

Pensions Ombudsman Roundup – Spring 2017



2017 has been a busy year for the Pensions Ombudsman, with over 180 determinations made at the time of writing for the year to date, compared to 246 for the whole of 2016. This article looks at some of the common themes that have emerged from the decisions and what these might mean for pension trustees, administrators and advisers.

Ill-Health Retirement – *Ms R v NHS Pension Scheme*; *Mr R v Local Government Pension Scheme*

One of the most common complaints to the Ombudsman is how trustees have treated medical evidence when a member has applied for ill-health retirement.

In *Ms R v NHS Pension Scheme*, the member complained about the scheme's decision to not award "Tier 2" ill-health retirement. Ms R had been employed as a healthcare assistant until injuring herself in a fall. The rules provided "Tier 1" retirement if the member was unable to fulfil their role due to ill-health, and more generous "Tier 2" retirement if that ill-health meant the member was unable to carry out any other regular employment.

Ms R was dismissed for ill-health and applied for ill-health retirement. This was refused initially but awarded at "Tier 1" following an appeal to the Scheme's dispute resolution procedure. Ms R then appealed that decision, arguing medical evidence she obtained subsequently showed other conditions meeting the "Tier 2" test. Her appeal was refused and she then complained to the Ombudsman.

The Ombudsman did not uphold the main aspect of Ms R's case, on the basis the medical evidence at her stage two appeal was not available when the original decision was made. As such, the appeal-hearer was entitled to view this as irrelevant to the original decision when it was taken.

In *Mr R v Local Government Pension Scheme*, the member complained about the scheme's decision to not award ill-health retirement. Mr R was employed by a local council until 2012, but became absent from work

following an accident. This absence continued until he was made redundant in December 2013. The regulations provided ill-health retirement if, among other things, the member's condition made them permanently incapable of carrying out their job.

Mr R's initial application for ill-health retirement was refused on the basis of a medical report, which stated that while he was currently incapable there were further treatment options available. Mr R appealed via the scheme's dispute resolution procedure but, due to delays by the Scheme, a final stage appeal decision was not issued until June 2015. This refused ill-health retirement and Mr R complained to the Ombudsman.

The Ombudsman upheld Mr R's complaint in part, agreeing the delay in his appeal was unacceptable. It also agreed the Council had been wrong to refuse ill-health retirement initially. The medical report referred to further treatment options but did not explain what effect these would be likely to have on Mr R, and the trustees failed to take steps to establish this. As such, the medical evidence was incomplete.

However, the Ombudsman upheld the appeal decision to not award ill-health retirement. While the initial decision had not been justified, the medical evidence obtained at the appeal did examine the likely impact of treatment options, and so cured the original error. Evidence submitted by Mr R about his subsequent decline in health was not relevant to the decision taken in December 2013.

These cases underline the importance of trustees getting it right when it comes to considering ill-health retirement – that is, clearly understanding what 'test' is set out in

the rules, and then obtaining the evidence necessary for the trustees to assess if that test has been met.

Exercise of Trustee Discretion – Mrs N v BAE Pension Scheme; Mr A v Local Government Pension Scheme

A common concern is whether the Ombudsman might interfere in decisions taken by Trustees about a particular member when exercising their discretion. The circumstances where he may do so are set out in the case of *Edge v Pensions Ombudsman*:

- where the trustees have asked the wrong question;
- where the trustees have misunderstood the law or rules; or
- the decision was one no reasonable trustee could make.

These Ombudsman decisions serve as a useful reminder of the extent of this power.

In *Mrs N v BAE Pension Scheme*, the estranged wife of a deceased member complained about the trustees' decision to divide a spouse's pension between her and a woman the member had been in a relationship with when he died. The relevant rules permitted the trustees to reduce a spouse's pension where a marriage had broken down, and to apportion it to another person living with the member as husband and wife.

The Ombudsman found the trustees' decision was justified and did not uphold the complaint. He found the trustees had approached the decision correctly by gathering relevant evidence and coming to a reasonable conclusion on the strength of this. As such there was no basis for him to interfere in their discretion.

In *Mr A v Local Government Pension Scheme*, the member challenged Enfield Council's decision to deduct sums from his local government pension to meet the cost of a fraud he committed. Mr A had illegally transferred money to his personal account when Head of Finance for the Council. This only came to light after he had been made redundant as part of a restructuring exercise. The relevant regulations permitted the trustees to retain sums from a pension where there was a debt to the Council (i.e. the money taken) and the member had left employment "as a consequence" of criminal, negligent or fraudulent acts.

The Ombudsman found the trustees' decision was not justified, and directed it to reconsider its approach or else stop the deduction. He found the requirement the member had left employment "as a consequence of" a fraudulent act was unambiguous, and because the member had left employment due to redundancy this part of the test was not met. Therefore the trustee had misunderstood the rules and he was obliged to overturn their decision.

These cases serve as a useful reminder of the circumstances in which the Ombudsman will interfere in discretionary trustee decisions. It is important that

when taking these decisions, the trustees have a clear understanding of the relevant rules and the questions they are obliged to ask.

GMP Equalisation – Gordon Kenworth v Campden RA Pension Scheme

One of the longest-running issues in the pensions industry is the equalisation of guaranteed minimum pensions (GMPs). GMPs were built up by members of schemes contracting-out of the additional state pension, until May 1997.

The accrual rate for GMPs was fixed by law and varied based on the member's sex (to reflect the difference in state pension age). Since at least 2010 it has been known GMPs are "pay" and so in principle must be equal between the sexes. The difficulty has been exactly how equalise – the Government has published various consultations ([most recently in December 2016](#)) but no settled position has been reached.

In *Gordon Kenworth v Campden RA Pension Scheme*, the member complained to the Ombudsman that the scheme had failed to calculate his pension correctly, as they had not equalised his GMP. Unlike many other aspects of unequal pay, men are more likely to suffer from unequalised GMP as their accrual rate was lower. The trustee responded that it had not equalised GMP as there was continued uncertainty about the correct method to use, and it was monitoring developments before taking any action.

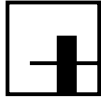
The Ombudsman agreed with the trustees that it was appropriate to defer equalisation of GMPs until the issue had been settled, noting that the Government had undertaken various consultations and that further developments in this area are expected. He also noted that the decision of a previous Ombudsman that there is an overriding requirement to equalise GMPs has since been overruled, and so is not binding.

This decision will reassure many trustees that the Ombudsman considers it acceptable to delay equalisation of GMPs until it is clear what method should be used, at least in an ongoing scheme.

High Court – Limit on Ombudsman Awards for Non-Financial loss – Bagniet v Capita Employee Benefits Ltd (t/a Teachers' Pensions)

Under the Pension Schemes Act 1993, if the Pensions Ombudsman makes a finding of maladministration he can order a scheme to pay a member reasonable compensation for distress and inconvenience. This is separate to any award for financial loss.

While the Act does not specify a limit on these payments, in the 1999 High Court case *Swansea City Council v Johnson* it was held that unless there are exceptional circumstances, any award should not exceed £1,000. This limit has since been followed by the Ombudsman, whose June 2015 guidance stated the 'usual' award for non-financial loss would be £500 - £1,000.



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The significance of *Baugniet v Capita Employee Benefits Ltd* lies in the comments made by the judge, HHJ Simon Barker QC, regarding these limits. He noted that it is almost 20 years since Swansea City Council was decided, and as such a figure which was an appropriate maximum then may no longer be so, due to the effect of inflation. He directed the Ombudsman to reconsider the maximum

'normal' award for non-financial loss, suggesting £1,600 as an appropriate inflation adjusted figure.

At the time of writing the Ombudsman has yet to issue any response, but we will continue to monitor this closely as it is likely that the maximum limit will be raised.



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