



Pensions Ombudsman Update

JUNE 2023

For what comes next

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Contents

The new Pensions Ombudsman (**TPO**) has been busy since taking up his appointment in mid-January, although all four determinations covered here were addressed by the now Deputy PO, Anthony Arter, in the period of ‘transition’ between the two. Our latest round-up includes several public sector related decisions, and one regarding an FCA-regulated provider.

In this edition, we look at two determinations that address different aspects relating to members who have died – and two that address different types of transfer. In particular, we note TPO looking at the specifics of complaints when making his awards – where, for example, a member’s circumstances might prove an aggravating factor.

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Mrs N – Preston benefits, and a duty of care

TPO made an award for serious distress and inconvenience sustained when a scheme failed in its duty of care towards a member.

Facts

Mrs N was a deferred member of the Teachers' Pension Scheme (TPS), administered by Teachers' Pensions (TP). She had successfully applied to the Employment Tribunal (ET) on grounds that that she had been unlawfully excluded from the TPS by one of her employers, and in 2007 the ET directed that employer to make the relevant payments to the TPS (commonly known as 'Preston benefits' following the [House of Lords judgment](#).)

Mrs N joined the Universities Superannuation Scheme (the Scheme) in 2002, administered by the Universities Superannuation Scheme Ltd (the USS). The Scheme was part of the 'Public Sector Transfer Club,' a group of public sector DB pension schemes that had reciprocal transfer arrangements. In 2003, Mrs N asked for her TPS benefits (which did not include Preston benefits at that stage) to be transferred to the Scheme on a 'Club' basis (providing a year-for-year service credit). The USS accepted the transfer, but on a 'non-Club' basis. She left active membership of the Scheme in July 2004.

Mrs N complained to TPO, both against TP (on administrative grounds) and the USS (for failing to accept the cash equivalent transfer value (CETV) on a Club basis). While these claims progressed, Mrs N requested that her benefits be transferred back to TPS, as she felt they had not been invested or increased appropriately by the USS. When TP tried to return the CETV to the Scheme following TPO's determinations, the USS refused it. However, the USS agreed to ask TPO for guidance on how the matter could be resolved.

Decision

TPO upheld Mrs N's complaint.

There was no maladministration on the USS's part in relation to the return of the CETV to the TPS at Mrs N's request. However, there was maladministration in the USS's refusal to accept her CETV back. TPO held that under the rules that applied to Mrs N, the USS had the power to accept the transfer (contrary to its arguments). Having accepted the CETV originally and kept it from 2011 to 2014, Mrs N had a right to a pension from the Scheme (on non-Club terms). By subsequently refusing to accept the CETV back into the Scheme, the USS breached its duty of care towards Mrs N, as a pensioner member of the Scheme. Its refusal to accept the transfer was 'flawed and unreasonable.' In addition, TPO confirmed that the additional Preston benefits should have followed the original transfer of Mrs N's benefits from the TPS to the Scheme.

TPO directed the USS to accept the Preston benefits, to reinstate her CETV into the Scheme's DB section on a non-Club basis (or if it was unable to do so, to provide Mrs N with equivalent benefits by means of another arrangement or from the DC section – in doing so, TPO took into account the USS' concerns about the cost and practicalities for the Scheme).

TPO further ordered the USS to pay Mrs N £1,000 for the serious distress and inconvenience caused.

The determination: Mrs N (CAS-45705-H0F4)

Impact

Several interesting points are raised here:

- While it is accepted that there is no overriding legislation requiring trustees to accept a transfer, the parties' past course of dealing is likely to affect whether a scheme's refusal to accept a top-up is reasonable in TPO's view. It will be interesting to see whether this determination is cited in the context of, for example, GMP equalisation exercises: in this case, beyond Preston issues, the USS raised [PASA's GMP Equalisation guidance](#) as further illustrating the point that there is no obligation for a receiving scheme to accept a top-up payment following earlier transfers.
- We see TPO viewing a member's circumstances as an aggravating factor (here, for example, Mrs N had asked that the matter to be dealt with urgently following a diagnosis of Alzheimer's – see also Mrs Y below).
- In examining the existence of the Scheme's duty of care to Mrs N, TPO helpfully sets out a detailed look at the three-fold test of foreseeability, proximity and fairness.
- Finally, seeking TPO's determination seems to have provided sensible resolution of a complicated and drawn out situation for all parties.

Mrs S – a decision based on incorrect and incomplete information

TPO directed a scheme to reconsider a decision, and made an award for severe distress and inconvenience in relation to a death grant.

Facts

Mr S had been a member of the Swansea City and County Pension Fund (the Fund), administered by the City and County of Swansea (the Council). The Fund was governed by Local Government Pension Scheme regulations.

Mr S died in November 2016 but had not completed a nomination form. Mr S was married to Mrs S, and they had a son (aged 21); he also had two older sons from a previous marriage (aged 42 and 39). Mrs S submitted the relevant death benefit claim forms to the Council, who requested further details including a copy of Mr S' will to help them decide the distribution of the benefit.

A panel to whom the decision had been delegated decided (in January 2017) to split the payment four ways between Mrs S and the three sons. Mrs S appealed the decision. She argued that the panel did not seek sufficient information regarding the drafting of the will and the family circumstances before making its decision.

The Council dismissed Mrs S' IDR complaint. It noted that the governing regulations granted it absolute discretion as to the award of death benefits, even if there had been a completed nomination form. In this case, the panel looked at Mr S' will in the absence of a form. The Council understood the will as leaving the house equally between Mr S' sons, and therefore decided that sharing the death grant four ways was the fairest exercise of discretion.

Mrs S escalated her complaint to TPO, where the Adjudicator held that the Council had failed to make reasonable enquiries regarding the potential beneficiaries. The Council

disagreed, arguing that the reasonableness of its decision was not within TPO's jurisdiction and that TPO had not respected its discretionary powers. Further, it argued that neither case law nor regulations imposed an obligation on them to make further enquiries.

Decision

TPO upheld Mrs S' complaint. A scheme must properly consider each class of potential beneficiary. Here, the Council had identified the potential beneficiaries, but it had failed to make reasonable enquiries about the circumstances of each (including relevant questions about the potential beneficiaries' financial status, financial dependency on Mr S at the time of his death, age and needs) before exercising its discretion.

The Council had also misinterpreted the will: the document in fact identified Mrs S as the sole beneficiary of the residual estate and provided that any property held on trust would be shared between his children only upon Mrs S' death. TPO agreed that the will was a useful indicator of Mr S' intentions in relation to his assets (and so the Council had been right to consider it), but that it then misinterpreted the will amounted to maladministration.

TPO directed the Council to make further enquiries and then reconsider its decision, and to pay Mrs S £1,000 for the serious distress and inconvenience caused. As the late payment of the death grant had not been the beneficiaries' fault, the Council agreed at an early stage to pay any resulting tax charges.

Impact

Payment of death benefits is an area that frequently gives rise to complaints, and naturally arises at a sensitive time, and so schemes must make sure their practice is as good as possible. This should include having a clear and practical procedure to follow, considering all of the facts of a case before making a decision (even when a nomination exists), and taking legal advice where there are doubts.

In this case, the Council had an established practice (to have regard to the interests of all family members where possible). TPO did not hold that the Council had fettered its discretion by applying this standard practice. While a public body must not fetter its discretion by adopting an over-rigid policy, he accepted that it is generally lawful and indeed can be useful to have a policy – as long as it allows for exceptions and there is genuine flexibility in practice.

The time it took to reach a resolution (with several years elapsing since Mr S' death) added to the award TPO determined should be made to Mrs S.

The determination: Mrs S (CAS-45793-J6Y3)

Mrs Y – compensating an estate for distress suffered before a death

TPO upgraded an award to one for ‘severe’ distress and inconvenience suffered in the final weeks of a terminally ill member’s life.

Facts

Mr R was a member of the NHS Pension Scheme (the Scheme), administered by the NHS Business Services Authority (NHS BSA). Mr R died in August 2016. In the months before his death, his wife, Mrs Y, had communicated with the Scheme in relation to his ill health options, but he died before he could take these.

Mrs Y, on behalf of her husband’s Estate, complained amongst other things that she had been unable to acquire sufficient information from NHS BSA to enable her to complete the form to allow Mr R to claim ill health benefit; that NHS BSA had delayed giving information to her about the benefits to which her Mr R was entitled; and that benefit statements had erroneously overstated Mr R’s period of service and therefore his benefits. She was not confident that she was therefore in receipt of the correct survivor’s benefits.

NHS BSA’s forms were difficult to understand and Mrs Y was unable to complete some sections. She sought information from NHS BSA by telephone on a number of occasions. However, it was not on Mr R’s record that Mrs Y had the appropriate letter of authority in place to acquire information about his pension. The evidence showed that there had been several occasions when the helpline refused to discuss the details of Mr R’s benefits.

Decision

The complaint was partly upheld. There was no dispute that there had been maladministration. The failings by NHS BSA included the failure to maintain proper records, providing incomplete information in letters setting out options, delays in providing statements, and sending incorrect figures. Mr R was not able to make an informed choice about how to take his benefits before he died.

However, the claim for financial loss was not upheld: it was not possible to prove what Mr R’s would have opted to do with his benefits, nor to prove that NHS BSA’s failure to provide information to Mr R before he died caused loss.

The Adjudicator noted that the CETV requested in August 2016 took 18 days to arrive. Despite NHS BSA’s guidance stating that 40 days was standard, in the circumstances, as Mr R was suffering from a terminal illness with a prognosis of ‘short weeks’, the Adjudicator held that time ‘was clearly of the essence’. That element of the complaint was upheld.

Mrs Y was happy with the findings in the Adjudicator’s Opinion, but not the quantum of redress. She argued that Mr R had experienced ‘severe’ and not serious distress. TPO agreed: an increased award of £2,000 was made – a figure that he called appropriate in the case, given the number of failings which occurred in the last weeks of Mr R’s life.

Impact

TPO cannot make a non-financial injustice award in relation to distress and inconvenience sustained by someone in their capacity as executor of an estate. It can, however, compensate the deceased (via the estate) for distress and inconvenience sustained while alive, even where the complaint is raised after death.

The determination is a reminder that administration systems, including the paperwork required of members and beneficiaries, should be reviewed to ensure it is clear, practical and necessary. Here, while some of the incorrect or missing information could have been found in the Scheme’s Retirement Guide, Mrs Y found the information hard to follow (a situation exacerbated by her upset at a time of high stress, and frustration at the poor administration). Further, given the conflicting information she received, it was reasonable for Mrs Y to wonder whether she had been provided with the right information at all.

Again, it is worth noting that TPO takes the circumstances both of the member and their spouse into consideration in passing judgment on the distress suffered, and on reasonable timescales. Here, he agreed that several of NHS BSA’s failures would have caused Mr R severe distress and inconvenience in the weeks before his death. Schemes need to be alive to these sensitivities.



...any paperwork required... should be clear, practical and necessary.

The determination: The Estate of Mr R (CAS-35611-Z7D3)

Mr Y – reasonable methods of providing risk warnings on withdrawals

TPO did not uphold a [complaint](#) where a member wished to withdraw their benefits from an FCA-regulated scheme without taking the relevant regulatory risk warnings.

Facts

Mr Y was a member of the Direct Line Group Personal Pension Plan (the Scheme), administered by Fidelity International (Fidelity). In July 2020, Mr Y wished to withdraw his benefits, valued at less than £10,000, from the Scheme. Fidelity informed Mr Y that it was its policy to conduct a brief 'cash out call' to explain the withdrawal process and the relevant regulatory risks. Mr Y said that he had received and read a previous wake-up pack that had been sent to him, and declined to participate in the call. Fidelity stated that it could not proceed with his request until the call had been carried out.

Mr Y complained, but Fidelity maintained that this process was standard practice. They offered to allow Mr Y's own financial advisers to explain the relevant regulatory risk warnings to him instead, but Mr Y still refused, insisting that he had already been sufficiently warned of the risks by the wake-up pack.

Fidelity informed Mr Y that it would not carry out the withdrawal request. Whilst it understood that Mr Y had read the wake-up pack, Fidelity maintained that it had made a commercial decision to present the risk warnings in both written and verbal form to ensure optimal opportunity for members to access the relevant information, and to discuss and confirm members' understanding. Fidelity further argued that the process allowed it to conduct anti-money laundering checks at the same time, and to provide an additional layer of authentication to protect members from increasingly sophisticated pension scams.

Decision

TPO did not uphold Mr Y's complaint. As Fidelity was regulated by the FCA, it was subject to the Conduct of business sourcebook (or COBS) regulations which apply to pension providers (including SIPP operators) when communicating with a customer. The regulations provide that 'a firm must give the client appropriate risk warnings,' but do not specify the form in which the risk warnings should be communicated; TPO therefore agreed that Fidelity had discretion as to how to ensure compliance with the requirement.

While Fidelity's insistence on a cash out call may have felt 'inconvenient' to Mr Y, TPO was satisfied that Fidelity's requirement that members to receive warnings in both written and verbal format was in line with both the COBS regulations and The Pensions Regulator's (TPR) expectations of providers. TPO held that this process was an appropriate way for Fidelity to discharge its duties. In addition, while providers must ensure members understand the risks when withdrawing their pensions, the COBS regulations do not define a particular level of understanding on the part of the member to allow the provider to proceed. As Fidelity had not breached regulatory guidance, or acted contrary to COBS regulations or the Scheme's rules, no maladministration had occurred.

Mr Y did not object to undertaking the money laundering questions, but given these would be conducted in conjunction with the explanation of the regulatory risk warnings, TPO noted that if he wished to withdraw his benefits Mr Y would be required to participate fully in the cash out call.

Impact

Decumulation options, and member protection, understanding and engagement when making retirement choices, are increasingly hot topics.

The industry's rules and guidance aim to ensure that firms and schemes provide sufficient risk warnings to members at the point they decide how to access their pension savings: a 'second line of defence' for the member when applied with requirements to signpost where regulated advice and pensions guidance can be found, and to give a 'Stronger Nudge' to that guidance.

This determination may be a comfort to providers and schemes (FCA-regulated or not): there is scope for them to develop their own processes and restrictions, as long as these meet the FCA and TPR's minimum requirements. TPO's focus is on whether these standards are met – and whether the chosen methods are 'acceptable' and 'reasonable.'

TPO was satisfied that Fidelity's blanket approach operated to protect Scheme members from discrimination by ensuring they had equal opportunity to understand risks, and that its 'extra layer' method was reasonable in the face of growing pension scam activity.

The determination: Mr Y (CAS-61797-Y0L9)

Ombudsman news:

The Ombudsman has recently published **'Where to go for help with your pension complaint'** – a factsheet setting out where a complaint should be raised with TPO, and where going to the Financial Ombudsman Service (FOS) would be the correct route. The leaflet looks at the approaches each Ombudsman may take to a complaint and contains details of FOS' **recently increased award limits**.

Schemes may wish to link to the leaflet in member documentation.

Effective and compliant scam-prevention means getting up to speed with any new guidance quickly (see our **March Pensions Ombudsman Update** for more on this duty).

Our recent **Insight** provides information on a March 2023 update to the industry 'Interim Practitioner Guide on Combating Pension Scams', and our recommended actions in light of those changes. Make sure you are aware of these, and follow us to keep you informed of developments in 2023.

Recent and forthcoming from TLT's Pensions team:

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- See our **'Pensions – key issues for your trustee agendas – May 2023'** briefing, for current hot topics and expected developments.
 - See our Spring **SIPP & SSAS round-up** for some recent key Ombudsman determinations in relation to SIPPs and SSASs. These include cases on transfers, conflicts and dispute management, governance, and trustee protections.
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- For more detail of key developments for public sector schemes, see our recent **What's coming up in pensions: public sector focus May 2023**.
 - Watch our latest SSAS **webinar** on the legal and practical considerations on key issues related to SSAS documentation.
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We understand the issues facing companies and trustees, and provide clear and realistic solutions based on commercial and practical realities to help clients, whether employers or trustees, achieve the right result.

The team is experienced in dealing with complaints to the Pensions Ombudsman, acting on behalf of individuals as well as employers and trustees.

Disputes involving members and disputes between trustees and employers require careful handling and a pro-active approach.

Most disputes the team have been involved in have not become public knowledge as we pride ourselves on pro-active case management to resolve matters at an early stage, avoiding wherever possible the unwelcome cost exposure involved in full blown litigation.

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“They are the best pensions lawyers I have ever dealt with: they are responsive and practical,” says an impressed source.

Pensions, Chambers

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