



**Pensions Ombudsman Update**  
September 2020

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# Mrs R (PO-24281) auto-enrolment and maladministration

The Pension Ombudsman (the **Ombudsman**) has upheld Mrs R’s complaint that her employer’s failure to automatically enrol her into a qualifying scheme amounted to maladministration.

## Facts

Mrs R was an eligible jobholder employed by her employer (the **Company**) in February 2015. She received a letter in August 2015 stating that she had been automatically enrolled in the National Employment Savings Trust (**NEST**). Employer contributions were deducted from her payslip each month she worked with the Company.

In April 2018, having left the Company in 2016, Mrs R received a refund from the Company purportedly as a refund for her employee pension contributions. Upon investigation, Mrs R discovered that she had never been enrolled into NEST despite deductions being made from her salary.

After further investigation, Mrs R discovered that her employer and employee contributions should have been significantly more than the refund offered by the Company. Mrs R received no response from the Company when she complained to them.

After escalating her complaint to the Ombudsman, the Company stated that they had set up an account with NEST, however the contributions had been refunded to them.

## Decision

The Ombudsman upheld Mrs R’s complaint.

The Ombudsman found that the Company was under a duty to automatically enrol Mrs R, which it had failed to do. The Company had failed to provide a satisfactory reason as to why it could not make the contributions and should not have returned them to Mrs R. This amounted to maladministration.

The Ombudsman further found that the Company’s failure to respond to Mrs R, and additional questions submitted by the Ombudsman, amounted to maladministration causing distress and inconvenience for Mrs R.

The Ombudsman ordered the Company pay all contributions in respect of Mrs R into an account with NEST, along with additional funds to compensate Mrs R for the investment loss suffered as a result of the non-payment. The Company was also ordered to pay £2,000 for distress and inconvenience its maladministration caused Mrs R.

## Impact

This serves as a timely reminder of how difficult, costly and lengthy correcting auto-enrolment errors can be. Employers and trustees should ensure they have adequate procedures in place to ensure errors of this nature do not arise. However, where any errors do arise it is imperative those responsible take swift and decisive action to resolve the position. This will avoid the likelihood of formal claims and, ultimately, complaints to the Ombudsman.

It is also worth noting in this case that the award from distress and inconvenience was significantly higher than the contributions, reminding those involved in running schemes of the potentially significant consequences of even seemingly minor errors.

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**‘Mrs R discovered that her employer and employee contributions should have been significantly more than the refund offered by the Company.’**  
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# Mr S (PO-26563) and Mr N (PO-25138): unpaid contributions and exceptional distress

The Ombudsman has given determinations in two similar cases, ruling that unpaid contributions caused both members exceptional distress and inconvenience.

## Facts

Both Mr S and Mr N were employed by the same company (the **Company**) and enrolled in the Company's pension plan (the **Plan**).

Financial difficulties and administrative issues with payment resulted in the Company making irregular contributions to the Plan for both Mr S and Mr N. Both were assured that any arrears would be satisfied by October 2015 and that they would not suffer any financial disadvantage as a result of the delay.

In March 2018, the Company issued Mr N a letter, stating that owing to financial difficulties his employer contributions would be reduced from the end of June, however all contributions before this date would be brought up to date.

Both Mr S and Mr N gave notice to the Plan's administrators that they wished to retire in 2018, however inaccuracies with their contributions meant that this would not be possible.

After complaints to the Ombudsman, the Company replied to Mr N saying that they have provided statutory contributions, however his contract provided a right to higher contributions.

## Decision

The Ombudsman upheld both complaints.

The Ombudsman found that contributions had either been significantly delayed or missed entirely, meaning the Plan's records were completely inaccurate for both members.

The Ombudsman also found that the Company had impeded any early reconciliation or resolution which would have rectified the situation, resulting in an exceptional level of distress for both members. The Company's actions had also meant that neither member could properly undertake their retirement plans.

The Ombudsman ordered the Company to reconcile the data regarding outstanding contributions and pay the outstanding amount into the Plan. The Ombudsman also ordered the Company to pay extra contributions to Mr S to allow him to receive what he would have got had he retired when he wanted.

In addition the Ombudsman made an award of £3,000 each for the distress and inconvenience as a result of the missed contributions to the Plan. The Ombudsman noted that the Company's failure to engage at an earlier opportunity added to the distress the member's suffered.

## Impact

Trustees and employers need to ensure that they swiftly resolve any issues with outstanding contributions in a timely manner, engaging with the Ombudsman at an early stage. The Ombudsman has emphasised in its new Corporate Plan the importance of early engagement with complaints, to ensure as many cases as possible can be resolved without the need for a formal determination.

It is interesting to note a trend of increasing values of recent distress and inconvenience awards over the past year or so, which may act as more of a deterrent to employers who do not engage constructively with the Ombudsman throughout the process.

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**'The Ombudsman found that contributions had either been significantly delayed or missed entirely...'**  
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## Mr S (PO-15170) - negligent misstatement and tax liability

The Ombudsman has recently ordered an employer with responsibility for administering a pension scheme to refund a member for a tax liability they incurred as a result of a negligent misstatement in relation to the taking early retirement.

### Facts

Mr S was a firefighter and member of the Firefighters Pension Scheme (the **Scheme**). His employer (the **Employer**) had responsibility for administering the Scheme. As part of a transitional arrangement, Mr S was able to retire before age 55 provided that he met certain conditions.

One of these conditions was that he had to cease being a regular firefighter on retirement. The Employer was informed of this fact by HMRC and that any payment to a member who did not comply with these conditions would incur a tax liability.

Mr S held two firefighting roles in 2013, when he received a pension estimate from the Employer. The Employer informed Mr S of the risk of tax liability by taking a lump sum, however did not mention the communication it had received from HMRC.

Later in the year Mr S retired from one of his roles but not both, taking a lump sum when he did. HMRC then asked the Employer to disclose any payments incurring tax liability, at which point the Employer realised Mr S did not meet the conditions to retire early and may be liable to pay tax on the payment received.

After receiving advice confirming this position, the Employer informed Mr S of his tax liability which he duly paid, with the Employer paying an additional tax liability.

Mr S then complained to the Ombudsman seeking to recover his payment from the Employer.

### Decision

The Ombudsman upheld the complaint against the Employer.

The Ombudsman found the Employer was under a general obligation to be aware of the relevant legislation relating to the Scheme as it was responsible for administering the Scheme. The Employer ought to have known the tax implications for Mr S taking his benefits at the time and manner in which he did so.

The Employer argued that Mr S should have been aware of the potential tax liability, however the Ombudsman dismissed this argument. The Ombudsman held that as Mr S was still employed when he received his pension estimate, therefore reference him being able to take a tax free lump sum was materially wrong.

As a result the Employer had committed a negligent misstatement and should be responsible for any financial loss Mr S suffered as a result. The Ombudsman held that the Employer should refund the tax liability Mr S paid and to pay £2,000 for the distress caused.

### Impact

Scheme administrators and trustees must ensure that any statements regarding benefits are accurate, taking advice as necessary. If they are not, they run the very real risk of being held to have negligently misstated the position to a member which, as was shown in this case, can have material financial consequences. There is of course a fine line between giving advice to members on their options and ensuring they have all information available to make their decision. However, where an employer or scheme administrator knows – or should know – a course of action could have particular detriment to a member then the relevant party should ensure this is brought to the member's attention. Other determinations (such as Mr H (PO-15168) and Mr N (PO-15171)) are consistent with this position.

Scheme administrators must ensure that they are up to date regarding relevant legislation, incurring potentially significant liability for failing to do so. Those involved in the management of schemes should ensure their training needs in this regard are met on a regular basis.

## Mr S (PO-21047): AVCs and incorrect information

The Ombudsman has recently ruled that incorrect information provided to a member regarding the possibility of purchasing additional pension using additional voluntary contributions (**AVCs**) was maladministration.

### Facts

Mr S was a member of the Northamptonshire Pension Fund, a section of the Local Government Pension Scheme (**LGPS**) administered by Northamptonshire County Council (the **Council**). Mr S contacted the Council in July 2002, enquiring about the possibility of transferring in his free-standing contributions (the **Contributions**) into the LGPS. Mr S claimed the Council stated he could use the Contributions, transferred into LGPS, as AVCs to purchase additional pension under the rules of the LGPS.

Following his redundancy, also in July 2002, Mr S received a transfer quotation and transferred the Contributions into LGPS. After he had left employment Mr S again contacted the Council regarding his pension, who again stated that it would be possible to buy additional pension using the Contributions.

After a number of years Mr S contacted the Council again regarding his pension. He was informed that due to changes to LGPS Regulations in 1997, he was unable to convert his AVCs into additional pension in LGPS.

Mr S complained under the internal dispute resolution procedure, with the Council partially upholding his complaint, acknowledging that it had provided incorrect information and offering compensation of £100. Mr S then complained to the Ombudsman.

### Decision

The Ombudsman upheld Mr S's complaint.

The Ombudsman indicated that Mr S could not argue he had suffered financial loss as a result of any information provided post-transfer, therefore what was key was the information he received before the transfer was made.

The Ombudsman held that Mr S could have reasonably relied on information provided when he first contacted the Council and it was likely that this was incorrect. Therefore the provision of incorrect information amounted to maladministration. It was also held that the information was repeated on a number of occasions over the relevant period, which made the maladministration worse.

The Ombudsman held that Mr S satisfied the conditions required for reliance which resulted in financial loss, as he could have adopted an alternative approach had he received the correct information, which would have resulted in better financial performance for the Contributions.

The Ombudsman ordered the Council to compensate Mr S for the loss of investment opportunity that he had suffered as a result of the misinformation provided to Mr S and an additional £1,000 for serious distress and inconvenience.

### Impact

This is another prime example of the importance of providing accurate information to members in relation to their pension options. It also highlights the need for employers, trustees and administrators to ensure that they record and retain any information which is given to members.

The provision of repeatedly incorrect information is likely to increase any award for distress and inconvenience. Parties making communications to members should ensure that information is reviewed before it is sent to members for accuracy to ensure errors are not made and repeated.

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**'The provision of incorrect information amounted to maladministration.'**  
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## News update - Pension Ombudsman publishes Corporate Plan for 2020-2023

The Pension Ombudsman has recently released its Corporate Plan for 2020-2023, including its review of the last year and forecast for areas of significant numbers of complaints in 2020/21.

The figures show that there has been a significant increase in communications with the Ombudsman over the past year, a trend which the Ombudsman expects to continue, suggesting a growing awareness from members of the role which the Ombudsman plays. The majority of complaints were dealt with before the need for a full determination, showing the importance for employers and trustees of engaging early with the Ombudsman to resolve matters swiftly.

The Ombudsman has highlighted four key areas where it predicts there will be a significant growth in communication over the next 12 months. The main area the Ombudsman envisages an increase in complaints is in relation to scams, especially following COVID-19. This follows previous statements from the Regulator regarding scams and reminds trustees of the importance of undertaking robust due diligence before accepting transfer requests.

Along with concerns about the provision of information and ill-health benefits, the Ombudsman also predicts a significant number of complaints relating to the Job Retention Scheme, especially

as the rules regarding pension contributions become increasingly complex in August and beyond.

The increasing number of Ombudsman complaints and predicted areas for complaints demonstrates the importance of good record-keeping for trustees to ensure that should any decision be challenged, they will be able to evidence and justify the action taken.

## 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.

**Pensions, Chambers**



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