Pensions Ombudsman Update

Welcome to the first of our quarterly Pensions Ombudsman Updates. The Pensions Ombudsman Service resolves hundreds of cases every year which are not only important for the parties concerned but influence wider industry practice. However, the sheer volume of cases dealt with can make it hard to keep track of decisions on individual topics, and underlying trends. We hope that our Updates will help you to get to grips with the Ombudsman's thinking.

Last summer, Anthony Arter was appointed Pensions Ombudsman, succeeding Tony King who had been in post since 2007. In this edition we consider the new incumbent's take on four key areas. In future issues, we will focus on the Ombudsman's activities in the previous three months and any emerging trends and relevant court rulings on appeals from his decisions.

The rise and rise of pensions liberation

The host of statistics revealed by the new Ombudsman's first Annual Report last summer included a 21% increase in enquiries, with the Ombudsman noting the challenge of increasing volumes of work and keeping pace with demand. One reason for this was the sharp increase in complaints about pension liberation, a topic which accounted for 177 new investigations in 2014/15, more than three times the figure for the previous year. Liberation - barely on the Ombudsman's radar two years earlier – had become the source of 14% of all new investigations.

Helpfully, Anthony Arter's decisions to date have been consistent with the principles laid down by his predecessor. In PO-7126 Hughes (30 June 2015) a personal pension plan provider refused to transfer a member's benefits to a small self-administered scheme recently set up in her name, saying it was unable to satisfy itself that the payment would be used appropriately. The plan rules also gave the provider a discretion to grant a transfer if the member had no statutory right to do so. The Ombudsman accepted that the receiving scheme was both an occupational scheme and a registered scheme but said that as the member was not receiving any earnings from her employer under the receiving scheme, she had no statutory transfer right; and, as the provider had legitimate concerns, it was entitled to decline to exercise its discretion to allow transfer.

In February 2016 the rug was pulled from under this line of reasoning, with the High Court holding in Hughes v The Royal London Mutual Insurance Society Ltd [2016] EWHC 319 that the member had the right to transfer if she had earnings from any source, not just from an employer under the receiving scheme. The Ombudsman issued a press release, which confirmed that he accepted the ruling. It remains to be seen whether the legislation is tightened to mean earnings from an employer in the receiving scheme (which may have been the intention all along).

Two other complaints heard by the new Ombudsman, PO-5869 Johnston (30 June 2015) and PO-6388 Powell (23 June 2015), involved members who had chosen to transfer to alleged liberation schemes, but now regretted having done so. They sought redress from the pension providers that had made the transfers. The Ombudsman held that in both cases the receiving arrangements had appeared legitimate, and on the basis of good industry practice at the time the transfers were made (significantly, in both cases before the Pensions Regulator issued detailed guidance on liberation in February 2013), there was no maladministration by either provider.

It is important to emphasise that the High Court decision in Hughes does not call into question the Ombudsman's wider approach to the liberation cases to date. Trustees should undertake appropriate due diligence, taking into account their legal duties, relevant regulatory guidance and good industry practice. If, having done so, trustees cannot establish a reason why there is no right to transfer, their duty is to make payment.

Overpayments

The attempted recovery of overpayments made to members remains fertile ground for complaints, so it was perhaps not surprising that Anthony Arter's very first determination, PO-2865 Mayes-Wright (2 June 2015), concerned precisely that subject. The member retired from employment and began receiving his pension, before re-starting work with his employer on a contract basis. Scheme communications explained that if re-employed his pension could be abated, depending on his new rate of pay.

Over the years it became apparent that the member had, since being re-employed, exceeded the earnings level at which his pension should be abated, and been overpaid some £31,000 of pension. The member argued that he had "changed his position" in reliance on the overpayment, which had been subsumed into his normal spending including running his home and providing for his children through school and university.

The Ombudsman said that the member acted in good faith and relied on the employer and the administrators to pay the correct pension, which was not an unreasonable expectation. The overpayment had allowed him to live an improved lifestyle and provide more for his family than he ordinarily would have, and that could not be undone. Having spent his pension believing that it was his to do as he wanted with, the Ombudsman ruled that *"it would be unequitable for Mr Mayes-Wright, at this time of his life, to be encumbered with a significant debt that he was not aware of until it was too late".* The Ombudsman held that he should not have to repay any of the £31,000.

The determination reflects the Ombudsman's guidance note on overpayments which says: *"If money was spent on a generally improved standard of living over a period of time that may… mean it can't be repaid."* The outcome can be contrasted with a later overpayments case, PO-372 and PO-4244 Belk (30 November 2015), where the Ombudsman held that as the member had been unable to supply any evidence for the 'change of position' defence which he asserted, the scheme administrators were entitled to make recovery. The Ombudsman said: *"In my opinion, it was reasonable for the Respondents to have asked Mr Belk to prove that he had spent the money on something which he would not otherwise have done and that it could not be recovered before considering his request to be allowed to keep the overpayment."*

The Ombudsman's approach to limitation periods which may time-bar actions is also important where administrators seek to recover overpayments made over long periods of time. In broad terms, the limitation period for mistaken overpayment is six years from when the mistake was discovered (or should with reasonable diligence have been

discovered). In December 2014, on appeal from the Ombudsman, the High Court held in Webber v Department for Education [2015] 023 PBLR (023) that a scheme could not claim back overpayments made more than six years before *"the relevant date when the limitation period is to be regarded as having stopped (the cut-off date)"*. The judge went on to suggest that this cut-off date should be the date that the member first complained to the Ombudsman's office, in 2011. However, when the case returned to him in PO-8094 Webber (2 February 2016) the Ombudsman took a different view and held that the cut-off date was in fact the earlier date on which the scheme notified the member of the overpayments. The effect of this was that the scheme could claim back overpayments made in the six years leading up to November 2009. We understand that Mr Webber is appealing this decision.

Distress awards

One of Anthony Arter's first acts on taking office was to issue a factsheet about redress for non-financial injustice (better known as awards for 'distress and inconvenience'). This said that most awards would now range from £500 to £1,000, but went on to note that sometimes higher awards would be necessary. He commented that *"[a]lthough the courts have historically held that an award over £1,000 should only be given in exceptional circumstances, there has been a recognised general shift in attitudes to make higher awards."*

The announcement was noteworthy because Tony King had previously described his usual practice as making 'modest' distress awards, in the region of £75 to £250.

Our analysis of distress awards made since the factsheet was issued shows that they are generally higher than before, and an early indicator of this new approach in practice was determination PO-1145 Forrest (19 June 2015). A member sought £43,000 in unpaid pension contributions, owed to him by his former employer, directly from the individual who had been its sole director. As well as ordering the director personally to make up the missing contributions, the Ombudsman directed him to pay the member £2,000 for the considerable distress and inconvenience caused by his maladministration. The size of that award (twice the amount once suggested by the courts as a "ceiling" on distress awards) supports the hypothesis that we can expect higher awards in future.

In addition to Forrest, there have been four distress awards of £1,000, with the average award made being around £500 (which is becoming something of a going rate for "significant distress"). As the factsheet noted, this does not mean that distress always merits an award: see e.g. PO-6655 McLachlan (14 October 2015) in which the Ombudsman said that an employer's failures in respect of the award of ill-health pension *"will have caused distress and inconvenience for Mr McLachlan. However, I do not find that it amounts to distress of a magnitude which would justify a monetary award."* Instead, the appropriate redress for the employer's maladministration was for it to provide the member with a more comprehensive explanation for its decision, and allow him the opportunity to appeal it.

When should employers provide information on pension issues?

Determinations PO-7096 Cherry, PO-7097 Lott and PO-7098 Dodge (all 22 December 2015) concerned complaints made against the South Wales Police and Crime Commissioner, in his capacity as an employer. The members retired early, their pensions coming into payment, before being re-employed by the police force within one month. The effect of re-employment was that they lost their right to protected minimum pension age under tax legislation, and their pension instalments would be unauthorised payments until they reached age 55.

The Commissioner said that he had no legal liability to advise individual employees on their tax and pension liabilities and that it was for them to take their own independent financial or legal advice on such matters. The Commissioner had nevertheless agreed in principle to indemnify the members against tax liabilities they might incur.

The Ombudsman agreed that the Commissioner was under no legal obligation to advise individual employees on their tax and pension liabilities. However, this was not a matter of giving advice but about providing relevant information to employees. It was reasonable to expect the Commissioner to have provided the salient information and as a responsible employer he had a duty of care to inform members of the tax implications of re-employment on their retirement benefits. In consequence of the failure to do so, the employer should reasonably meet the tax liabilities incurred by the members as a result.

In determination PO-7511 Lennon (25 November 2015) the Ombudsman held that an employer had breached its duty to inform an employee that she had only a limited period to take a transfer-in to her new scheme on favourable terms. He did so by applying a House of Lords decision, Scally v Southern Health Board [1992] 1 AC 294, which held that there was an implied contractual term that:

- an employer must take reasonable steps to inform employees of a contractual right in circumstances where the terms were not individually negotiated;
- the particular term made available a valuable right which was contingent on the individual taking action to avail himself of it; and
- the employee could not reasonably be expected to be aware of the term unless it was drawn to his attention.

Although the Ombudsman went on to find that the complaint was out of time, sparing the employer from compensating the member, the determination is another reminder that employers may have duties to provide pertinent pensions information to employees who are members of a pension scheme.