

ALLEN & OVERY

Pensions in Dispute

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Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

Pension liberation: High court rules on employment link test

A recent High Court ruling changes industry practice on determining whether a member is validly exercising a statutory right to transfer out of a pension scheme:

[*Hughes v Royal London*](#).

Background

If a member requests a transfer of their benefits to an occupational pension scheme, and there is no evidence that the member is employed by, and receiving remuneration from, a participating employer in that scheme (i.e. if there is no employment link), this is a potential risk indicator for pension liberation. However, if a member has a statutory right to transfer, trustees must comply with a valid transfer request even if they suspect pension liberation.

The Pensions Ombudsman has previously interpreted the relevant legislation as meaning that, if there is no employment link with the proposed receiving scheme, then there is no valid exercise of a statutory transfer right and so trustees could reject the transfer request. The High Court has now ruled that this approach (which involved reading words into the legislation) is incorrect as the relevant legislation does not require there to be an employment link with the receiving scheme.

What does this ruling mean for trustees?

Following the decision, the lack of an employment link is still a risk indicator for pension liberation (so the member should be given all relevant information, for example, the Regulator's "Scorpion" materials, to alert them to that risk). However, it is no longer a means of determining whether trustees have to comply with a transfer request (although trustees may in the past have

used it in this way, based on guidance issued at the relevant time). Trustees should note this development and adjust internal processes accordingly. It does not, however, mean that those requests should now be granted automatically, or that pension liberation is not involved. Trustees/administrators should continue to exercise due diligence and operate in line with the industry [Code on Combating Pension Scams](#) and the Regulator's guidance.

In light of the decision in *Hughes v Royal London*, the Regulator's checklist for use on scheme transfers has been updated so that it no longer includes a question about whether the member has an employment relationship with the employer sponsoring the proposed receiving scheme.

Previous refusals of transfer requests

Previous trustee decisions to reject a request for a statutory transfer within the six-month deadline specifically because of the lack of an employment link could in some cases now be challenged by members. If a member has a valid statutory right which s/he is determined to enforce even in the face of severe risk warnings, then as long as trustees have confirmed that all aspects relating to the transfer are valid, they have no legal right to block the transfer beyond the six-month deadline.

Good communication is vitally important

Several recent cases have demonstrated the importance of ensuring scheme communications are as carefully drafted and accurate as possible. Getting it wrong can be costly.

- In the *Mather* determination, the Deputy Pensions Ombudsman held that the scheme must honour benefit statements which wrongly included a period of pensionable service for which the member had previously requested (and received) a total refund of contributions. This was the case even though the statements were expressly stated to be “for illustration only” and not guaranteed.

Crucially, however, the statements had also contained the claim that “every effort has been made to ensure the accuracy” of the statement. The DPO deemed that this statement about the accuracy of the figures meant that it had been reasonable for the member to rely on the figures quoted and that it had been wrong for the administrator to indicate that it made thorough checks on the accuracy of annual statements when this was not the case.

The outcome in *Mather* is surprising for two reasons: (a) it was found that Mrs Mather’s reliance on the statements was reasonable, despite the fact that she had received a refund of contributions for part of the period quoted; and (b) the statement about efforts to ensure accuracy appears to have overridden the qualification that the figures were not guaranteed and had the effect of allowing Mrs Mather to rely on the statement.

There is a tendency to assume that the standard qualification that the benefits in a statement are not guaranteed is adequate protection for the scheme. However, the *Mather* determination shows that it is nonetheless important that no grand claims are made about the accuracy of the figures being quoted because such assertions could allow the member to rely on a statement that they might not otherwise be entitled to rely on.

- In another Pensions Ombudsman case, *Vose*, a member whose employment transferred under TUPE was told by his new employer on several occasions that he would be credited with an additional 5 years’ service in the pension scheme. When he took early retirement he discovered he had been misinformed. There had been a policy of

awarding 5 additional years, but this had never been properly documented and did not apply to Mr Vose. Although the Pensions Ombudsman had found that Mr Vose had not suffered loss, he held that the confusion about whether the policy applied to Mr Vose was maladministration which had caused Mr Vose to suffer distress and inconvenience, for which he was awarded compensation.

Again, the issue stemmed from poor communication and a lack of clarity in the way policies had been recorded and implemented.

- The outcome of the ongoing Employment Appeals Tribunal case, *Ford Motor Company v Elliott*, is likely also to depend on exactly how Ford described lump sum payments it made to employees – i.e. whether they were stated to be made in order to avoid disruption to the business from industrial action, or whether they were being made as compensation for lower future pension increases. If the latter, then the fact that pensioners were not paid the same sum could amount to age discrimination. It will be an interesting case to follow.



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