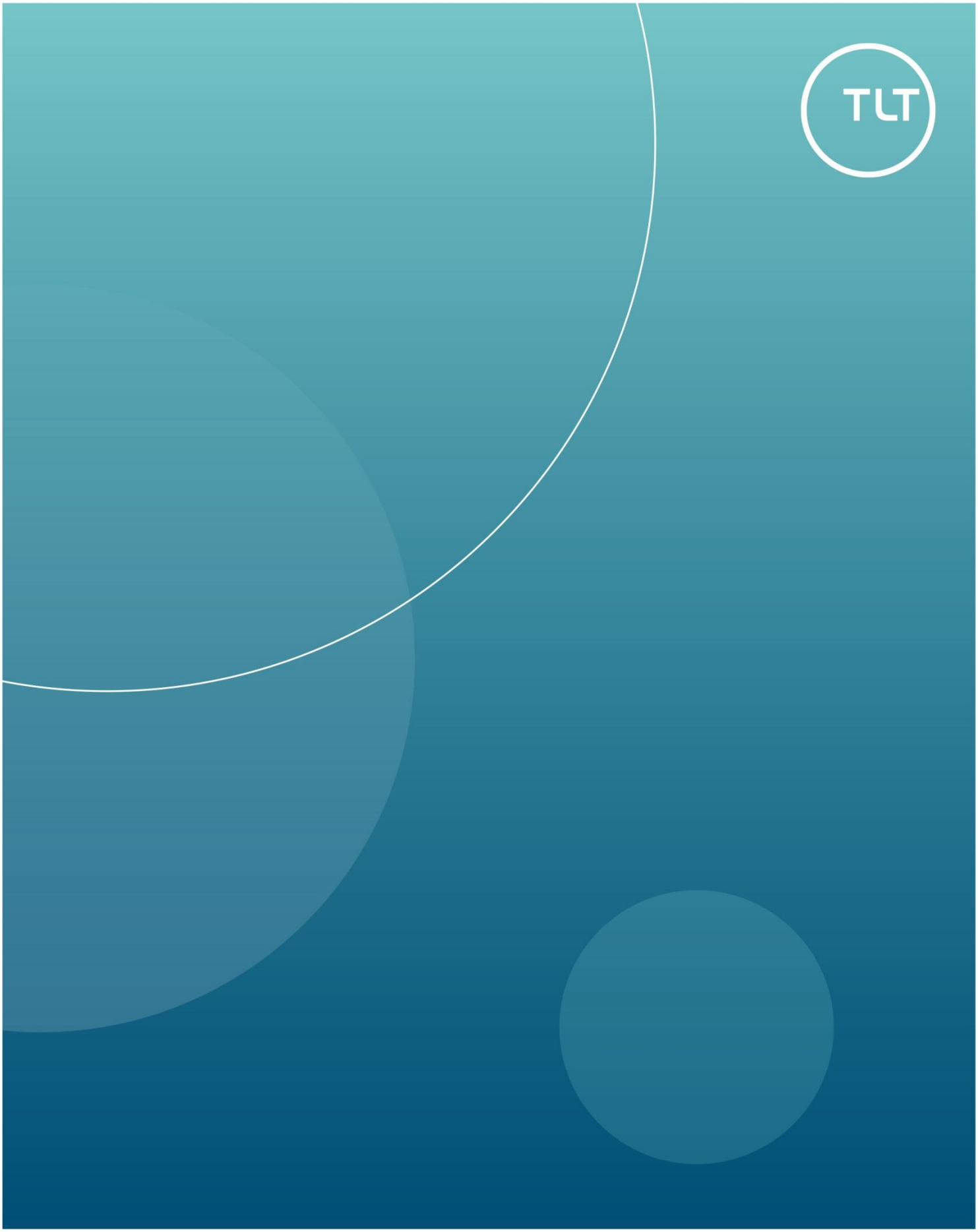

Pensions Ombudsman Update

January 2020

Mr D (PO-27469): Trustee's duties and disclosure in relation to ESG

The Deputy Pensions Ombudsman (the **Deputy Ombudsman**) dismissed a member's complaint, determining that the Trustee's refusal to provide requested information about climate change did not amount to maladministration or breach of a positive disclosure duty.

Background

Mr D, a deferred member of the Shell Contributory Pension Fund (the **Scheme**), requested the Trustee of the Scheme to provide him with various information about the Scheme's investment strategy. The Trustee provided Mr D with some of the requested documents (the recent actuarial valuation and the statement of investment principles (**SIP**)) but refused to provide other documents that had been requested (the investment strategy, risk management framework and internal management documents) as these were considered to be commercially sensitive by the Trustee. The Trustee went to some length to reassure the member, holding a face to face meeting with Mr D and informing him that climate change was identified as "one of the biggest risks". The Trustee also explained to Mr D that it took environmental considerations very seriously and also that only 1% of the Scheme's assets were invested in fossil fuel equities.

Mr D was not satisfied by the Trustee's response and complained under the internal dispute resolution procedure (**IDRP**). After the Trustee refused to provide further information, stating that it had discharged its legal disclosure requirements under the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (*SI 2013/2734*) (the **Disclosure Regulations**), Mr D took his complaint to the Ombudsman.

Decision

The Deputy Ombudsman dismissed the member's complaint stating that the Trustee had complied with its duties under the Disclosure Regulations and went "above and beyond" its duties by organising a meeting with Mr D to discuss the issue.

According to the Deputy Ombudsman Mr D's request went "far beyond" what was required by the Disclosure Regulations.

The Deputy Ombudsman held that there was no breach of a positive disclosure duty nor maladministration in refusing to provide the member with all the documents requested.

Impact

With climate change at the forefront of so many people's agendas, this type of request (and possibly complaint) is likely to become more common.

The recent new requirements for trustees of pension schemes to disclose environmental, social and governance (**ESG**) considerations in the SIP demonstrates how important climate change is becoming, on a political as well as individual level. Clearly pension schemes are not exempt from scrutiny, as this case reveals.

Although the Deputy Ombudsman ultimately found in the Trustee's favour and made it clear what trustees are and are not required to disclose to members, complaints can be time consuming and costly to defend so trustees should treat this type of request with care.

The legal requirements regarding the content of the SIP have developed since this complaint was considered, and continue to do so (depending on the type and size of scheme in question).

Trustees should ensure that their scheme is compliant with current requirements referred to above, as failure to do so could come under the spotlight as investment documents come under increased scrutiny from members.

Miss Y (PO-27699): Death benefits payable to cohabiting partners

The Pensions Ombudsman (the **Ombudsman**) dismissed a complaint raised by a cohabiting partner of a member of the Local Government Pension Scheme (**LGPS**) stating that she was not entitled to a death grant or a survivor's pension, despite incorrect statements being made to her.

Background

Mr R was an active member of the LGPS until 2004 when he became a deferred member. In August 2011 his pension was put into payment. In June 2016 Mr R completed a death grant expression of wish form (the **Form**) nominating Miss Y, his cohabiting partner, as the sole beneficiary of the death grant. The Form made it clear that the death grant was only payable if Mr R died within five years of his pension coming into payment. In October 2016, Mr R died.

In November 2016 the Council told Miss Y she was not entitled to the death grant because the death of Mr R occurred more than five years after he started receiving his pension, but that she was entitled to receive a survivor's pension.

One month later Miss Y received another communication from the Council stating that she was not in fact entitled to a survivor's pension. This was because the LGPS regulations in force at the time Mr R became a deferred member (the LGPS Regulations 1997) did not provide for a survivor's pension for cohabiting partners.

The LGPS Regulations 2008 introduced the entitlement for cohabiting partners (in addition to spouses) to receive survivor's pensions but this entitlement was only in respect of members in active service on 1 April 2008 (whereas Mr R ceased to be an active member in 2004). Miss Y complained first under the scheme's IDRP and then to the Ombudsman.

Decision

The Ombudsman dismissed the complaint, finding that Miss Y was not entitled to the death grant or the survivor's pension.

The Ombudsman determined that Miss Y was not entitled to the death grant because Mr R died more than five years after he started receiving his pension and this timing requirement was made clear in the Form. Furthermore, according to the Ombudsman, Miss Y was not entitled to a survivor's pension because LGPS Regulations provided that a cohabiting partner would only qualify for a survivor's pension if the member was an active member on 1 April 2008; this was not the case.

The Ombudsman held that there was maladministration on the part of the Council in giving incorrect information to Miss Y (by telling her she was entitled to a survivor's pension). This had caused a loss of expectation but no financial loss (as she was never entitled to the pension) and therefore the compensation for maladministration of £750 which had already been offered to Miss Y by the Council was sufficient.

Impact

This case reminds trustees and administrators of the need to carefully consider the relevant rules of the scheme to establish what (if any) benefits are due on the death of a member and to whom. Taking legal advice on matters of doubt is always recommended.

In particular, trustees and scheme managers should make sure to check the applicable scheme rules at the date a member leaves pensionable service, as often more recent iterations of scheme rules will not be applicable to deferred or pensioner members (as was the case with Mr R's complaint).

However, trustees and administrators can take comfort in the fact that incorrect statements made to members (although far from ideal) are unlikely to override the rules of the scheme. The Ombudsman will generally focus on the actual entitlement of the individual, rather than the provision of incorrect information.

Mr T (PO- 23961): Loss of fixed protection after auto-enrolment

The Ombudsman has dismissed a member's complaint, stating that there was no requirement to warn members of the potential tax consequences of failing to opt out of a pension scheme, where some form of lifetime allowance (**LTA**) fixed protection is at stake.

Background

Mr T previously worked for a bank and he had a significant pension entitlement. He was granted LTA fixed protection 2012 (**FP12**) in 2014. This meant that he was able to protect his LTA up to £1.5 million but one of the conditions to retain the protection was that he did not make any further pension contributions.

Mr T later became a visiting lecturer at the University of Hertfordshire (**UoH**). He was automatically enrolled into the Teachers' Pension Scheme (the **Scheme**) when he started work there in October 2015. He was given the option to opt out of the Scheme but did not do so. Three years later, Mr T's independent financial adviser stated that by contributing to the Scheme, Mr T had invalidated his FP12 and had incurred an additional tax liability.

Mr T requested a refund of his contributions to the Scheme but the UoH rejected the request due to the fact that Mr T had more than two years' worth of contributions**.**

Mr T made a complaint via the Scheme's IDRP stating that he was not advised by the UoH about the consequences of contributing to the Scheme rather than opting out. The UoH rejected his complaint on the basis that they provided Mr T with all the statutory information they were required to.

Mr T complained to the Ombudsman. He highlighted that the visiting lecturer's handbook had been amended after his IDRP complaint and now included financial advice on joining the Scheme.

Decision

The Ombudsman rejected Mr T's complaint and confirmed that there was no requirement under legislation or in the Scheme Rules to provide new members with guidance about lifetime allowance protections. He confirmed that the information Mr T received by the UoH when he joined his new role was sufficient and in accordance with the Disclosure Regulations.

The Ombudsman considered the fact that the handbook was amended but concluded that this did not mean that the previous handbook had insufficient information for the members.

The Ombudsman concluded that the matter was therefore one for resolution between Mr T and HMRC.

Impact

In this case, the Ombudsman determined that there was no obligation for the Scheme trustees/administrators or the employer to provide Mr T with advice on any impact his automatic enrolment into the Scheme may have on any LTA fixed protection granted to him, as this went beyond their statutory (and Scheme) obligations.

It is important for new joiners that they consider the tax implications of being auto-enrolled into a new pension scheme and, even if this case makes it clear that there is no duty to advise employees of this, trustees and employers should consider making this clear in their pensions joining information in order to prevent potential complaints.

The fact that the member was paying regular member contributions ought perhaps to have prompted him to opt out of the Scheme some time before he did, given that he clearly would have understood the tax consequences of having future pension accrual after claiming fixed protection.

Mrs S (PO- 20087): Employer duties in relation to ill-health cases

The Deputy Ombudsman upheld a member complaint stating that the employer had failed to progress the member's ill-heath retirement pension (**IHRP**) application with reasonable care and skill and without undue delay.

Background

Mrs S was employed by NHS Property Services Limited (**NHS PSL**). In November 2014 she enquired about applying for an IHRP and was provided with the relevant form (the AW33E form) and link to the NHS Business Services Authority (**NHSBSA**) website for information.

In December 2014, she was provided with an estimated quote for an IHRP benefit of just over £12,000 a year which was calculated under the 2008 NHS Pension Scheme Regulations, as were in force at the relevant time. In January 2015, NHS PSL referred Mrs S to the newly appointed occupational health provider, OH Assist.

The IHRP form was completed by NHS PSL and Mrs S in February 2015 but there were delays in OH Assist seeking further medical evidence from Mrs S's GP, meaning that it did not complete its part of the form until the end of May 2015.

The IHRP application was finally accepted by NHSBSA in July 2015. The new statement that NHSBSA sent to Mrs S was for just over £10,000 this time and this was because the benefits were calculated both under the 2008 and the 2015 NHS Pension Scheme Regulations, due to a change in applicable Regulations during the time during which the application was being processed.

The NHS Pension Scheme Regulations 2015 (which replaced the 2008 Regulations) established that members could continue with their existing ill-health benefit applications under the 2008 Regulations only if they submitted form AW33E together with supporting medical evidence and this was received by the relevant authority on behalf of the Secretary of State before a deadline of 1 April 2015.

Mrs S complained under the NHS Pension Scheme's IDRP arguing that she was not adequately informed that had she submitted her application before the deadline, she would have received the higher IHRP benefit calculated only under the 2008 Regulations (and not under both the 2008 and 2015 Regulations).

NHSBSA stated that all employers agreed to inform the employees of the new Regulations and, in some cases, to provide the employees with a leaflet with their payslips.

Mrs S submitted that the leaflet did not constitute a "reasonable step" by the employer to inform her of the changes, as required under its *Scally* duties. She argued that she had suffered a financial loss as a result.

Decision

The Deputy Ombudsman upheld Mrs S's complaint stating that, even if the *Scally* duties did not apply in this case (because, crucially, Mrs S was aware of her right in question whereas in *Scally* the employees were not aware of their rights), NHS PLS had assumed a duty of reasonable care and skill towards Mrs S. In failing to process the IHRP application promptly, to allow Mrs S to make her application by the 1st April 2015 deadline, NHS PLS had breached this duty. The Deputy Ombudsman directed NHS PLS to pay Mrs S the sum of money she would have received had her application been received before the deadline, plus interest.

Impact

This case highlights the uncertainty around an employer's duty to inform its employees of their contractual rights. It reminds employers of the importance of seeking advice and considering their conduct in cases where employees have rights which might affect their conduct.

In this case Mrs S mentioned *Scally,* a case in which the House of Lords ruled that only in limited circumstances can an employer be under a duty to inform an employee of their contractual rights. The Courts and the Ombudsman have, historically, been generally reluctant to find that an employer has breached its *Scally* duty. Nonetheless, as a matter of good employment practice employers should seek to ensure employees are made aware of factors which could reasonably have an impact on the employee's entitlements.

Mr R (PO-27867): Pension increases: change to RPI upheld

The Ombudsman rejected a member complaint and found that the Trustee of a pension scheme was in fact entitled to switch the linkage of the Scheme's annual increases from RPI to CPI.

Background

Mr R was a pensioner member of the Newsquest Pension Scheme (the **Scheme**). The Scheme Rules established that pensions in payment in excess of GMP were increased by reference to RPI published by the Department of Employment *"or such other index as may from time be approved by the Revenue for the purpose of the Scheme".*

The Trustee sent an announcement to Mr R in July 2018 stating that, after taking appropriate covenant, actuarial and legal advice, the applicable new index for pension increase purposes would be CPI (rather than RPI) with effect from 1 March 2019.

Mr R raised an objection to the change through the Scheme's IDRP and later to the Ombudsman.

Mr R, relying on the Supreme Court's judgment in *Barnardo's v Buckinghamshire and others*, argued that the Trustee should not have been allowed to switch the index as RPI was still an index produced by the government and that the member booklet stated that the index to be used was RPI.

The Trustee argued that the switch was requested by the employer, properly considered and the decision taken in the interest of the Scheme's beneficiaries, noting that the employer covenant was determined by the Trustee's professional advisers to be "weak/tending to weak". The Trustee also specified that the Scheme booklet stated that in case of any conflict between the booklet and the Scheme Rules, then the Rules would prevail.

Decision

The Ombudsman dismissed the complaint. In *Barnardo's v Buckinghamshire and others*, the rules only allowed an alternative index to be used if RPI was discontinued. In this case, the Scheme Rules allowed for an alternative index (approved by the Revenue) to be used. The Trustee had taken appropriate actuarial, covenant and legal advice before agreeing to the switch.

Impact

This case follows the trend of the Ombudsman to dismiss member complaints concerning a decision to switch from RPI to CPI for indexation or revaluation purposes. It highlights that each case will turn on its own facts or, more appropriately, each set of scheme rules will turn on its own drafting.

This determination shows how important it is for both employers and trustees to take relevant professional advice in making any amendments to scheme rules, especially in an area so prone to member complaints.

It also highlights the benefits of ensuring that information provided in members' booklets is maintained and updated regularly, to ensure members are correctly informed which should reduce the prospects of member complaints. Members will often look to booklets for information, rather than the scheme rules (even if the latter override the former). So care must be taken in booklets and other communications to describe benefit entitlements as precisely as possible. Whilst in this case the Ombudsman did hold that the Scheme Rules did prevail in the conflict, regardless both the Trustee and employer will have had to expend considerable time and money defending the complaint.

TLT's Pension Dispute Resolution team

Pensions disputes have become a key issue for many employers and trustees. TLT's Pensions Dispute Resolution team are first and foremost pensions lawyers.

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.

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