

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 Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenavery.com.

Compensation for distress and inconvenience

Trustees often ask us what compensation the Pensions Ombudsman might award to a member if his or her complaint is successful. In a case where there has been an error or possible maladministration, then apart from compensation for any financial loss, the Ombudsman may also award compensation for distress and inconvenience. Awards of this type do not normally exceed GBP1,000, although the Ombudsman sometimes directs higher aggregate compensation by making awards for more than one aspect of the member's non-financial loss.

Two recent decisions (**Venables** and **Parker**) concerned incorrect information relating to state pension age and bridging pension rules. In these cases the Ombudsman has, for the first time, set out guidelines on levels of compensation and the factors influencing the specific amount awarded:

'The process of deciding on a payment for distress can never involve a simple calculation as it would for a financial loss; by its nature, it is not an exact science. I will look to take into account the particular circumstances of the individual, but will also take a wider view and ask whether a reasonable person (with those characteristics) would have reacted in the same way. It is a matter of judgement. The individual circumstances of those making these complaints are not identical, but in each case the crux of the matter is that they were given an expectation for some time of a certain level of retirement income only to find that in fact they will be living on a lower income and will have to adjust their finances accordingly. There will be considerable distress for anyone who finds themselves in that situation.'

The amount of such awards may range from £150 to £750 (and very occasionally more). Awards within the range of £400 to £750 might be where there are emotional issues or cumulative effects rather than a simple issue of poor customer service.'

Direction: In each of these cases, GBP500 was awarded for distress and inconvenience.

Comment: *As always, the decisions do not bind the Ombudsman in relation to decisions on future complaints, but having this information can be useful for trustees: if you are considering making an offer to resolve a complaint as part of your internal dispute resolution process, then it's important to be able to pitch the offer at a level which the Ombudsman would regard as reasonable if the complaint goes further.*

Trustee powers and decision-making

The principles for exercising discretionary powers are well-established: trustees must ask the correct questions (as required by the scheme rule); gather all the information required to make the decision; take into account all relevant factors and disregard irrelevant factors; and reach a decision that is not perverse.

In a recent case, the Deputy Ombudsman found that irrelevant factors were taken into account in an employer's decision-making process. The scheme rules provided that where an early retirement pension was awarded, the employer could decide that it should be granted without reduction on compassionate grounds. The employer's published policy said that it would grant early payment of benefits only on 'exceptional compassionate grounds' – benefits would then be granted on an unreduced basis.

In contrast to its policy, the employer decided to allow the member's benefits to be paid early but on an actuarially reduced basis, to avoid the cost to it of granting unreduced benefits. Later, it said that its decision was supported by information obtained about the member's household income and savings.

The Deputy Ombudsman found that it was not clear that the employer had considered the member's application on compassionate grounds at all. If it had done so, it had set the bar too high as a result of its flawed policy which referred to 'exceptional compassionate grounds'. In making its decision, the employer took into account other, irrelevant, information such as financial factors, when it should have considered compassionate grounds alone – these need not necessarily relate to money.

Direction: The complaint was upheld and the decision remitted to the employer for reconsideration. GBP500 was awarded for distress and inconvenience. [Read more](#)

Comment: *In this case, the policy merged two discretions – first, whether to consent to early payment, and secondly, whether those benefits should be paid without reduction. It also failed to match the scheme rule which set out the precise boundaries of the discretion to be exercised. Even without the those flaws, where a decision-maker has a policy in place on how it will exercise its discretion, it must be prepared to make exceptions on the basis of individual cases, considering whether to follow the policy or whether there are grounds to depart from it.*

In another recent case, the Ombudsman struck down a trustee decision in 2012 to end a longstanding practice of making discretionary annual increases to pensions based on pre-April 1997 service. The scheme rule required the trustees to review pensions in payment on a regular basis and, if both they and the company agreed, to award increases 'of such amount as they decide, having regard to the sufficiency of the fund and after taking actuarial advice'. The trustees did not have power to decide never to undertake a future review, nor to fetter their discretion as to the outcome of future reviews. A decision not to award an increase in a particular year might be proper, but the trustees had no power to take that decision in perpetuity.

Direction: The decisions about increases for 2012 and 2013 were remitted to the trustees for reconsideration. GBP200 was awarded to the member for distress and inconvenience. [Read more](#)

Comment: *There were other flaws with the trustees' decision. First, the Ombudsman was not satisfied that they had distinguished their trustee duties from the sponsor's views. In addition, the decision was made in a telephone call and was not minuted or ratified at the next meeting, so there was no clear record of the decision-making process. The trustees had also failed to consider actuarial advice, as required by the rule.*



Jason Shaw, Senior Associate

Jason is a Senior Associate in the Litigation Group. He specialises in all aspects of pensions disputes, including advising clients in relation to internal disputes and disputes before the Pensions Ombudsman, Financial Ombudsman Service, the Pensions Regulator, PPF Ombudsman and the Courts. Jason is ranked in Chambers & Partners Directory in the field of Pensions Litigation.

April 2014

Allen & Overy LLP

Your contact office for this proposal is London: One Bishops Square, London E1 6AD, United Kingdom | Tel +44 (0)20 3088 0000 | Fax +44 (0)20 3088 0088 | www.allenovery.com.

In this document 'Allen & Overy' means 'Allen & Overy LLP and/or its affiliated undertakings'. Any reference to a partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. This document is for general guidance only and does not constitute definitive advice.

Allen & Overy LLP or an affiliated undertaking has an office in each of: Abu Dhabi, Amsterdam, Antwerp, Athens (representative office), Bangkok, Beijing, Belfast, Bratislava, Brussels, Bucharest (associated office), Budapest, Casablanca, Doha, Dubai, Düsseldorf, Frankfurt, Hamburg, Hanoi, Ho Chi Minh City, Hong Kong, Istanbul, Jakarta (associated office), London, Luxembourg, Madrid, Mannheim, Milan, Moscow, Munich, New York, Paris, Perth, Prague, Riyadh (associated office), Rome, São Paulo, Shanghai, Singapore, Sydney, Tokyo, Warsaw and Washington, D.C. | CO:21158971.3