

ALLEN & OVERY

Pensions in dispute

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 ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

Engaging with members: online systems and accurate communications

In a world where schemes are increasingly facilitating online member access, administrators need to ensure that members who engage with their investments in this way can get that access and that requests are handled promptly and accurately.

The recent case of **Underwood** for example, concerned a member of a personal pension plan, which had an online facility enabling him to monitor and actively manage his investments. Due to errors with the member's fund value, he was unable to actively manage his investments for 5 months. As a result, the claimant transferred all his funds out of the plan, after paying an exit penalty. The claimant sought compensation for investment loss over the period and for the exit penalty to be waived.

The Pension Ombudsman held that the harm to the claimant could not be accurately determined, as it was impossible to be sure of what switches he might have made or whether they would have been beneficial. However, he did lose the opportunity to mitigate his loss through switches and suffered uncertainty about the value of his plan as a result. In relation to the penalty charged on the final transfer, the claimant had stated he would not have left the plan had the administrators not made these errors. The Pension Ombudsman stated that if he had stayed, the administrators would have recovered an amount equivalent to the penalty over the following few years in the form of charges and therefore the claimant was no worse off by having to transfer away than he would have been if he had stayed. The Pensions Ombudsman held that the exit penalty was therefore not recoverable.

Direction: The complaint was partially upheld. Whilst the exit fee could not be reclaimed, the Pensions Ombudsman directed the administrators to pay the 'nominal and proportionate sum' of £625 for the claimant's loss of opportunity to manage his funds together with £800 for the 'significant' annoyance and distress caused by the administrator's failings.

Comment: This determination is useful in highlighting an example of the kind of administrative process that will have to be handled promptly and accurately in line with the new DC governance regulations (although contract-based arrangements will be regulated separately by the FCA).

Exit penalties will fall within the new cap on charges from April 2015 which will apply to default funds in schemes used to meet auto-enrolment duties. The new governance standards will also oblige trustees and providers of most DC arrangements to ensure that all charges and costs represent 'good value' for members, including exit penalties in non-default funds.

Our [DCHQ](#) website has more information on the charge cap and new governance standards.

DB to DC transfers: standards of professional advice

In a topical case concerning professional advisers giving advice to members on a defined benefit to defined contribution transfer, the Financial Ombudsman ordered a provider to compensate two customers who transferred out of defined benefit schemes following what it deemed to be ‘unsuitable advice’ 20 years previously.

With the **first customer**, the Financial Ombudsman said that the move from DB to a personal pension carried with it certain risks and it was the responsibility of the adviser to investigate her level of risk tolerance and recommend a suitable course of action. The Financial Ombudsman held that the advice to the customer to transfer her benefits was unsuitable, as it was inconsistent with the degree of risk which the customer was either able or prepared to accept.

The Financial Ombudsman held that the **second customer** should be treated as an ‘insistent customer’, i.e. someone who transfers despite being advised not to, after he refused to complete most of the fact-finding exercise. Instead, the adviser recorded that he recommended the transfer to increase the level of flexibility and the likely benefits from the customer’s pension fund and to allow the fund to be available for early retirement. This was held to constitute incorrect advice.

Direction: In both cases, the Financial Ombudsman said that any loss would have to be compensated for by the provider.

Comment: This shows the burden on financial advisers to ensure that the advice they provide on DB/DC transfers is correct. Alongside the new DC pensions flexibilities coming in from April 2015, there will be a requirement for members to seek advice on a DB to DC transfer worth more than GBP30,000. More member complaints against advisers for giving them the wrong advice which led them to transfer out of a DB scheme could increase. Pension providers have expressed alarm over the possibility of a flood of insistent transfers out of DB schemes in the wake of the new April 2015 reforms. Where employers and trustees facilitate or signpost advice processes, they will be concerned to ensure that the advice provided is fully compliant with FCA standards and regulatory requirements, and that they are indemnified against the risk of future complaints arising from that advice.



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