

# 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@allenovery.com](mailto:pensions.team@allenovery.com).

### **Trustee and employer duties when dealing with seriously ill members**

Two recent Pensions Ombudsman determinations highlight issues relating to seriously ill members, including:

- the need to act as swiftly as possible, rather than simply operating standard processes; and
- the issue of whether or not there is a proactive duty to inform members about the possibility of taking benefits as a lump sum if they have less than 12 months to live (serious ill-health commutation).

In the first of these decisions ([Dando](#)), a scheme paid a lump sum death benefit in respect of a deceased deferred member. The amount payable was lower than the sum to which she would have been entitled as a serious ill-health lump sum before her death, and the member's daughter complained that the scheme had failed to act sufficiently quickly to make payment at the higher level.

The scheme did not respond promptly to initial enquiries made on behalf of the member on 9 February; the first recorded discussion took place on 21 February and the member died on 2 March.

**Determination:** The Ombudsman ruled that, although the timescale from initial notification to death was very short, the member's entitlement to a serious ill-health lump sum would have been established prior to her death if the scheme had acted with appropriate speed (even by its normal service standards). Payment would then have been made at the higher level to her estate following her death. In fact, on an appropriately expedited timetable, payment should actually have been made before her death. This failure was maladministration by the scheme, which was ordered to make up the difference between the amount already paid and the commutation amount, plus interest. Compensation of GBP350 for distress and inconvenience had already been paid.

In the second decision ([Webb](#)), the surviving spouse of a deceased member argued that the member's employer had failed to provide information on ill-health early retirement/serious ill-health commutation options. The scheme paid a death-in-service lump sum of GBP85,857 in respect of the member; a serious ill-health commutation lump sum would have exceeded GBP154,000, with the same spouse's pension in either case.

**Determination:** Did the employer have a duty to provide information about the member's options under the scheme? The Ombudsman ruled not – although caselaw has established that an implied duty can apply to employers in some circumstances, these are narrowly defined. In particular, a duty will only arise where the employee cannot reasonably be expected to know the information unless it is drawn to his attention. In this case, because the relevant information was readily available to members on the scheme website and referred to in the members' booklet, including the steps necessary to claim the benefit, the employer had no additional duty to draw attention to it or obtain information on the member's behalf.

**Comment:** *The Ombudsman expressly distinguished a recent decision of the Deputy Ombudsman where it was held that it was not sufficient for an employer simply to make information available without providing guidance as to where to find it. In that case, the member had been directed to a resource which did not provide all the information required to make an informed decision. In this case, all the necessary information was readily available to members. However, it's worth noting that an implied duty to provide information has been held to apply in previous determinations where there were ongoing discussions between the employer and the member in relation to termination of employment due to incapacity. These situations will always be very fact-specific,*

*but trustees, administrators and HR teams should be aware of the need to identify cases of this type as soon as they arise and deal with them urgently.*

## **Trustees should provide reasons for delays in providing CETV quotations**

The Pensions Ombudsman has ruled that, where trustees fail to provide a cash equivalent transfer value (CETV) quotation within three months of the date of request, they should give the member requesting the quotation information about the reasons for the delay ([Brackley](#) determination).

The Transfer Values regulations require that the guarantee date in relation to a statement of entitlement must be within three months from the date of the member's application or, where the trustees are unable to meet this deadline for reasons beyond their control, within any longer period they reasonably need (not exceeding six months from the date of the application). There is no explicit duty to give the member reasons for any delay.

In this case, the administrators had missed the six-month deadline by four weeks, but the Ombudsman held that the delay was justified because they were waiting for the resolution of questions about the equalisation of benefits and the rate of indexation provided by the scheme, as well as for the outcome of a GMP reconciliation exercise. If the statement had been provided earlier, it might have contained an incorrect CETV figure.

The impact for the member was that his proposed transfer to a Guernsey-based arrangement could not be completed before changes to legislation in April 2012 caused the scheme to be delisted as a QROPS. His benefits would therefore be subject to income tax, and his transfer value had also fallen by over GBP30,000.

**Determination:** The member's complaint was not upheld; the trustees' failure to provide information about the reasons for the delay was maladministration, but had not caused the member any injustice in this case, as he would not have acted any differently had the maladministration not occurred.

**Comment:** *Trustees should note the Ombudsman's expectation that members will be kept informed of the reasons for any delay in providing a statement of entitlement, but can take comfort from the fact that the justifications for delay in this case were held to be valid. In situations like this, trustees should also consider the Pensions Regulator's Code of Practice on Reporting Breaches of the Law. Here, the administrators treated the breach as a 'green' breach – i.e. one that should be recorded but need not be reported.*



**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.

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