



**Pensions Ombudsman Update**  
January 2017

# Contents

- Trustee discretion: pension payment dates and tax consequences ..... 1
- Incorrect retirement statement: maladministration but no entitlement to higher benefits ..... 2
- CETV guarantee: active member was not treated unfairly ..... 3
- Transfers – trustees had no duty to warn member of change in CETV basis after end of guarantee period ..... 4
- Death benefits – trustees made the correct decision to deny paying trivial commutation lump sum to estate ..... 5
- Transfer request – two scheme administrators held responsible pro rata for periods of delay within their control ..... 6
- News update ..... 7
- TLT’s Pension Dispute Resolution team ..... 7



## Trustee discretion: pension payment dates and tax consequences

The Deputy Ombudsman has dismissed a complaint by a member who claimed that the trustee should have changed the pension payment date in order to avoid the member incurring extra income tax.

### 27 September 2016

**Mr E (PO-6567):** The Deputy Ombudsman has given her determination in a complaint by Mr E against the trustee of the Gibbs section of the HSBC Bank (UK) Pension Scheme (the **Scheme**).

Pensions were paid on the first day of each month in line with the Scheme rules. In 2013, following the introduction of real time information (**RTI**) by HMRC, the trustee informed Mr E that he would have to pay an additional £582.30 in tax. This was because his pension payment on 1 April 2014 would be taxed as a 13th payment in the tax year ending 5 April 2014. Prior to the introduction of RTI, this payment would have been taxed in the 2014/15 tax year.

Mr E complained to the Scheme. However, the Scheme executive (responsible for the day-to-day running of the Scheme) decided not to advise the trustee to move the payment date to avoid the additional tax. Mr E then unsuccessfully complained under the Scheme's IDR. In its response, the trustee gave various reasons in support of its decision, some of which were as follows:

- the Scheme rules govern when pensions are paid;
- the trustee has the discretion to change the date on which pensions are paid but this should be exercised appropriately; and
- the trustee is under no obligation to assist members in managing their individuals tax affairs.

Mr E complained to the Ombudsman, arguing that the trustee had both ignored advice given by its appointed advisers and disregarded his legitimate expectations that his financial losses would be considered.

The Deputy Ombudsman dismissed Mr E's complaint, finding that the trustee had acted within its powers under the Scheme rules. In considering how the trustee exercised its discretion, the Deputy Ombudsman also looked at several factors such as whether (a) the correct questions were asked, (b) the Scheme rules were correctly interpreted, (c) all relevant, but no irrelevant, factors were taken into account, and (d) the decision arrived at was not perverse (i.e. a decision that no reasonable body would make). The Deputy Ombudsman held that the trustee did act in accordance with these principles when reaching its decision.

Further, the Deputy Ombudsman noted that even if the trustee did not follow the advice of its advisers to change the payment date, it was reasonable for the trustee to prefer its own decision.

### Impact

This decision looks at the extent to which trustees are obliged to take action where external changes, such as HMRC requirements, have a detrimental impact on members. In this case, notwithstanding the additional tax Mr E incurred, the Deputy Ombudsman could not find any evidence of maladministration, despite the fact that she sympathised with his position. For this reason, this determination can be viewed as a reminder of the limits of the Ombudsman's powers in certain instances.

“...a reminder of the limits of the Ombudsman's powers in certain instances.”

## Incorrect retirement statement: maladministration but no entitlement to higher benefits

The Deputy Ombudsman has dismissed a complaint by a member who claimed that she based her decision to retire on the misquoted lump sum amount stated on her retirement statement.

### 3 October 2016

**Mrs N (PO-12613):** The Deputy Ombudsman has given her determination in a complaint by Mrs N against the trustees and administrator, Hymans Robertson, of the University of Edinburgh Staff Benefits Scheme (the **Scheme**). As well as being an active member of the Scheme, Mrs N had deferred benefits in the Scheme from her previous period of employment. In this case, her complaint related to her deferred benefits accrued between 1998 and 2005.

On 16 July 2015, the Scheme administrator sent a retirement statement to Mrs N (the **July 2015 Statement**). This was based on a retirement date of 31 October 2015. The statement provided that Mrs N could take a reduced pension along with a tax-free lump sum of £47,222.50, although it stated that the figures were an “estimate only” and not guaranteed.

Following the above statement, Mrs N retired on 31 December 2015, opting for the reduced pension and lump sum. However, a revised statement issued in January 2016 (the **January 2016 Statement**) provided much lower figures, with the lump sum quoted as being £25,666.23. The covering letter advised that the July 2015 Statement did not accurately reflect Mrs N’s entitlement. Nonetheless, Mrs N decided to proceed with taking the reduced lump-sum but, at the same time, complained under the Scheme’s IDRP.

Upon reaching stage two of the Scheme’s IDRP, the trustees highlighted that previous deferred benefit

statements sent to Mrs N had consistently showed the correct figures. On this basis, Mrs N ought to have reasonably cast doubt on the much higher incorrect figure. Nevertheless, the trustees accepted their error and offered £500 in compensation. Mrs N accepted this but did not agree that it was sufficient and so she complained to the Ombudsman.

In doing so, Mrs N argued that she had “signed and accepted” the incorrect figures provided in the July 2015 Statement. Further, she submitted that she based her decision to retire on receiving the lump sum of £47,222.50 and was relying on this in order to pay off her mortgage. Mrs N also denied receiving any of the earlier statements that had consistently quoted the correct figures.

Mrs N’s complaint was considered by an Adjudicator, who found that whilst the incorrect July 2015 Statement amounted to maladministration, this was not enough to create a legal entitlement to the misquoted benefits. Instead, Mrs N needed to demonstrate detrimental reliance, meaning that it was reasonable for her to have relied on the incorrect information and that she suffered loss as a result. In view of the previous correct statements sent to Mrs N, the Adjudicator found that it was unreasonable for Mrs N to rely on the incorrect information given the significance discrepancy between the figures. The Adjudicator concluded that Mrs N could not claim detrimental reliance and deemed the compensation already offered to be reasonable. The Deputy Ombudsman added that issuing a retirement

benefits statement was not a contractual offer capable of being “signed and accepted”. The Deputy Ombudsman agreed that the discrepancy between the figures in the July 2015 Statement and January 2016 Statement should have put Mrs N on notice that the higher figure may have been wrong. Overall, the Deputy Ombudsman was satisfied that the Scheme “investigated properly and made its offer of compensation promptly”. The complaint was therefore dismissed.

### Impact

This determination highlights that when a member receives an inaccurate benefits statement, the member must not only prove detrimental reliance on the statement, but also that the reliance is reasonable. Where a member ought to have recognised that an error had been made, it would appear to be less likely that the Ombudsman would hold in the member’s favour. This decision also emphasises the fact that whilst one-off mistakes in statements may be acceptable, the best approach is, of course, to ensure that members are provided with correct figures in the first instance.

## CETV guarantee: active member was not treated unfairly

The Ombudsman has dismissed a complaint by an active scheme member who claimed that she was treated unfairly on the basis that deferred scheme members receive a three month guarantee on a Cash Equivalent Transfer Value (**CETV**), whereas active members do not.

**20 October 2016**

**Mrs E (PO-12359):** The Ombudsman has given his determination in a complaint by Mrs E against the trustees of the Scottish Widows Retirement Benefit Scheme (the **Scheme**). Mrs E was employed by Scottish Widows and was an active member of its DB Scheme. In 2015, Mrs E requested a CETV statement with a view to transferring out the Scheme to a DC scheme.

A letter and CETV statement were issued in June 2015 (the **June 2015 Documents**), providing a transfer value of £686,687. Both documents made it distinctly clear that the CETV was for “illustration purposes only” and “not guaranteed”.

In August 2015, it came to Mrs E’s attention that a new actuary had been appointed to the Scheme and that the CETV basis had been changed during the previous month. Following this, Mrs E received a further CETV statement in August 2015 showing a revised CETV of £644,226. In response, Mrs E complained that the warnings contained in the June 2015 Documents were not “prominent enough” meaning that both she and her IFA missed the warnings. Nonetheless, Mrs E proceeded with the transfer of the lower amount to the DC scheme, albeit whilst pursuing her complaint with the trustees.

Mrs E argued that she had been treated unfairly compared to a deferred member. This was because a deferred member’s CETV was guaranteed for three months. Mrs E also argued that she had been forced into seeking financial advice from an IFA. The trustees dismissed Mrs E’s complaint but recognised that the revised CETV basis could have been notified to Mrs E sooner and so offered £500 compensation.

Mrs E then complained to the Ombudsman. Amongst other things, she claimed that the trustees had not acted in the best interest of “all” members because active members were not given a three month guarantee like deferred members.

Therefore, she argued that she could not make an informed choice given that the CETV could fall before the financial advice process was completed. Mrs E therefore wanted the trustees to honour the original CETV quoted.

The Ombudsman dismissed Mrs E’s complaint, noting that the June 2015 Documents contained sufficient warnings that Mrs E’s CETV was not guaranteed. The Ombudsman commented that these warnings “could not be clearer.”

Further, the Ombudsman emphasised that there was no statutory requirement for the trustees to place a

three month guarantee on Mrs E’s CETV because she was not a deferred member. For this reason, the Ombudsman said that it was not a question of whether the trustees were acting fairly or not.

The Ombudsman also found that it was not maladministration for the trustees to appoint a new actuary and change the CETV basis, stating that the revised CETV still represented a fair market value of the pension benefits Mrs E was giving up.

### Impact

Whilst elements of the CETV regime may seem unfair to active members, provided that trustees comply with the relevant legislation and the scheme rules are applied correctly, members will struggle to prove that they have been treated unfairly. This determination also demonstrates the importance of having clear warnings in correspondence to members that transfer value quotations, where not guaranteed, are for illustration purposes only.

# Transfers - trustees had no duty to warn member of change in CETV basis after end of guarantee period

25 November 2016

**Mr E (PO-13588):** The Deputy Pensions Ombudsman has dismissed a complaint by a member who failed to complete his application to transfer within the three month guarantee window and was then offered a significantly lower cash equivalent transfer value (**CETV**) following a change in the Scheme's CETV basis.

## Background

Mr E was a member of the Northern Foods Pension Scheme (the **Scheme**). In March 2015, Mr E requested a CETV from the Scheme administrator, Capita. On 26 March 2015, a CETV of £73,765.06 was issued and guaranteed for three months from the date of the calculation. A copy of the CETV was also sent to Mr E's financial advisor, stating that it was guaranteed until 25 June 2015.

Capita sent a reminder to Mr E on 19 June 2015, advising that the CETV was about to expire and they needed to receive all completed forms by 25 June 2015 for the transfer to proceed. Despite this, Mr E missed the deadline and Capita subsequently issued a new CETV statement. However, this statement was for the much lower figure of £57,078.84 because it had

been calculated on a new basis introduced on 1 April 2015 (after Mr E's first CETV statement was issued) in line with actuarial advice in light of the new pension freedoms introduced at the time.

Notwithstanding the lower CETV value, Mr E decided to proceed with the transfer. Following its completion, Mr E complained to both Capita and the Scheme trustees that the CETV should have been for the higher figure originally quoted.

The trustees rejected Mr E's complaint, saying that trustees do not have a general disclosure requirement to notify all members about a change in the CETV calculation basis. Mr E therefore complained to the Ombudsman, arguing that trustees should not be allowed to make sudden and significant reductions to CETVs to suit their own needs.

## Decision

The Deputy Ombudsman dismissed Mr E's complaint. Turning to the relevant legislation – The Occupational Pension Schemes (Transfer Values) Regulations 1996 – he commented that a CETV must be calculated on an actuarial basis reflecting the amount required to make provision within a scheme for a member's accrued

benefits, options and discretionary benefits. This means that trustees are under a legal duty to monitor and review the manner of calculation of CETVs to ensure that it is appropriate. This duty extends to taking into account the financial interests of all scheme members.

For the above reason, trustees are right to take action if there is the possibility of an increase in the number of transfer requests, meaning that the existing calculation basis would result in CETVs considered too high and detrimental to members as a whole. Therefore, whilst the revised CETV was significantly lower, the trustees acted in line with their obligations and duties.

## Impact

This determination demonstrates that the basis for CETV calculations is a matter for trustees to decide based on actuarial advice and recommendations on how CETVs should be calculated. This broad discretion means that trustees may occasionally make decisions detrimental to one member if they are concerned by the potential harm to the overall scheme.

“...This means that trustees are under a legal duty to monitor and review the manner of calculation of CETVs to ensure that it is appropriate.”

# Death benefits - trustees made the correct decision to deny paying trivial commutation lump sum to estate

30 November 2016

**Mrs E (deceased) (PO-12824):** The Pensions Ombudsman has dismissed a complaint by a deceased member's estate after the trustees refused to pay to it a trivial commutation lump sum, ruling that in the absence of the deceased signing the offer letter prior to her death, trustees should not be placed in a situation where they are making assumptions on behalf of members.

## Background

Mrs E received a spouse's pension from Balfour Beatty Pension Fund (the **Scheme**). On 2 September 2015, the trustees of the Scheme wrote to Mrs E, advising that she could exchange her pensions for a taxable trivial commutation lump sum of £25,796.98, provided that she sign and return the letter by 30 November 2015. Shortly afterwards, Mrs E became seriously ill and died on 5 October 2015, leaving the offer letter unsigned.

Mrs E's son later telephoned the Scheme administrators to ask if the lump sum could be paid to Mrs E's estate. However, because Mrs E had not signed the paperwork and the trustees did not know what her decision would have been, they said that they could not use their discretion to make the payment in these circumstances. Because Mrs E was deceased, the spouse's pension was also stopped.

The estate therefore complained that Mrs E intended to sign the letter but her illness prevented her from doing so.

## Decision

The Ombudsman dismissed the complaint, advising that the decision whether to take a taxable trivial commutation lump sum was an individual one. The Ombudsman held that the trustees "*should not be placed in a situation where they are making assumptions on behalf of their members*". Whilst, given her terminal diagnosis, it was likely that Mrs E would have chosen the lump sum option, the trustees

had a fiduciary duty to ensure that benefits were paid correctly. The lump sum was not a death benefit but an offer to Mrs E alone, in exchange for her spouse's pension to which the estate was not entitled.

The Ombudsman expressly concluded that the trustees had "made the correct decision", suggesting that the trustees had no alternative but to reach the decision they did.

## Impact

The clear message from this determination is that trustees are not expected to second-guess the decisions of members. In a rather unusual step, the Ombudsman even went further than saying that the trustees' decision was reasonable, stating that the trustees had "*made the correct decision*".

.....

"The Ombudsman expressly concluded that the trustees had "made the correct decision", suggesting that the trustees had no alternative but to reach the decision they did."

.....

# Transfer request - two scheme administrators held responsible pro rata for periods of delay within their control

16 December 2016

**Mr Y (PO-8890):** The Deputy Pensions Ombudsman has upheld a complaint by a SIPP member whose transfer request suffered undue delays of nearly three months.

## Background

Mr Y wanted to transfer his SIPP from Curtis Banks Ltd (**CB**) to Fidelity Worldwide Investment (**Fidelity**). On 4 December 2014, Fidelity sent CB a transfer request via the electronic pension transfer system, Origo. The following day, CB updated Origo's records to show the transfer as being "in progress" despite the fact that CB could not carry out the transfer using Origo and would have to do so manually.

However, it was not until 9 January 2015, when Fidelity telephoned CB for an update, that CB realised its mistake and informed Fidelity that it would send the relevant transfer paperwork instead. This oversight caused a delay of 23 working days (the **First Delay**).

Upon receiving the paperwork from CB, it took Fidelity a further 13 working days to forward it to Mr Y (the **Second Delay**).

When the transfer was eventually completed (some 3 months after the initial request was logged on Origo), Mr Y complained to the Ombudsman office that the transfer value had fallen significantly due to the delay. Following Mr Y's complaint, CB conceded that there had been undue delays and offered to pay 50% of loss suffered (calculated at £13,917.06) if Fidelity agreed to pay the remaining 50%. In its defence, CB argued that Fidelity should have requested an update 10 working days after logging its transfer request. At the same time, Fidelity argued that it should only be held responsible for the Second Delay.

## Decision

In the first instance, the Ombudsman adjudicator found that both respondents were responsible in equal measures and agreed that Fidelity should have requested an update after 10 working days. However, the Deputy Ombudsman disagreed, finding that CB was solely responsible for the First Delay and Fidelity for the Second Delay.

With this in mind, the Deputy Ombudsman held that each party should bear responsibility for the period of delay which *"occurred while an outstanding task was actually in their hands and within their control"*

and liability should therefore be apportioned pro rata on this basis. CB and Fidelity were ordered to recalculate the compensation amount payable to Mr Y at the date of settlement, with CB to pay Mr Y 64% of the loss suffered (23 out of 36 working days) and Fidelity 36% (13 out of 36 working days). Each party was also ordered to pay £250 for the distress and inconvenience.

## Impact

Despite the vast number of transfers made via the Origo service, providers need to ensure that those transfers outside of its scope do not get overlooked. Providers should be mindful that undue delays may result in reductions in applicable transfer values and they may well be liable for any consequential loss suffered during periods of which the delay was avoidable and within their control

.....  
"The Deputy Pensions Ombudsman has upheld a complaint by a SIPP member whose transfer request suffered undue delays of nearly three months."  
.....



## News update

### The Pensions Ombudsman intervenes in an appeal against one of its decisions

10 November 2016

As highlighted in our last update, the Pensions Ombudsman Service can, if permitted by the court, be a party to an appeal. Following the High Court's decision in *Hughes v Royal London Mutual Insurance Society Ltd* [2016] EWHC 319, the Pensions Ombudsman published a statement on 27 July 2016 announcing that it planned to take a more proactive approach to appeals in cases where there is a greater public need.

In what is the first reported example of the Ombudsman adopting this interventionist approach, the High Court has overturned the Ombudsman's original determination (PO-6773). The High Court overturned the determination in the case of Catherine Butterworth and Police and Crime Commissioner for Greater Manchester. In summary, the Ombudsman had directed the Police and Crime Commissioner for Greater Manchester (the **Commissioner**) to pay the claimant a "bridging pension" from its own funds – a decision which the Commissioner appealed on numerous grounds.

Whilst the claimant was not a party to the appeal, the Ombudsman was given permission by the High Court to intervene. A particular point to note was

that in providing his submissions, the Ombudsman asked the court to uphold the determination on an entirely new ground. Interestingly, this new ground was contradictory to the position adopted by the Ombudsman in his earlier determination. The Ombudsman also asked that the High Court remit the matter back to him to consider a new point.

In its decision to overturn the Ombudsman's finding of maladministration, the High Court held that the Ombudsman had misinterpreted certain aspects of the matter in his determination. Therefore, the High Court did not expressly consider whether the Ombudsman should be able to raise new arguments on appeal. However, parties considering whether to appeal an Ombudsman determination should bear in mind that should he intervene, the Ombudsman may raise new arguments which might even be contrary to his original stance.

This case also demonstrates that, for the moment, the Ombudsman is sticking by its commitment to take a more proactive stance where necessary. However, given that in this case the Ombudsman was ordered to pay the Commissioner's costs of bringing the appeal, the Ombudsman may think carefully about whether to intervene in the future.

**We will, of course, monitor any developments on this.**

## 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 us



**Sasha Butterworth** | Partner

T 0333 006 0228

E [sasha.butterworth@ttsolicitors.com](mailto:sasha.butterworth@ttsolicitors.com)



**Edmund Fiddick** | Partner

T 0333 006 0309

E [edmund.fiddick@TLTsolicitors.com](mailto:edmund.fiddick@TLTsolicitors.com)



[tltsolicitors.com/contact](https://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.