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Pensions

Pensions Ombudsman's determinations 2015 round-up and appeals awaited

Briefing

November 2015

Two of the areas of decision-making which are notoriously difficult for trustees and administrators are pension transfers out of a scheme, and the award of death in service benefits. This briefing looks at some of the Pensions Ombudsman's recent determinations on both these topics and offers some commentary which trustees may find useful.

Introduction

This month we have drawn together some of the Pensions Ombudsman's (PO's) 2015 determinations in two areas which are notoriously problematic for trustees and administrators:

- transfers of benefits where pensions liberation is a potential issue
- the award of lump sum death benefits.

The salient points are highlighted below, and all decisions are available for further reading, if required, on the PO's website.

We also assess briefly two High Court decisions awaiting review in the Court of Appeal.

Pensions liberation

Important to all schemes is awareness of pensions liberation scams, which constitute a considerable proportion of the PO's caseload. These cases illustrate the difficulties for administrators in dealing with possible pensions liberation. Where a member has a statutory transfer right that he is determined to exercise even in the face of severe warnings, administrators cannot resist payment, so long as they have made such enquiries as they think necessary to establish the existence of the right.

Jerrard (PO-3809) – member had no right to take transfer on statutory basis or under scheme rules

In this case, the PO found that there was no statutory right to transfer. The main reason was that the intended receiving scheme was not within the definition of ‘occupational pension scheme’ under the Pension Schemes Act 1993 since it was not ‘for the purpose of providing benefits to, or in respect of, people with service in employments of a description’. Secondly, there was no right to the transfer under the scheme rules as a provision making a transfer mandatory on a written request was overridden by another rule barring unauthorised payments.

Stobie (PO-3105) – administrator did not consider discretion to transfer where no statutory right to CETV

In this case, although the intended scheme was an occupational scheme within the statutory definition, Mr Stobie was not an ‘earner’ in relation to it, so the PO found there was no statutory right to transfer. However, under the rules of the transferring scheme, a Standard Life SIPP, Standard Life had discretion to pay a transfer value even where there was no statutory right. The PO partially upheld the member’s complaint that Standard Life refused to make the transfer. The PO noted that Standard Life had not followed the steps recommended in TPR’s guidance on pension liberation, and that Standard Life had not exercised its discretion under the SIPP’s rules properly. He directed Standard Life to consider payment when there was no statutory right to transfer.

However, the PO sounded a ‘serious note of caution’ and suggested that Mr Stobie should take professional advice from a properly authorised person before taking a step that was at the least high risk, and at worst potentially financially disadvantageous.

Harrison (PO-3184) – provider directed to make transfer where member had contractual right

A deferred member of a personal pension scheme must be allowed to exercise his contractual right under the scheme rules to transfer his pension fund to an occupational pension scheme in circumstances where the transfer was not an unauthorised payment. This contractual right was separate from the statutory transfer right, which was not established as the transfer would not have secured ‘transfer credits’, as defined in the relevant legislation.

Winning (PO-5799 and 5930) – no maladministration by pension providers in allowing transfers

It was not maladministration for two personal pension providers to transfer a member’s scheme benefits to an HMRC-registered occupational scheme where the member had a statutory right to take a cash equivalent transfer value (CETV).

The PO dismissed a complaint by the member who was subsequently unable to contact the receiving Capita Oak Pension Scheme about the transferred funds, totalling £52,401.08. The PO held that the member had a statutory right to a CETV, which could not be supplanted by regulatory or other guidance. The transferring providers’ duty of care to the member was overridden by this statutory right. In any event, the transfers took place before the Pensions

Regulator issued guidance on pension liberation and the Ombudsman could not apply current good industry practice to past situations. Even if the transferring providers had carried out further due diligence or expressed concern to the member, he might have insisted on the transfers in any event.

Hughes (PO-7126) – administrator properly exercised discretion in refusing transfer

The administrator of a personal pension scheme properly exercised its discretion under the scheme rules in refusing to transfer a member's benefits to another scheme because it had legitimate concerns over the status of the receiving scheme, the proposed investment and the extent of the advice received by the member. The administrator made the decision having established that the member did not have a statutory right to a CETV, which would have overridden its discretion under the scheme rules, as well as any regulatory or other guidance.

The PO dismissed a complaint by the member against the administrator, who refused to make a transfer to an arrangement described as a small self-administered scheme. The member did not have a statutory right to take a CETV as the transfer would not have secured 'transfer credits' since the member was not an 'earner', in relation to the receiving scheme. Although the Pensions Regulator's guidance was not strictly relevant to the administrator as an FCA-regulated provider, it was understandable that the administrator had regard to it, in addition to the FCA handbook and its duty of care, in exercising its discretion under the scheme rules.

Death benefits

PO determinations relating to the payment of lump sum death benefits are also often a source of complaint. The cases highlight that schemes should have in place proper procedures for flagging outstanding death benefits that remain unpaid towards the end of the two-year time period, so that payment can be made before any tax charges become due. Difficulties can also arise when trustees and administrators exercise their discretion on the distribution of death benefits. The proper approach for decision-makers is to undertake a thorough fact-finding exercise after the member's death to ensure they are fully aware of the relevant factors to be taken into consideration, and only then to decide how to exercise their discretion.

Bashford (PO–2704) – scheme administrator should have warned beneficiary of two-year time limit for death benefits

Lump sum death benefits paid from a registered pension scheme are authorised payments for tax purposes if certain conditions are met. Where a member of a DC pension arrangement dies before age 75, any uncrystallised funds lump sum death benefit must be paid to the beneficiary within two years of the earlier of the date the scheme administrator knew of the death, or could first be reasonably expected to have known of it.

Here, the PO held that the scheme administrator should have made a member's widow aware of the statutory two-year time limit for payment of death benefits to avoid the payment being an unauthorised payment for tax purposes. He also held that if the administrator had done so, the widow would have provided the necessary documents to allow it to make the payment within the time limit.

The PO partially upheld a complaint by the widow of the holder of a retirement annuity contract, who provided the administrator with a grant of probate four years after she informed it of the policyholder's death. The PO directed the administrator to reimburse the widow for the unauthorised payment charge and unauthorised payment surcharge (totalling £36,866) that resulted from the ensuing unauthorised payment, with interest. But he also held that the late payment of these charges after the due date was caused by an accountant instructed by the complainant and was entirely outside the administrator's control. It therefore had no responsibility for the resulting late payment surcharges and interest on late payment (totalling £5,865).

The administrator's failings caused the widow distress and inconvenience for which it was directed to pay £200 in compensation. However, the PO did not make any award for the legal fees claimed, because the complaint was 'relatively straightforward'.

Moreland (PO-2087) – provider's decision-making process 'flawed and unreliable'

The PO held that a pension provider's decision-making process in relation to the discretionary payment of a lump-sum death benefit under a personal pension was 'so flawed as to be regarded as unreliable throughout'.

The complaint of the deceased's partner was partially upheld where the member had left her all his scheme benefits in a will made in 2007. Although the scheme administrator initially told the complainant she would receive the entire death benefit of over £225,000, it later decided to pay her only half and to give the remainder to the member's previous partner, whom the member had made his nominated beneficiary for death benefits under the scheme in 1999. The scheme administrator had no formal review process in place at the relevant times and, in particular, '[u]nrecorded decisions were made based on unidentified evidence by decision makers who may or may not have had appropriate authority'. The administrator also wrongly took the complainant's claim of detrimental reliance on its initial decision into account as a factor when later retaking its decision.

The PO directed the scheme administrator to retake its decision to the extent of deciding whether it should award the complainant more than 50 per cent of the death benefit. If it did not increase the award, the administrator must pay her £1,500 for distress and disappointment caused by it changing its original decision and must, in any event, separately pay her £500 for the inconvenience of a delay in paying the 50 per cent award and the need to pursue the whole matter. Payment of simple interest on any late or increased award was also ordered.

Barnicoat (PO-5763) – delay waiting for beneficiaries' information was reasonable

It was reasonable for the trustees of a self-invested personal pension to delay making a decision on the distribution of death benefits in order to give the deceased member's adult children time to provide further information, given the circumstances of the case. These included allegations by the children of financial irregularities, including possible fraud, against the member's current partner, Mrs Barnicoat, whom he had nominated to receive the death benefits six months before he died.

The PO dismissed a complaint by Mrs Barnicoat, who was eventually awarded the member's death benefits nearly a year after his death. She submitted that the delay while the trustees looked into the children's allegations caused her financial loss and considerable distress, a situation she said was exacerbated by the trustees' decision to keep the details of the children's claims confidential.

The PO found that although the trustees could have been more proactive in checking the truth of the allegations where possible and keeping the member updated without breaching confidentiality, it had acted fairly and reasonably in the exercise of its discretion. In doing so, it had balanced the need to obtain accurate information against the 'legitimate desire to protect people's confidentiality'.

The decision to dismiss the complaint is sensible in these circumstances. The full details of the allegations made by the deceased member's children are not available and so it is difficult to evaluate the pension provider's conduct in delaying the payment of death benefits pending its investigation.

This determination is a reminder that when a provider or trustee is required to exercise discretion over death benefits, this is often not straightforward. On the one hand, it is effectively required to make payment within two years so as to avoid tax charges. On the other hand, interested parties may reasonably expect the trustee to gain a thorough understanding of the underlying background, which may take some time to establish.

However, in this case the benefit payment was made well before the end of the two-year window, so the complainant's submission that it should have been made earlier was unlikely to find favour with the PO. It is therefore also unsurprising that the PO refused to reimburse her expenditure in pursuit of her complaint.

...and news awaited from the Court of Appeal in 2016

Looking ahead to the New Year, there are two cases due to be heard early in 2016:

- In *Horton v Henry* [2014] the High Court declined to follow *Raithatha*, a 2012 decision which held that a bankrupt's right to receive income from his personal pension could be the subject of an income payments order (IPO) under section 310 of the Insolvency Act 1986, even though the bankrupt had not elected to draw his pension before or during his bankruptcy. However, in *Horton v Henry* the Court departed from this ruling and held that a bankrupt's unexercised rights to draw his pension did not represent income to which he was entitled within the insolvency legislation, and so did not form part of the bankruptcy estate.

  As a result of the Budget 2014 and the pension flexibilities introduced from 6 April 2015, an individual with defined contribution pension savings will be able to access his fund in full once he reaches age 55, provided this is permitted under the scheme rules. The effect of the changes will mean that, for affected schemes, there will no longer be a distinction between the member's pension and lump sums, making even a relatively small pension fund of a bankrupt an attractive target for an IPO.

  The position for occupational pension schemes is further complicated, as the payment of lump sums on commencement may be subject not only to elections and decisions by the bankrupt but also to the discretion of the scheme's trustees.

The appeal in *Horton v Henry* is to be heard by the Court of Appeal in January 2016. Clarification on the issue of whether or not undrawn pensions are part of a bankrupt's estate will be welcome, particularly in the light of the Budget flexibilities available from April 2015, under which members will be able to access their entire fund as a lump sum.

- The decisions in the *IBM* litigation are of interest to all DB schemes, both in cases where benefit changes have been carried out in the past or where they are contemplated for the future. The decision in the remedies hearing was published on 20 February 2015, with Warren J deciding in favour of the scheme members who have been found to be entitled to a variety of substantial remedies, including damages. It will be interesting to learn the Court of Appeal's view on the effect of members' reasonable expectations on employers' intent to implement benefit changes.

  The case also raises concerns for employers relating to the way such benefit changes are conducted, as the *IBM* case was the first in which an employer was held to be in breach of both its contractual and *Imperial* duties, although irrationality or perversity is required for such a breach.

  The appeals are to be heard by the Court of Appeal by March 31, 2016, with an appeal and counter-appeal likely, on both the liability and remedies decisions.

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