Determination.

Linklaters

Pensions Ombudsman Focus for the period
June 2011 to August 2011
Welcome to the 30th edition of the Pensions Ombudsman Focus for the period June 2011 to August 2011.

Our aim is to provide you with a quarterly review of important determinations of the Pensions Ombudsman and alert you to Ombudsman-related issues of practical relevance. If you wish to discuss these issues and how they might affect you, please contact Mark Blyth, Partner of our specialist Pensions Litigation Group, on (+44) 20 7456 4246.

If you would prefer to receive this booklet in electronic format in the future, please email: pensionsgroup@linklaters.com
The applicable regulations were those in force at the date a member applied for early retirement benefits; not the date on which his employment ceased.

Mr A S Runham and NHS Pensions

Mr Runham’s NHS employment terminated in 1997. He applied for early payment of his deferred benefits on the grounds of ill health in 2009. Mr Runham was a member of the “1995 section” of the NHS Pension Scheme and the NHS Pension Scheme Regulations 1995 (SI1995/300) (as amended) (the “1995 Regulations”) applied.

According to the relevant Regulation, a member was entitled to receive an early retirement pension and lump sum if “the Secretary of State is satisfied that the member is suffering from mental or physical infirmity that makes him permanently incapable of engaging in regular employment…” The phrase “of like duration” was inserted after “regular employment” with effect from April 2008. “Regular employment of like duration” was defined as whole-time or part-time employment, depending on which the member was engaged in before leaving, with regard being had to the number of hours, half-days and sessions the member worked.

On 2 September 2009, Atos Healthcare (“Atos”), the NHS Pension Scheme’s medical advisers, informed Mr Runham that his application was rejected as benefits could “only be paid where the medical evidence… shows that you are permanently incapable by reason of physical or mental incapacity of engaging in any regular employment, not just your former NHS occupation”.

Atos referred to a report from Mr Runham’s GP outlining several medical conditions which Mr Runham was suffering from, including lifelong asthma, long standing osteoarthritis and diabetes. However, Atos noted that these preceded termination of his most recent employment. Atos also said that it was unclear why Mr Runham’s GP thought that he was permanently incapable of regular employment and noted that Mr Runham had not seen a relevant consultant.

Mr Runham appealed and his case was reviewed by two further medical advisers, each of whom concluded that permanent incapacity for regular employment had not been established. Both considered that Mr Runham’s conditions could be improved sufficiently, through further treatment and adjustments to his working conditions, to enable him to return to regular employment. Mr Runham appealed to the Ombudsman.

Before the Ombudsman, NHS Pensions claimed, in reliance on the Rutherford case, that the applicable regulations were those in force on the date that Mr Runham’s employment terminated in 1997, rather than those in force on the date on which Mr Runham’s application was made in 2009.
The Ombudsman upheld the complaint. The Ombudsman distinguished *Rutherford* as it was central to the finding in that case that the member’s relevant entitlement on the date on which employment ceased. That was not the case here. Mr Runham’s disputed entitlement would arise on his fulfilling certain criteria in the regulations at the date of his application. For this reason, the applicable regulations were the 1995 Regulations as amended with effect from April 2008.

NHS Pensions did not ask the right question when reaching a decision as to whether Mr Runham satisfied the relevant Regulation. They should have asked whether his medical condition meant that he was permanently incapable of engaging in regular employment of like duration to his former NHS employment. Atos had considered whether he was permanently incapable of any regular employment, which could include employment of a shorter duration than his NHS employment. NHS Pensions committed maladministration in not referring the question back to Atos.

The Ombudsman directed NHS Pensions to pay Mr Runham £100 due to the distress and inconvenience he suffered as a result of their maladministration. They were also directed to refer Mr Runham’s application back to their medical advisers and ask them to apply the correct test and “specifically consider whether his medical conditions (taken as whole) renders him permanently incapable of regular employment of like duration to his former NHS employment”.

Maladministration can occur where a member is provided with incorrect forms to complete and through this lack of care and attention the member suffers financial loss.

Mr CDO Barrie and Clerical Medical and Origen Financial Services (‘Origen’)

On 13 February 2009, the Trustees of the National Art Collections Retirement Benefits Scheme (the ‘Scheme’) wrote to Mr Barrie (himself a trustee of the Scheme) confirming that the Scheme was to be wound up and informing him of his options concerning his accrued benefits.

Members were entitled to a range of options. The default option was for members’ benefits to be transferred to a “buy-out” contract with Scottish Widows (‘Option 1’). Amongst other options, members could, alternatively, elect for their benefits to be transferred to a Group Personal Pension Plan (GPP) with Scottish Widows (‘Option 2’).

Mr Barrie chose Option 2. He followed the instructions provided and returned the documentation to Origen, who confirmed receipt on 9 March 2009 and provided two further forms (one being a Clerical Medical transfer form) for his completion. Mr Barrie completed the forms and returned them to Origen by 16 March 2009. On 31 March 2009, Clerical Medical informed Origen that the Clerical Medical transfer form that it had received was “obsolete”. It appears that the form provided was only suitable for members opting for Option 1. Clerical Medical therefore provided a new transfer form to be signed by two of the Scheme Trustees.

Due to an absence, the only other remaining Trustee (other than Mr Barrie) was unable to sign the form until 20 April 2009. Mr Barrie then signed it on 30 April 2009 and returned it to Origen. Scottish Widows finally sent the form to Clerical Medical on 8 May 2009.

Clerical Medical received the transfer form on 14 May 2009 and a transfer value of £255,748 was calculated on 15 May 2009 and paid on 20 May 2009. This was a reduction of £11,413 from the transfer value on 31 March 2009. Mr Barrie complained to Clerical Medical about the financial loss incurred.

Clerical Medical claimed that Mr Barrie’s original transfer form was only signed by him and the transfer could not be effected until a new transfer form had been completed by both Trustees. Clerical Medical also noted that the reduction in value was largely caused by a reduction in the applicable final bonus rate, which took place on 1 April 2009. Origen claimed that Clerical Medical gave no advance warning of their intention to reduce the final bonus rate and that it was unfair that they did not provide a reasonable time limit to complete the transfer.
The Deputy Ombudsman partially upheld the complaint. By receiving the preferred option forms and distributing the relevant Clerical Medical forms, Origen, who were acting as advisers to the Scheme, assumed responsibility for distributing the correct forms and so were responsible to Mr Barrie for distributing the wrong form. Origen lacked the “knowledge and preparedness” required with regard to members choosing Option 2 as opposed to the default Option 1. In sending forms to Mr Barrie that were only suitable for Option 1, Origen committed maladministration, which led to the rejection of the transfer by Clerical Medical and attendant delays in completing the correct documentation.

By contrast, Clerical Medical had not committed maladministration. They were entitled to demand the appropriate form of authority from the Trustees prior to completing the transfer and did nothing wrong by not informing Origen or Mr Barrie about the final bonus rate reduction and applying it to the transfer.

Origen was directed to find out from Scottish Widows what Mr Barrie’s benefits would currently be had they received a transfer payment of £267,162 instead of £255,748. Origen were instructed to pay the difference to Scottish Widows plus interest from the date of calculation to the date of payment.
On 30 December 2009, the Ombudsman upheld a complaint relating to the payment of survivors’ pensions to Mrs O’Grady and Leo Bissex (a minor) (together, the “Dependants”) following the death of Mr O’Grady. The Ombudsman found that the scheme trustees had incorrectly failed to secure these pensions through the purchase of annuities and had incorrectly reduced Leo Bissex’s pension on the basis that there was insufficient scheme funding to support both pensions. The Ombudsman directed the scheme trustees to reconsider the allocation of funds from 2005 onwards, having regard to: (i) the financial circumstances of the Dependants; and (ii) the fact that Mrs O’Grady’s pension might also be reduced (the “Direction”).

Mr I, an independent financial adviser, wrote to the Dependants on 6 January 2010 to obtain details of their financial circumstances. Neither Dependant replied. The Trustees held a meeting on 27 January 2010 (the “First Meeting”) to discuss the Direction. At this meeting, the Trustees acknowledged that it would have been beneficial if the Dependants had provided them with their financial details. They also noted that, at the time of Mr O’Grady’s death, the Dependants’ pensions were calculated in a 2:1 ratio in favour of Mrs O’Grady whereby she was to receive £40,000 p.a. for life and Leo Bissex was to receive £20,000 p.a. until the later of his 18th birthday or the end of full time education. Mrs O’Grady had since received a pension but Leo Bissex had not.

The Trustees decided that it would be fair to reimburse Leo Bissex the amount (£20,000 p.a.) that he would have received from the date of Mr O’Grady’s death to January 2010 in the form of an annuity. In respect of future pension payments, the Trustees decided that Leo Bissex would be paid an annuity until his 18th birthday on a ratio of 2:1 in favour of Mrs O’Grady, based on what the current fund could afford. The Trustees considered the value of the fund and determined that Mrs O’Grady would receive an annual pension of £25,884 (subject to review). The Trustees wrote to the Dependants on 29 January 2010 to explain their decision.

Mrs O’Grady then asked for, and was granted, an opportunity to provide details of her financial circumstances. The Trustees held a second meeting on 23 February 2010 (the “Second Meeting”) to consider this information. Leo Bissex did not provide the Trustees with any financial details. The Trustees concluded that Mrs O’Grady had a “far greater need for the funds than Leo” and decided to award her an annual pension of approximately £33,000. Leo Bissex would therefore receive approximately £7,000 per annum. Both Dependants were dissatisfied with this decision.

The Trustees resigned in May 2010 and Capita was appointed as sole trustee. After receiving legal advice, Capita decided that the decision made at the First Meeting was valid and that it had not been within the Trustees’ powers to revisit this decision at the Second Meeting. Mrs O’Grady disagreed with this decision and submitted a complaint to the Ombudsman.
The Ombudsman dismissed the complaint. The key question was to identify which of the Trustees’ decisions was properly made and therefore binding on Capita. The Ombudsman found that Capita was correct to decide that the decision made at the First Meeting was properly made. The decision was clearly expressed in the minutes and there was nothing to suggest that it was provisional or subject to review. Similarly, the letters that were sent to the Dependants after the First Meeting did not suggest that the decision could be revisited or that further evidence would be taken into account.

The decision taken at the Second Meeting did not take into account that a documented and communicated decision had already been made at the First Meeting, nor was it decided that the decision-making or evidence-gathering process at the First Meeting was defective and that first decision void.

The Ombudsman further considered whether the Trustees should have regarded the evidence gathering process for the First Meeting as defective and stated that there was “no overwhelming reason that they should”. The Dependants knew the context for the request for details of their financial circumstances. While the Ombudsman had directed the Trustees to have regard to the financial circumstances of the Dependants, it was implicit that “they could not have regard to evidence that they asked for but did not get”. The decision made at the First Meeting therefore stood and was binding on Capita.
Mrs D Maxwell and Mr P Sturman

Mrs Maxwell was employed by the Buck Hotel (the “Hotel”) and became a member of the Buck Hotel Group Personal Pension Plan (the “Plan”) in 2003. The Hotel was taken over by Enterprise Inns in August 2007 and Mr Sturman was Mrs Maxwell’s direct employer until March 2010.

Weekly deductions were taken from Mrs Maxwell’s salary and invested in the Plan as monthly employee contributions. Mr Sturman also paid monthly employer contributions. The contributions were paid to AEGON, the Plan manager. Between 26 May and 3 August 2009, Mrs Maxwell took a period of unpaid leave, during which she made no contributions to the Plan.

In fact, no contributions were received by AEGON for seven months from January 2009. Mr Sturman then made two lump sum payments on 7 September 2009 in order to make good the outstanding contributions. On 18 September 2009, AEGON wrote to Mrs Maxwell informing her that the Plan had lost £91.73 in value due to the irregular payment of contributions between January and September 2009.

AEGON did not receive any employee contributions in November 2009 and no employer contributions were received in November and December 2009. However, copies of Mrs Maxwell’s payslips showed that deductions were made from her pay during these months, along with the relevant employer contributions. Mrs Maxwell complained that Mr Sturman’s actions had led her to incur financial losses and caused her distress and inconvenience.

The Ombudsman upheld the complaint. Excluding the months where Mrs Maxwell was on unpaid leave and made no contributions, the Ombudsman held that it was maladministration and a breach of the relevant regulations that Mr Sturman did not promptly pass on the contributions to AEGON (and in some months, did not pay them at all). The Ombudsman noted that staff shortages should not disturb compliance with regulations. The Ombudsman held that Mr Sturman was liable for the investment loss suffered by Mrs Maxwell. An additional award was made for the distress and inconvenience suffered by Mrs Maxwell in trying rectify matters, she had not received a satisfactory response to her complaints to Mr Sturman.
Mr D Phillips and the Trustees of the Servier Laboratories Ltd Pension Fund and Mercer Limited

Mr Phillips joined the defined benefits section (the “DB Section”) of the Servier Laboratories Pension Scheme (the “Scheme”) in 1979. The DB Section of the Scheme was closed to future accrual in 1997. The members were given three options: (i) transfer their accrued rights in the DB Section with enhanced terms to the new defined contribution section (the “DC Section”) (“Option 1”); (ii) retain their accrued rights in the DB Section as deferred benefits (“Option 2”); or (iii) leave the Scheme.

In March 1997, Mr Phillips informed the Trustees that he would be choosing either Option 1 or 2. He asked the Trustees to confirm whether he would be able to take an unreduced pension from age 60 if he became a deferred DB Section member under Option 2. The Trustees incorrectly confirmed that he could and Mr Phillips then elected Option 2. In 2005, Mr Phillips again sought confirmation from the Trustees that he could receive his DB Section benefits without reduction at age 60. The Trustees confirmed that he could do so.

In 2006, Mr Phillips asked whether he could take a cash sum equal to 25% of the combined value of his DB and DC funds from his DC fund only. Mercer Limited (“Mercer”), the Scheme administrators, confirmed that this was possible as both sections of the Scheme were under a single trust. The Scheme’s lawyers then confirmed this position to Mr Phillips.

In 2007, Mr Phillips enquired about retiring at age 56 and taking a 25% commutation. The Trustees informed him that as a deferred member his DB Section benefits would be reduced for early retirement at any age prior to 65 and that they had previously advised him on the incorrect assumption that he would be taking early retirement from active pensionable service. They also said that the “cross subsidy” between the DB Section and DC Section of the Scheme was not possible, because “there were separate provisions dealing with cash commutation under each [section]” and it would cause a “funding strain” on the DB Section of the Scheme.

After unsuccessfully appealing under the Scheme’s internal dispute resolution procedure, Mr Phillips complained to the Deputy Ombudsman. He submitted that he had suffered financial loss by relying on the misinformation given by the Trustees and Mercer. In particular, he had part-purchased a house for his in-laws in expectation of a £170,000 lump sum and could no longer pay off the mortgage.

The Deputy Ombudsman partially upheld the complaint. In relation to the reduced pension on early retirement, the Trustees had clearly provided Mr Phillips with incorrect information and this was maladministration. However, Mr Phillips was still only entitled to rights due in accordance with the Scheme Rules. In deciding whether to award Mr Phillips compensation, the Deputy Ombudsman considered whether Mr Phillips had “relied upon the incorrect information to his detriment”. The evidence showed that...
Mr Phillips had not suffered financial loss; he probably would have chosen Option 2 regardless of the information given, he appeared to want to retire at age 56 anyway, he would receive the pension he was entitled to and the investments that he had made in reliance on an earlier retirement date had not resulted in loss. However, Mr Phillips was awarded £700 for loss of expectation and the “associated inconvenience and disappointment as he had to correspond further to get the right answers”. This compensation was higher than usual because the Trustees had answered a clear question incorrectly on two occasions.

The Deputy Ombudsman directed Mercer to pay Mr Phillips £100 for the inconvenience caused by their incorrect advice. The Deputy Ombudsman noted that Mercer “ought to have referred the matter back to the Trustees, as it was ultimately the Trustees who needed to reach a decision”. Again, the evidence did not indicate that Mr Phillips had relied on the incorrect information to his detriment so as to cause him any financial loss. He could still repay his mortgage using his aggregated DB and DC lump sums. In relation to the commutation request, the Trustees had not provided any incorrect information, had considered all relevant matters and had not made a perverse decision. The Deputy Ombudsman concluded it was “probable that declining Mr Phillips’ request is in the best interest of the Scheme and other existing members”. Therefore, there was no evidence of maladministration by the Trustees in relation to the commutation request.
Ms J W Jones and JLT Benefit Solutions Ltd

Ms Jones’ husband, Mr Ingram, was a deferred member of the Tyco Holding (UK) Ltd CARE Pension Scheme (the “Scheme”). He asked JLT Benefit Solutions Ltd (the “Scheme Administrators”) whether he could transfer his scheme benefits to a personal pension with Legal & General (“L&G”). On 13 July 2009, the Scheme Administrators sent Mr Ingram a statement quoting a transfer value of £30,050 and requested various documentation, including a copy of L&G’s approval letter from HMRC, to effect the transfer. Mr Ingram forwarded the signed documentation to L&G on 26 August 2009.

On 3 September 2009, the Scheme Administrators received a completed transfer request and other transfer documentation from L&G. After reviewing the documentation on 18 September 2009, the Scheme Administrators wrote to L&G on 21 September 2009 requesting a copy of their approval letter from HMRC. This was the last document required before the transfer value could be paid and it was received by the Scheme Administrators on 25 September 2009.

The Trustees operated a manual cheque request and sign off process under which approval of a transfer value payment could take up to two weeks from receipt of the transfer pack produced by the Scheme Administrators. Due to staff illness, the transfer pack was not produced until 14 October 2009.

Mr Ingram died on 9 October 2009. The Trustees informed Ms Jones that Mr Ingram had died as a deferred member of the Scheme as he had died before the transfer to L&G had been completed. Ms Jones was therefore entitled to a refund of contributions of £1,922 together with an annual spouse’s pension of £926. Ms Jones complained to the Deputy Ombudsman that, because of the Scheme Administrators’ undue delay, the death benefits that she would now receive from the Scheme would be less than they would have been had the transfer to L&G been completed before her husband died.

The Deputy Ombudsman upheld the complaint. The delays by the Scheme Administrators in completing the transfer after they had received the transfer documentation from L&G on 3 September 2009 constituted maladministration. The main reason for this delay was their failure to review the transfer documentation until 18 September 2009. The Deputy Ombudsman was not sympathetic to the Scheme Administrators’ submission that Mr Ingram and L&G had contributed to the delay because Mr Ingram had not forwarded the signed transfer documentation to L&G until 26 August 2009 and the Scheme Administrators had not received the HMRC approval letter from L&G until 25 September 2009. The Deputy Ombudsman commented that in any case “it should not take more than five working days to raise and issue a transfer value cheque and there was adequate time to make payment before Mr Ingram’s death”. She also noted that “the fact that payment was made within statutory timescales does not mitigate against [the] finding of maladministration in the particular circumstance of this case.”
In order to determine whether Ms Jones had suffered a financial loss because of the Scheme Administrators’ maladministration, it was necessary to calculate whether the capital cost of providing her scheme benefits (the refund of contributions of £1,922 and the annual spouse’s pension of £926) was less than the £30,050 transfer value available at the date of Mr Ingram’s death. The Deputy Ombudsman directed the Scheme Administrators to pay any such shortfall to Ms Jones, together with £150 for the distress that she had suffered as a result of their maladministration.
Mr A and the Lothian Pension Fund (“Lothian”)

Mr A became a deferred member of the Local Government Pension Scheme (the “Scheme”) in June 1984. In May 2004, he transferred the non-Guaranteed Minimum Pension (“GMP”) element of his Scheme pension to a pension arrangement with Norwich Union.

Mr A received a deferred pensioner benefit details statement from Lothian in January 2006. The statement showed the predicted value of his annual pension and lump sum, both of which were payable when Mr A reached 60. This was incorrect because Mr A was not entitled to commute his GMP pension and his pension would be payable when he reached 65. Mr A queried the statement in March 2006. Lothian initially confirmed the details in the statement but then informed Mr A in April 2006 that he could not in fact commute his GMP pension. In Mr A’s 2007 and 2008 benefit statements, Lothian continued to indicate that Mr A’s annual pension would be payable from his 60th birthday.

When Mr A contacted Lothian in October 2009, Lothian realised its error and confirmed that Mr A’s annual pension would only be payable when he reached 65. Mr A unsuccessfully instigated the internal dispute resolution procedure in January 2010, asking to be allowed to draw his pension from age 60, as he had been led to believe was possible. Mr A then complained to the Deputy Ombudsman. He submitted that he had relied to his detriment on Lothian’s incorrect information that he would receive an annual pension and lump sum at age 60. In expectation of these payments he had planned to pay off a bank loan using the lump sum and switch to working part-time shortly after his 60th birthday.

The Deputy Ombudsman partially upheld the complaint. Lothian gave Mr A incorrect information on at least 3 separate occasions and this constituted maladministration. However, the Deputy Ombudsman stated that this did not entitle Mr A to treat this information as correct in contravention of the Scheme Rules.

The Deputy Ombudsman then considered whether Mr A had suffered any pecuniary and/or non-pecuniary loss (i.e. distress and inconvenience) as a result of Lothian’s maladministration. The Deputy Ombudsman was not persuaded that Mr A had changed his position as a result of receiving incorrect information from Lothian. He had not shown that he had originally taken out the bank loan with the expectation that he would receive a lump sum. He had not actually paid off the loan or switched to part-time work. Therefore, he had not suffered actual pecuniary loss.

The Deputy Ombudsman did, however, find that Mr A had suffered non-pecuniary loss because he had been inconvenienced by having to verify his true pension provision and was distressed to find less income than he had anticipated. Lothian was directed to pay Mr A £300 for the distress and inconvenience caused by its maladministration.
Mrs Boate was employed by a participating employer of the KPMG Staff Pension Fund (the “KPMG Fund”). In March 2000, the KPMG Fund was sub-divided into the Pre-2000 Fund (in which members ceased to accrue benefits) and the Post-2000 Fund. In 2005, the Court of Appeal decided that the Pre-2000 Fund was an average salary defined benefit scheme. In February 2008, Aon Trust Corporation Limited (the “Trustee”) transferred funds in the Post-2000 Fund to a cash deposit fund with Standard Life, having taken advice from an investment consultant. The transferred funds fell in value in 2009.

In November 2008, Mrs Boate applied for the payment of her benefits. In calculating her pension entitlement, the Trustee did not revalue her Pre-2000 Fund benefits on the basis that there was no obligation for it to do so under the KPMG Fund Rules. Further, statute provided for revaluation on either a final salary basis or an average salary basis, if trustees considered it appropriate. As there was a 0% revaluation rate for active members, the Trustee deemed it appropriate to apply the average salary method to its deferred members, which was therefore also a nil rate. The Trustee dismissed Mrs Boate’s appeals under the internal dispute resolution procedure on this basis.

Mrs Boate complained to the Ombudsman. She submitted that the Trustee was not obliged to use the average salary method and that it had not acted in the best interests of members in adopting a nil revaluation approach. She suggested that, in the absence of a revaluation rule in an average salary scheme, the final salary method should apply by default. Mrs Boate also submitted that the Trustee had caused her financial loss by switching investment manager without her consent, when she had been told that she could make her own investment choices.

The Ombudsman dismissed the complaint. The Pension Schemes Act 1993 “does not oblige trustees to revalue benefits by the final salary method nor does it impose the final salary method as a default. It provides for trustees to use the average salary method where this appears appropriate. There are no grounds for me to find that [the Trustee’s] decision is inappropriate.” The Trustee was not required to consult members before taking an investment decision. Although members were offered a degree of choice in their investment, this did not extend to making overall investment decisions for the KPMG Fund. Although the Trustee had taken advice from an investment consultant before deciding to transfer funds to Standard Life, it had not made any promises of a particular return. Therefore, there could be no financial loss due to breach of any such promise.