Pensions Ombudsman Update – May 2022

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Mrs Y – No excuse for automatic enrolment failures

The Pensions Ombudsman (the Ombudsman) has ordered an employer to pay all missing contributions in respect of an employee, along with £1,000 for serious distress and inconvenience.

Facts

Mrs Y was an employee of Bolton Textiles Ltd for over 27 years. In May 2017, Bolton Textiles Ltd went into administration and the administrators transferred certain assets to Bolton Textiles (Group) Limited (**BTGL**). As a result, BTGL had responsibility for meeting the pension obligations in respect of Bolton Textiles Ltd employees.

In December 2018, NEST (with whom the pension was held) notified Mrs Y that it was reporting BTGL to the Pensions Regulator (**TPR**) because it had failed to pay certain contributions, despite several reminders. Mrs Y questioned BTGL, and in response they informed her that this would be rectified. Mrs Y received additional letters from NEST in relation to the missing contributions, and made several complaints to BTGL, but did not receive any further response. In June 2019, Mrs Y brought her complaint to the Ombudsman.

In November 2019, in response to a letter from the Ombudsman, BTGL made a number of derogatory comments about Mrs Y and her employment. It acknowledged that contributions had not been paid because the company did not make enough profit to accommodate pension payments, but that it would resolve the issue once its financial circumstances improved.

Decision

The Ombudsman upheld Mrs Y's complaint.

The Ombudsman stated that "there is no doubt that maladministration has occurred and that BTGL has failed in its legal duties as an employer". BTGL failed to pay the correct contributions and actively decided not to resolve the issue when first raised by Mrs Y in 2018. As a result, the Ombudsman ordered BTGL to provide a schedule showing the contributions due in the relevant period, and to agree this schedule with Mrs Y and NEST. Once agreed, BTGL must pay the missing contributions to NEST, and cover any shortfall in the units that were able to be bought arising as a result of its failure to make contributions on time.

The Ombudsman also awarded Mrs Y £1,000 for the serious distress and inconvenience caused by the incorrect contributions being paid and for BTGL's responses since the initiation of the complaint.

The determination: Mrs Y (CAS-32392-R4T8)

Impact

Employers have a duty to automatically enrol relevant employees into a pension scheme, and to ensure that the correct contributions are paid in respect of them. Where an employer fails in their obligations, they will be liable to pay any missing contributions and potentially to cover the cost of any investment or interest shortfall, in addition to possible penalties from TPR.

It is worth employers also noting that this Ombudsman determination sits alongside a run of recent Tribunal decisions in relation to TPR automatic enrolment compliance penalties. These have held that **financial difficulties** and **issues with pension providers** were no excuse for failures to pay contributions, and that, even where there is eventual compliance in relation to unpaid contributions, **a failure to provide evidence** of such on request to TPR can result in the penalties being upheld. Whilst recent economic challenges have put employers under pressure, there is rarely any wriggle room in relation to automatic enrolment.

Employers should, as ever, be mindful to maintain appropriate communication with employees and ensure complaints are dealt with promptly. The inappropriate responses in this instance will not have helped BTGL's case.

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Mr F – The importance of proper decision-making

The Ombudsman has determined that a scheme was entitled to refuse a member's application for unreduced early retirement where the decision was properly made and within the trustees' discretion.

Facts

Mr F was employed by Manchester City Council (the **Council**) and became a member of the statutory Greater Manchester Pension Fund (the **Scheme**). In 2010, he left employment to become a full-time carer to a family member. In November 2018, having reached the age of 55, Mr F applied for unreduced early retirement on compassionate grounds due to his full-time caring responsibility.

The Council rejected his application on the basis that Mr F had been a full-time carer for some time and there had been no change in circumstances that could justify the additional cost to the Council. Mr F could access his pension from 55 subject to the usual early retirement reductions.

Mr F appealed, but the Council decided not to uphold the appeal following both stages of its IDRP. Mr F applied to the Ombudsman on the grounds that the Council had used the incorrect criteria to assess his case, and had not properly considered the complexity of his circumstances.

Decision

The Ombudsman did not uphold the complaint.

It determined that the question for the Council was whether, in exceptional cases such as those Mr F argued applied to him, there was a "clear financial or operational benefit to the Council" in granting an unreduced early pension. It was within the Council's discretion to decide whether or not to reduce Mr F's pension and by what degree, and the Discretions Policy stated that nothing should fetter this discretion. In reaching its decision that the costs would be too significant for the Council to bear, the Council had acted in accordance with the statutory Scheme Regulations and its Discretions Policy. It was within the Council's discretion to decide whether or not Mr F's situation constituted "exceptional circumstances" and not for the Ombudsman to disagree with this in circumstances where the Council had acted within their discretion and in accordance with the relevant rules and policies.

The determination: Mr F (CAS-44381-K1J8)

Impact

In circumstances where trustees make a reasoned decision in accordance with any relevant legislation (as applicable at the appropriate date) and governing documentation, the Ombudsman is unlikely to depart from the decision made. In the absence of procedural error, it is not relevant whether the Ombudsman agrees or disagrees with the actual decision of the trustees.

Decision-making was looked at again in the recent **Ms G** determination, where a scheme failed to consider an IHER application properly, and was directed both to increase its offer for distress and inconvenience, and to reconsider its decision. However, the Ombudsman again made clear that it is the process and not the decision that is his focus.

In decision-making, trustees should therefore focus on the correct procedure, ensuring that they have considered all relevant factors and disregarded all irrelevant ones, and reaching a decision that is reasonable and one that others would make. The determination is also a reminder that scheme and any related policy documentation should be kept up to date, and that trustees should ensure they both understand and follow them. Schemes may wish to consider taking occasional discretionary decision-making training to ensure that their standards and procedures are up to scratch.

Key recent publications

The Ombudsman has recently produced a series of factsheets designed to explain to beneficiaries what to do if they have complaints about **death benefits**, **ill health pensions** or **scams**. In addition, it has published guides on how its **Early Resolution Service** operates, and **how parties should try to resolve complaints** before the Ombudsman can become involved.

Trustees and employers should be aware that these publications exist, consider offering them to members or linking to them in relevant communications, and ensure that they are aware of their contents.

Mr N – A duty to communicate changes to pension entitlement carefully

The Ombudsman held that an employer has a duty of care to clearly inform a member of policy changes that affected his pension entitlement.

Facts

Mr N was a member of the Local Government Pension Scheme (the **Scheme**) which was administered by City of Bradford Metropolitan District Council (referred to as **WYPF**). Mr N reduced his hours due to ill-health in December 1996 and retired on an ill-health pension in September 1998. In September 2003, Mr N was re-employed by another Scheme employer but opted out of Scheme membership after WYPF used an incorrect salary in the earnings test to conclude that Mr N would be subject to an abatement of his current pension upon re-employment. Mr N questioned this initially, but did not pursue the matter further.

WYPF's abatement policy was amended in 2005, and again in April 2008, so that abatement would not generally apply on re-employments. Mr N was automatically enrolled into the Scheme in November 2014, but did not know about the enrolment or the policy change until after he left employment.

Mr N complained to the Ombudsman on the following grounds:

- his loss of Scheme membership between 2003 and 2014 was due to the incorrect advice he had received from WYPF, as his decision not to opt in was based on his belief that he would be subject to abatement;
- even if the abatement should have applied from 2003, WYPF should have informed Mr N of the policy alterations in 2005 and again in 2008, and had Mr N been made aware he would have re-joined the Scheme at these points.

Decision

The Ombudsman upheld Mr N's complaint.

The Ombudsman determined that he did not have jurisdiction to consider the member's complaint in relation to events occurring in 2003 and 2005, as these were out of time.

In relation to the 2008 amendment, the Ombudsman held that WYPF's failure to inform Mr N of the change to its abatement policy was a breach of its duty of care to inform members of changes which affected their pension entitlement. This maladministration caused Mr N to miss out on active membership of the Scheme from 2008 to 2014, as Mr N would have re-joined the Scheme once he discovered abatement would not apply.

The Ombudsman ordered WYPF, upon receipt of Mr N's employee contributions, to pay employer contributions for the period between April 2008 and October 2014, including interest. The Ombudsman also awarded Mr N £2,000 for the severe distress and inconvenience caused.

The determination: Mr N (PO-14629)

Impact

Employers have a duty of care to members to ensure that any policy change is clearly communicated to affected members. In this case, this included pensioners in employment at the time when the abatement policy was introduced as well as those who took re-employment after the policy came into force. When making changes to scheme policies, employers should take care to fully consider who may be affected by the changes, as this may include those who have opted out of a scheme. In addition, the lengthy delay here in taking corrective action was criticised.

Another **recent abatement determination** (in that case, one where a member argued that they had not been warned that abatement would apply on re-employment), found the posting of a policy on an internal website to be sufficient – but did suggest that, as a matter of good practice, someone being re-employed should be reminded of any abatement rules.

> When making changes to scheme policies, employers should take care to fully consider who may be affected.

Mr S – Failure to implement a pension sharing order – examining the unjust enrichment test

The Ombudsman has decided that, although there had been maladministration, a member was not unjustly enriched when a pension sharing order failed to be actioned.

Facts

Mr S was a member of the Ryland Group Pension Scheme (the **Scheme**). In October 2011, following his divorce, 100% of Mr S' benefits in the Scheme were allocated to his ex-wife through a Pension Sharing Order (**PSO**). However, the PSO was not implemented, as Prudential (with whom the pension was held) never received instructions from Ms S. In 2014, Mr S requested his benefits from the Scheme be transferred to his pension with Rowanmoor (the **SSAS**). Mr S then loaned almost all of this amount to his business, which subsequently went into administration. The SSAS recovered no sums loaned to the business.

In 2018, Ms S contacted Mr S as she was concerned she had lost her pension. Mr S' IFA contacted Prudential to investigate. Following further exchanges, Prudential acknowledged that it failed to note the outstanding PSO and that it had therefore incorrectly informed Mr S of his benefits. However, it stated that Mr S had been aware of the PSO and knew the funds were not for his benefit. Prudential requested the funds be returned to it.

Mr S complained to the Ombudsman on the grounds that he was not aware that the funds in the Scheme did not belong to him. Prudential argued that Mr S had been unjustly enriched at Prudential's expense.

Decision

The Ombudsman upheld Mr S' complaint.

Prudential had incorrectly informed Mr S that his benefits in the Scheme were not subject to a PSO and had failed to prevent the transfer, and this amounted to clear maladministration.

Prudential could not rely on an argument of "unjust enrichment" to reclaim the money, because almost the whole sum was transferred to the business as a secured loan , which subsequently wound up with no distribution to the SSAS for the loan amount. Mr S was therefore not personally enriched.

The Ombudsman also determined that any enrichment would not have been at the expense of Prudential, as the transfer was from the Scheme to the SSAS. Only the transfer to his ex-wife was from Prudential, and Prudential was not entitled to recover funds from Mr S for this.

However, the Ombudsman acknowledged that Mr S had not been caused distress and inconvenience for which he should receive an award, as the effects of Prudential's actions were to the benefit of the SSAS and his business.

The determination: Mr S (CAS-31053-J5J5)

Impact

The determination is interesting in looking in detail at the concept of unjust enrichment, and at the defences to it. An award for unjust enrichment requires a member to have been personally enriched; this does not include a member's business. The enrichment must also be at the expense of the other party, which does not include circumstances where a separate payment has been made to a third party with no direct claim against the individual who has purportedly been enriched (even in circumstances involving a PSO).

Additionally, an award for distress and inconvenience will not be made where the complainant has benefitted from the maladministration.

Finally, with recent data from the Ministry of Justice showing a 17% increase in the number of applications for PSOs in the last year, pension sharing implementation looks likely to become a more frequent activity for schemes. Trustees should consider reviewing or developing procedures and communications that aid their correct and timely implementation.

> Schemes should ensure their systems for dealing with PSOs are effective.

Mrs G – No good faith defence available when member turns a blind eye to overpayment

The Ombudsman has determined has determined that a member in receipt of a significant overpayment was not entitled to rely on a defence of good faith; however, he made a high award for the 'exceptional' distress and inconvenience.

Facts

Mrs G was a member of the NHS Pension Scheme. In April 1971, she had the option to transfer to the Teachers' Pension Scheme (**TPS**) but declined. In March 2001, Mrs G switched to part-time employment and was no longer eligible for the NHS Scheme. In October 2006, Mrs G started accruing pensionable service in the TPS.

In February 2013, a computer system error altered Mrs G's record to incorrectly show 1971 -2001 TPS pensionable service. Mrs G queried this on a number of occasions with Teachers' Pensions (**TP**), explaining that she believed her TPS entitlement was overstated.

In September 2013, Mrs G retired and her TPS pension came into payment, based on the incorrect calculation. In 2017, TP sent Mrs G a revised benefit statement, notified her that an overpayment of over £90,000 had occurred, and asked her to repay it in full. Following a dismissed Internal Dispute Resolution Procedure (**IDRP**), Mrs G complained to the Ombudsman on the grounds that she had acted honestly and in good faith in assuming that her pension was correct, and "going over and above the requirement to query the overpayment". Mrs G submitted that she had been informed by TP on a number of occasions that the pension was correct, and was told during a July 2013 telephone call that it would write to her, but heard nothing further. She had therefore assumed that her queries had been resolved before receiving her pension.

Decision

The Ombudsman partially upheld Mrs G's complaint.

The Ombudsman noted that while "bad faith is not synonymous with dishonesty", a recipient of an overpayment cannot turn a "blind eye": if they believe a payment may be in error, the "change of position" defence is not open to them. He considered that the responses Mrs G received to her enquiries were not sufficient for her to proceed on the assumption that she was entitled to the "significant sums"; she should have sought written confirmation before spending them. On this basis, TP was entitled to recover the full amount of the overpayment.

However, the Ombudsman acknowledged that TP's repeated failures to take appropriate action to investigate Mrs G's concerns amounted to maladministration, and awarded her £3,000 in recognition of the exceptional distress and inconvenience caused. In addition, the Ombudsman expected TP to be generous in the length of time it allows for repayment, given its role in allowing the overpayment to accrue.

The determination: Mrs G (PO-27022)

> When alerted to potential errors, schemes should act promptly.

Impact

When a member receives overpaid pension, they cannot rely on a defence of good faith if they have turned a "blind eye" to the fact that the payment has been made in error. A member may be expected to make further enquiries before spending, where a significant overpayment seems to have been made.

Nonetheless, administrators must ensure that member queries are dealt with appropriately and within a reasonable timescale to avoid fines for maladministration. In this case, the shock of such a large mistake was compounded by the fact TP had been given "a very clear understanding that the situation was wrong and repeatedly failed to take appropriate steps". Schemes alerted by members to potential errors should always ensure they follow up on these swiftly, and carefully. Periodic payment audits should also be used to help to catch such mistakes.

In addition, IDRPs should be thorough and address all relevant issues: the Ombudsman noted that the Stage 2 IDRP adjudicator here refused to comment on distress and inconvenience, which is a legitimate consideration at IDRP, and that it was a failure on their part not to do so.

TLT's Pensions Litigation 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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