



Pensions Ombudsman Update
September 2019

Mrs N (PO- 19673): Ill-health early retirements: time is of the essence

The Deputy Pensions Ombudsman (the Deputy Ombudsman) upheld a complaint determining that the Local Government Pension Scheme's (LGPS) employer should have set the member's retirement date to the same day it approved the member's ill-health early retirement (IHER) application.

Background

Mrs N, an employee of Derbyshire County Council (the Council) who was the LGPS Scheme Employer, was diagnosed with a breast cancer. When talking to the HR department she was provided with two different figures for a survivor's pension and a death grant depending on whether or not she would have passed away in service. The figure was higher if she would have died after her retirement had started.

The Council requested medical reports which were received on 31 December 2015 and then considered by an independent registered medical practitioner (IRMP) who, on 12 January 2016, concluded that Mrs N's life expectancy was probably less than one year.

The Council approved Mrs N's ill-health retirement application and set her last day of employment to 31 January 2016 (19 days after receiving the IRMP's report).

On 30 January 2016, the day before her retirement, Mrs N died. Therefore, the member died in service and Dr Y, Mrs N's widower, was entitled to the lower level of death grant.

Dr Y complained under the LGPS' internal dispute resolution procedure but the employer stated that the Rules of the Scheme did not allow to retrospectively amending the retirement date and rejected the complaint.

Decision

The Deputy Ombudsman held that the employer should have set the member's retirement date to the same day it approved the member's ill-health early retirement application and directed the employer to pay the complainant the difference between the benefits if Mrs N had not died in service and the death in service grant Dr Y had actually received. The Deputy Ombudsman also directed the employer to pay interest and the additional tax liability.

Impact

This determination shows how important it is for employers (but also trustees) to deal immediately with ill-health retirement applications. This case demonstrates that even the slightest delay can cause unwanted risks for members and their beneficiaries.

The Ombudsman is commonly critical and strict in cases where there are avoidable delays. Last year, for example, in *Estate of Mr Y, 26 July 2018 (PO-13540)*, the Ombudsman dealt with a similar case and decided that the employer "reasonably ought to have enquired" as to whether the member wished to waive his remaining notice period.

It is also interesting to note that the Ombudsman not just upheld the complaint but also directed the employer to pay interest and the additional tax liability, as to underline how intolerant delays are particularly in ill-health retirement cases. Clearly, employers and trustees have to give priority to ill-health retirement applications if they do not want to incur any penalties.

Mr Y (PO-19206): Overpayments (1): requirement of good faith

The Deputy Ombudsman partially upheld a complaint from a member who tried to recover historic overpayments.

Background

Mr Y was a member of the Royal Mail Statutory Pension Scheme (the **Scheme**). In 1988, after about five years of membership, he became a deferred member and, in 1989, he decided to transfer his benefits under the scheme (just over £4,000) to Equitable Life.

Despite the transfer having taken place, for ten years the Scheme mistakenly continued to send Mr Y details of his benefits under the Scheme and in 2010 Pension Service Centre (**PSC**), the Scheme administrator, wrote to Mr Y to request his instruction to start the retirement process. At that point, Mr Y completed the relevant forms and in January 2011 he received the tax-free cash lump sum and from March 2011 his pension of around £100 a month.

Six years later, PSC discovered the mistake and wrote to Mr Y to inform him that he had mistakenly received benefits and to seek recovery. Mr Y argued that the Limitation Act 1980 applied to prevent such recovery and also stated that he received the money in good faith and spent the extra fund to cover his expenses, raising the defence of change of position.

PSC offered Mr Y £500 for the distress and inconvenience and a plan to recover only six years of the overpayments, in accordance with the Limitation Act 1980, with a repayment plan that best suited Mr Y.

After bringing unsuccessful complaints regarding the matter in both stages of the Scheme's internal dispute resolution procedure (**IDRP**), in 2018 Mr Y complained to the Ombudsman. The PSC's position throughout these processes was that, under the Scheme Rules, once the transfer value was paid the Scheme was discharged from any obligation about those transferred benefits (i.e. those which were transferred to Equitable Life) and thus Mr Y had no residual entitlement from the Scheme.

Decision

The Deputy Ombudsman agreed that the Limitation Act 1980 applied and that the period for the Scheme to recover the overpayment was from the date the Scheme formally responded to the member's complaint to the Ombudsman (in January 2018) to six years prior that moment and directed the Scheme for a new calculation.

The Deputy Ombudsman held the defence of change of position did not apply because Mr Y did not meet the criteria for "good faith" but nonetheless directed the Scheme to pay £500 to Mr Y for distress and inconvenience.

Impact

Recovery of overpayment is one of the top five grounds for complaints to the Ombudsman. Administrative mistakes when trustees and administrators administer members' benefits can occur and it is always challenging to ascertain whether the relevant parties are acting in good faith.

The Limitation Act 1980 prevents recovery of alleged losses which were incurred more than six years prior the date of the relevant claim. It provides, in certain circumstances, a useful defence for members to put forward against the recovery of historic overpayments (limiting overpayments to those made within six years of the date of the claim). Other defences are still of course available in addition or as an alternative to a limitation defence (such as change of position).

In this case, Mr Y stated that he received the money in good faith and spent the extra fund to cover his expenses. He sought to rely on a change of position defence against the recovery of the overpayments, on the basis that he had already spent the money. However, the Ombudsman disagreed with Mr Y and stated that he was not acting in good faith because he knew his benefits from the Scheme had been transferred, as he had actually requested the transfer. To that end it is actually quite surprising that the Ombudsman saw fit to make an award for distress and inconvenience to Mr Y.

That said, it was difficult for the Ombudsman to point the finger against just the one party. Mr Y should have noticed that straight after his benefits were transferred he was still receiving details of his benefits from the Scheme and should have asked the Scheme to update its records; on the other hand, the Scheme should have updated its records immediately after the transfer and cannot escape all liability for its part in the matter.

Mr T (PO-24307): Overpayments (2): limitations on change of position defence

The Deputy Ombudsman has held that a pensioner could not rely on an incorrect benefit quotation as a defence for a recovery of overpayments, holding that there was no direct link between his reliance on the quotation and his decision to purchase a new car.

Background

Mr T had a personal pension policy (the **Plan**) with Phoenix Life (**Phoenix**), the Plan's administrator.

When Mr T reached his normal retirement date in 2012, he was contacted by Phoenix which gave him the option to take a 25% tax free lump sum of his fund value in the Plan of about £28,000.

Mr T considered whether to transfer his benefits in the Plan to Standard Life but in 2014 Phoenix informed Standard Life that Mr T had actually transferred his benefits to another scheme, Kellogg Brown & Root (UK) Ltd Pension Plan (**Kellogg Plan**), back in 1990.

In 2016, Phoenix mistakenly told Standard Life that Mr T's benefits were transferred to Standard Life in 2014.

After receiving contradictory information from Phoenix, Standard Life tried to seek clarification from Phoenix but had no response.

Only in 2017 Phoenix informed Mr T that his benefits were actually transferred out to the Kellogg Plan back in 1990.

Phoenix apologised for the incorrect information sent to Standard Life and offered to pay Mr T £850. Mr T argued the sum was insufficient and that Phoenix failed to inform him which was in breach of their contractual relationship.

He also argued that he would have bought a cheaper car if he was informed sooner of the incorrect information about the tax free lump sum and argued that he could not mitigate the loss of his pension by selling the car when he was aware of the incorrect information because he would have lost more than the tax-free lump sum.

Decision

The Deputy Ombudsman partly upheld the complaint and held that Phoenix was in error of maladministration because it failed to promptly inform Mr T about the error.

However, the Deputy Ombudsman did not find a direct link between the reliance of the incorrect information about the tax free lump sum and the decision to purchase an expensive car. In addition, the member had not taken any steps to show that he tried to mitigate the loss of his pension by selling the car when he was notified of the error.

However, the Deputy Ombudsman directed Phoenix to pay £2,000 for distress and inconvenience.

Impact

It is always challenging for complainants to demonstrate not just the financial loss arising from a misinformation but also alternative routes they would have taken had they known the true position. For example, how could Mr T have proved he actually bought his car only because he thought he was entitled to a tax free lump sum, or which alternative options he might have taken if he had been aware of the correct facts?

It is interesting to see how this case differs from PO-19206 above. In this case, Mr T argued that had he known he was not entitled to the lump sum, he would have bought a cheaper car. In PO-19206 Mr Y argued he received the money in good faith and spent it to cover his expenses. It is clear from these cases as well as many before them that to rely on a change of position defence the members would need to show that their position was irreversible, as well as demonstrating that they had acted in good faith.

Mrs T (PO-21354) Cases of Ill-health: decision making

The Deputy Ombudsman has upheld Mrs T's complaint in which Mrs T argued that she should have received a "Tier one" ill-health benefits while she actually awarded "Tier two".

Background

The LGPS contains provisions which include different tiers of IHER. "Tier one" is awarded if members are unlikely to be capable of undertaking gainful employment before normal pension age whilst "Tier two" is awarded if the members are unlikely to be capable of undertaking any gainful employment within three years of leaving, but are likely to be able to undertake such employment before reaching normal pension age.

Mrs T was a member of the LGPS and worked in a Primary School run by the Spring Partnership Trust (**Trust**). She suffered from chronic back pain and, as a result, in 2016 she applied for IHER.

Mrs T's back pain was assessed by the independent registered medical practitioner (**IRMP**) who concluded that the correct Tier to award to Mrs T was Tier two based on the fact that, although her pain was permanent, she was having a treatment potentially able to improve her condition in the future.

Mrs T appealed against this decision stating that her condition got worse over the year. She disagreed with the IRMP because she believed there was no treatment able to improve her symptoms and she should have therefore awarded Tier one.

Decision

The Deputy Ombudsman upheld the complaint and determined that both the IRMP and the Trust failed to correctly deal with this complaint. On one hand the IRMP failed to address the LGPS requirements correctly because he did not give any reason or evidence to Mrs T for his decision and on the other the Trust did not ask the relevant questions to Mrs T and left the IRMP to make a decision.

The DPO directed the Trust to:

- reconsider the member's application for IHER;
- instruct a different IRMP; and
- pay £1,000 to Mrs T for compensation.

Impact

This is a delicate case where the right procedures were not followed correctly. IHER cases are one of the topics we see the most in the Pensions Ombudsman's determinations and it is vital, as a first step, to check the scheme rules to identify what are the qualifying criteria and who should ultimately decide whether to award it or not. It is often the case that decision makers consider it in order to effectively abdicate all responsibility for making a decision to a medical professional. However, the ultimate decision should not lie solely with the medical professional and the decision maker must consider the relevant requirements of the scheme rules as well as any other relevant factors which should be taken into account.

News update: proposed changes to the Pensions Ombudsman's jurisdiction

Following a consultation issued in December 2018, the DWP confirmed last month that it wants to introduce changes which would widen the jurisdiction of the Pensions Ombudsman. One of these changes would be to widen the Ombudsman's jurisdiction to permit employers using group personal pension arrangements to make a complaint of maladministration or refer a dispute of law to the Ombudsman. It also wishes to introduce an early resolution function that would allow the Ombudsman to resolve disputes informally before they proceed to a formal determination. This follows the transfer of the work previously undertaken by TPAS to the Ombudsman last year.

The DWP will be seeking to bring forward legislation to implement these proposals in due course. We will keep you abreast of further developments in future editions of our Ombudsman update.

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.

Contact TLT



Sasha Butterworth
Partner and Head of Pensions
T +44 (0)333 006 0228
sasha.butterworth@TLTsolicitors.com



Chris Crighton
Partner
T +44 (0)333 006 0498
chris.crighton@TLTsolicitors.com



Edmund Fiddick
Partner
T +44 (0)333 006 0208
edmund.fiddick@TLTsolicitors.com



Victoria Mabbett
Partner
T +44 (0)333 006 0386
victoria.mabbett@TLTsolicitors.com

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

Pensions, Chambers 2019



tltsolicitors.com/contact

Belfast | Bristol | Edinburgh | Glasgow | London | Manchester | Piraeus

TLT LLP, and TLT NI LLP (a separate practice in Northern Ireland) operate under the TLT brand and are together known as 'TLT'. Any reference in this communication or its attachments to 'TLT' is to be construed as a reference to the TLT entity based in the jurisdiction where the advice is being given.

TLT LLP is a limited liability partnership registered in England & Wales number OC308658 whose registered office is at One Redcliff Street, Bristol, BS1 6TP. TLT LLP is authorised and regulated by the Solicitors Regulation Authority under ID 406297.

In Scotland TLT LLP is a multinational practice regulated by the Law Society of Scotland.