman on a four-year term - starting this week. We wish her luck in her new role.

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 10 December 2024.