



# **Pensions Ombudsman Update**

May 2020

## Mr Y (PO-27002): Entitlement to full deferred pensions despite missing membership records

The Deputy Pensions Ombudsman (the **Deputy Ombudsman**) upheld a member's complaint in a recent case where the member was entitled to a full deferred pension, rather than simply a Guaranteed Minimum Pension (**GMP**), despite the member having no membership records.

### Background

Mr Y was employed by Royal Mail Group (**RMG**) between March 1979 and April 1986. At this time it was mandatory for all RMG employees over 18 to join the Royal Mail Statutory Pension Scheme (the **Scheme**). While employed by RMG, Mr Y was twice convicted of criminal offences following prosecutions brought by RMG.

In April 2017, Mr Y contacted the Scheme's administrators to enquire about his pension but the administrators informed him they had no record of his membership. Later that month, the Scheme conducted a GMP reconciliation exercise which revealed Mr Y had contracted out of the state earnings related pension scheme (**SERPS**) while a member of the Scheme between 1979 and 1986 and was entitled to GMP.

The administrators created a membership record showing Mr Y's GMP entitlement, however he argued that he should receive a full deferred pension. The administrator therefore contacted RMG to try to obtain records of his employment, however, as more than six years had passed since Mr Y left service, RMG had destroyed the records. The administrators informed Mr Y and asked if he had any record of his employment. Mr Y was unable to provide any evidence of either his employment or his pension entitlement and

therefore the administrators stated he was only entitled to a GMP.

The Scheme's rules permitted RMG to recover any losses suffered as a result of an employee's criminal actions from their pension, however only with the prior approval of the Secretary of State and the member receiving notice of this. The Scheme's management team argued that must have happened to Mr Y, however they had no evidence supporting this argument.

Mr Y argued that as Scheme membership was mandatory and he was entitled to a GMP, this showed he was and should be treated as a full deferred member of the Scheme. Mr Y also argued the Scheme should have kept accurate records of his membership.

After exhausting the Scheme's internal complaint's procedure, Mr Y complained to the Ombudsman, alleging maladministration.

### Decision

The Deputy Ombudsman upheld Mr Y's complaint. She noted that all parties agreed about the dismissal and criminal convictions, however recovery of loss via an employee's pension was only possible in tightly controlled circumstances. The Scheme could not produce any evidence to corroborate its argument that this had happened.

Therefore, on the balance of probabilities, the Deputy Ombudsman decided that Mr Y was entitled to a full deferred pension, not just a GMP. The absence of records regarding membership did suggest that the Scheme's records were incomplete, however the Scheme could not show that a deduction had taken place as they claimed.

### Impact

This decision reminds trustees and employers of the importance of keeping accurate records of membership. The absence of evidence here resulted in an adverse outcome for RMG. Accurate records kept by either RMG or the Scheme may have enabled the Scheme to demonstrate why Mr Y was not entitled to a deferred pension, but the lack of records left RMG unable to do so.

This decision is of particular importance for contracted out schemes who are required to provide GMPs to members. It is not uncommon for a reconciliation exercise to reveal individuals who are entitled to receive (at least) a GMP but no records exist for that individual. Trustees will, following this decision, need to decide whether such members are entitled to GMP only or whether they also have deferred membership rights. Each case will need to be determined on its own facts.

## Mr S (PO-16045): Ill-health early retirement and fettered discretion

The Ombudsman upheld a member's complaint that the trustees had fettered their discretion by not allowing him to retire early on the grounds of ill-health.

### Background

Mr S, a deferred member of the Sears Retail Pensions Scheme (the **Scheme**), was diagnosed with Multiple Sclerosis. Following this, in 2003, Mr S made enquires about the possibility of receiving ill-health early retirement.

The Trustees stated that as his pension would consist entirely of pre-1988 GMP, Mr S could not take early retirement as the Scheme Rules required ill-health early retirement pensions to be paid at a reduced rate (and they could not reduce his pensions below GMP).

As Mr S approached his normal retirement age he contacted the Scheme administrators to enquire about his benefits. Mr S was asked why he had not applied for early retirement benefits when he gave up work and the administrators confirmed that they could not pay a pension at less than his GMP.

Mr S reviewed the Scheme Rules which allowed pensions to be paid without reduction in cases of "serious ill health" and in light of his diagnosis contacted the administrators and asked to be considered for early retirement on the grounds of serious ill health, backdated to when he had retired.

A medical examination found that Mr S was unfit to work for the foreseeable future and graded his symptoms as a grade three incapacity. After considering the report the Trustees informed Mr S that only cases at

grade five or above amounted to serious ill health therefore Mr S would not receive any backdated benefits.

Mr S complained to the Ombudsman that the Trustees had improperly exercised their discretion and could have paid his GMP without reduction as this was a case of serious ill-health.

### Decision

The Ombudsman partially upheld Mr S's complaint. Mr S also complained on an unrelated ground regarding increased to his GMP which was not upheld.

The Ombudsman found that eligibility for ill-health early retirement was subject to the Trustees' consent. Ill-health pensions would be reduced unless Trustees decide otherwise. The Scheme Rules contained no definition of what amounted to 'serious ill-health'. As a result, because Mr S's pension was entirely pre-1988 GMP, the decision whether to pay a full or reduced rate was one of discretion for the Trustees depending on whether Mr S's condition amounted to 'serious ill-health'.

The Ombudsman determined that the Trustees, in refusing Mr S's request because he fell below the grade five incapacity threshold, had not properly exercised their discretion. The Ombudsman found that rigidly applying this criteria was importing a statutory requirement into the exercise of the Trustees' discretion. The evidence provided did not show that the Trustees had exercised independent judgement and as a result the decision was an unlawful fettering of discretion.

### Impact

This decision is an important reminder for Trustees of the significance of using independent judgment when exercising any discretion under Scheme rules. When making decisions such as whether a member should be allowed to retire early, it is important for Trustees to consider all relevant factors for that particular individual and not rigidly apply a set criteria which are not present in the scheme rules. Irrelevant factors should also be disregarded from the decision making process.

This case also reminds Trustees of the importance of keeping records of meetings and including the reasons for decisions. In the event that a decision is challenged, it will be useful for Trustees to show who made the decision, when it was made and which factors they considered, so as to demonstrate how they satisfied the requirement to exercise independent judgment.

## Mr N (PO- 20307): Scheme administration and benefits statements

The Deputy Ombudsman partly upheld a complaint by a member, Mr N, who believed that he was entitled to an increase in benefits following an incorrect statement provided by trustees.

### Background

Mr N joined the Keepmoat Pensions Plan (the **Scheme**) and was provided with a letter from his employer stating he would be granted special terms (the **Special Terms**) allowing him to retain a pension at 1/80<sup>th</sup> of his pensionable salary. The Scheme's governing deed and rules never incorporated this guarantee.

In June 2016 Mr N received a statement of benefits from the Scheme which incorrectly stated that his final salary pension would increase in line with RPI.

In 2017 a newly appointed trustee took legal advice on the benefits due under the Scheme. This concluded the Scheme was a Defined Contribution scheme which had been incorrectly administered as a Defined Benefit scheme. The sponsoring employer informed members that, as core benefits under the plan were covered in a separate illustration, they would not be affected by this advice.

Mr N complained to the Ombudsman arguing that there had been unilateral changes to the Scheme after his retirement which had affected the Special Terms and excluded the revaluation of his benefits. He also argued that

he had relied on the benefits statement he received which was incorrect.

The Trustees and the company argued that the Scheme's rules had not been changed, they had simply received legal advice regarding their interpretation. They argued that the Special Terms were a contractual promise with the company. They also argued that the loss he had suffered was a loss of expectation not financial loss.

### Decision

The Deputy Ombudsman partially upheld his complaint.

The Deputy Ombudsman held that the Special Terms were a contractual arrangement between the company and Mr N and did not include a revaluation. As the Scheme Rules had not been amended, the Special Terms were outside the Scheme, therefore not payable by the trustees. The Deputy Ombudsman agreed with the Trustees' view that the rules had been interpreted and not changed.

The Deputy Ombudsman did find however that the incorrect administration of the Scheme was maladministration leading to misleading information regarding Mr N being entitled to a benefit revaluation. However the Deputy Ombudsman stressed an incorrect benefit statement did not give rise to incorrect entitlement. Therefore Mr N would only receive compensation for the distress and inconvenience but not the benefits on the statement.

### Impact

This decision reminds Trustees of the difficulties which can be faced when replacing DB schemes with new DC arrangements. It is not uncommon for DB Schemes to provide benefits which incorporate special terms, however such terms should be carefully worded in order to prevent members receiving incorrect information and ultimately expensive Ombudsman proceedings.

Trustees and administrators are reminded of the importance of ensuring they receive appropriate advice regarding the interpretation of scheme rules if they are in any doubt as to what benefits should be paid. This will help to ensure members receive their correct benefits in a timely manner.

## Mrs R (PO-20302): Separate agreements and additional benefits

The Ombudsman upheld Mrs R's complaint that her employer had committed maladministration by attempting to increase her pension in contravention of the scheme rules. However her complaint that she should not have to repay the overpayment was dismissed.

### Background

Mrs R, a Nurse and NHS Pension Scheme (the **Scheme**) member, worked for Telford and Wrekin Primary Care Trust (the **Trust**). The Trust established a Professional Executive Committee (the **Committee**), comprised of GPs, Nurses and Allied Health Professionals, each paid an additional supplement (the **Supplement**) for work on the Committee. The Trust's initial advert stated the Supplement was pensionable, however a Government circular clearly indicated this was only correct for certain GPs.

After joining the Committee, the Trust informed Mrs R of the error. As Mrs R believed the Supplement was pensionable she had reduced her hours and decided against making additional voluntary contributions. In an attempt to rectify this perceived disadvantage, the Trust paid Mrs R an additional responsibility payment on top of her salary (the **Workaround**).

Mrs R retired in 2008, receiving her pension based on her salary including the Workaround. In 2015 NHS BSA (the **Administrator**) became aware of the Trust's initial error regarding the Supplement and that Mrs R's pension calculation included the Workaround, which was incorrect.

The Administrator informed Mrs R that as her benefits were calculated including the Workaround, she had been overpaid and would have to repay this. The Administrators stated payments for Committee work were

expenses and therefore not pensionable. The Workaround could not increase her pension benefit as this circumvented the Scheme's Regulations.

Mrs R complained to the Ombudsman. She argued payment for her Committee work should be pensionable as it was part of "all salary, wages, fees and other regular payments", which were pensionable under the Scheme Regulations. Alternatively, Mrs R argued the Workaround constituted a contract between herself and the Trust, therefore the Administrator should continue to pay an increased pension. Mrs R also argued that any claims for recovery of the payment were out of time.

### Decision

The Ombudsman held that when agreeing the Workaround, the Trust and Mrs R understood the Supplement was not pensionable. The Supplement was a substantial benefit and did not unduly disadvantage her, despite not being pensionable. The Workaround breached the Regulations, as the Trust went beyond its powers to increase Mrs R's pension, despite being warned they were doing so.

The Ombudsman held that as both parties knew Mrs R's Committee work could not increase her pension, the Workaround could not achieve this. However, as Mrs R relied on the information provided by the Trust, leading to significant distress due to maladministration, the Ombudsman awarded that Mrs R be paid the sum of £2,500 for distress and inconvenience.

The Ombudsman held the recovery of the overpayments was not in fact time-barred. He found fluctuations in annual salary alone (evident when Mrs R retired) did not require further investigation. However a fraud investigation regarding Mrs R should have prompted further enquiries.

### Impact

Employers, trustees and administrators must ensure that any agreement seeking to increase benefits for members is made in accordance with the relevant scheme rules. If trustees or administrators are in doubt about the interpretation of their rules, they should take legal advice. This will prevent the time and expense involved in recovering overpayments, as well as reducing any potential distress to members.

This decision is a timely reminder of the importance of investigating any irregularities regarding benefit entitlements. If there is evidence of an overpayment, but trustees or administrators do not investigate, they may be unable to recover such monies, which may have further consequences.

# Mrs E (PO-24238): Financial consequences for late payment due to maladministration

The Deputy Pensions Ombudsman (the **Deputy Ombudsman**) upheld Mrs E's complaint that her employer's late payment of contributions amounted to maladministration.

## Background

Mrs E began employment and was enrolled into a scheme with an alternative provider (the **Previous Provider**). In March 2018 her employer enrolled her as a member of the National Employment Savings Trust (**NEST**), however due to alleged maladministration with the Previous Provider, her employer paid her past contributions into NEST as a lump sum.

Subsequently Mrs E discovered that contributions since March 2018 had not been made into her NEST account. Following enquiries Mrs E received £104 in respect of unpaid contributions, however she maintained that over half of her contributions remained outstanding. NEST confirmed there was a schedule of unpaid contributions in respect of Mrs E.

Mrs E complained to the Ombudsman, after which she received the majority of the contributions due, however there was still a small percentage difference between the amount received and her contributions paid which she was unable to reconcile.

Her employer responded to the Ombudsman, stating that the shortfall was due to an issue processing payments which had now been rectified. They also confirmed that the remaining shortfall, amounting to £82.90, would be paid as soon as possible.

## Decision

The Deputy Ombudsman upheld Mrs E's complaint.

The Deputy Ombudsman found that although all outstanding contributions were either settled, or would be settled shortly, the late payment by the employer amounted to maladministration and had resulted in Mrs E suffering investment loss. The Deputy Ombudsman also held that Mrs E should receive compensation for the non-financial injustice which she suffered.

The Deputy Ombudsman ordered that her employer pay into Mrs E's NEST account the amount of contributions which remained outstanding, as well as the investment loss that Mrs E had suffered from her contributions not being invested.

In assessing the level of non-financial injustice the adjudicator found the maladministration had caused a serious level of distress and inconvenience over a prolonged period of time. Therefore applying Ombudsman guidance an award of £1,000 should be made. Mrs E's employer disputed this, stating that as the amount of contributions were only £1,275, this would be disproportionate.

The Deputy Ombudsman found that the level of redress for distress and inconvenience was not dictated by the level of a members benefit. However compensation was not intended to be punitive, therefore as the impact has not been long term, an award of £500 was more appropriate in the circumstances.

## Impact

This serves as a timely reminder that awards for distress and inconvenience can be sizable relative to the amount which is in dispute. Although the Deputy Ombudsman did not award the full £1,000 recommended, there was still a sizable award in the context of the amount in dispute. Employers should be mindful that seemingly trivial errors can result in significant costs.

## 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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