Determination.

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Pensions Ombudsman Focus for the period
March 2012 to May 2012
Welcome to the 33rd edition of the Pensions Ombudsman Focus for the period March 2012 to May 2012.

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.

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Mrs W McKinney against the trustees of the Howden Group Pension Plan

Mrs McKinney’s husband was a pensioner member of the Howden Group Pension Plan (the “Scheme”). He died in 1991, following which Mrs McKinney received a widow’s pension under the scheme. In April 2008 the Scheme administrators informed her that her widow’s pension had been underpaid from the outset as it was based on her husband’s pension on retirement, rather than on death. Her pension with indexation was adjusted to £21,773 a year, rather than the £17,619 she had been receiving, while arrears totalled £47,794. The scheme trustees paid Mrs McKinney these arrears, together with interest of £22,952 for late payment. They also provided information to HMRC to assist in her negotiations concerning the tax liability on the lump sum. In addition, the Scheme administrators offered to pay her £300 for her distress and inconvenience, which Mrs McKinney refused.

Despite this, Mrs McKinney complained to the Ombudsman that the trustees of the Scheme had not adequately compensated her for the underpayment, which had a detrimental effect on her living conditions. Lack of funds had obliged her to sell her apartment in Spain, downsize her UK home, cancel her tennis club membership and reduce her level of medical insurance. Now over 70, she could not use the arrears as she might have done when she was younger. In addition, she claimed her negotiations with HMRC, though ultimately successful, had been a trying, upsetting and stressful experience, especially at her advanced age.

The Deputy Ombudsman partially upheld the complaint. The miscalculation of Mrs McKinney’s widow’s pension was maladministration. The trustees had redressed her direct financial loss for this through the payment of arrears plus interest, and her potential extra tax liability had been settled with HMRC. The Deputy Ombudsman also held that at the time of the sale of the properties in Spain and the UK, the yearly underpayment of between £2,000 and £3,000 was too small to have been a determining factor in the sales. There was also no evidence that these sales, if at market rate, caused her any financial loss. The reduction in medical cover did not cause her any actual loss as it proved adequate for her medical needs over the period, including hip replacements.

Nevertheless, the Deputy Ombudsman found that Mrs McKinney had suffered non-financial injustice relating to the loss of enjoyment of her pension, noting that, in particular, the loss of tennis club membership amounted to non-financial injustice “at the higher end of the scale”. The Deputy Ombudsman directed the trustees to pay Mrs McKinney £1,000 in relation to this non-financial loss, together with a further £500 for additional non-financial injustice relating to the distress and inconvenience of having to settle her tax liability with HMRC.
Estoppel may be claimed in respect of what is said about benefits but not where the member has gone along with the situation.

Mr A Grieveson against Mr N Grieveson and Calberto Ltd

[Note: Estoppel is an affirmative defence alleging good-faith reliance on a misleading representation and a detrimental change in position resulting from that reliance.]

The complainant, Mr A Grieveson, and his brother Mr N Grieveson were the only trustees and members of the Calberto Limited Pension Plan (the “Plan”), a defined contribution scheme. A statement of net assets as at 30 June 2003 and the Plan’s 2004 valuation stated that its assets (around £110,000) were held on 50/50 basis as between the two brothers, except for individually earmarked insurance policies. But in 2006, an illustrative transfer value to the complainant showed a far lower figure (around £20,000) than he had been expecting based on a 50% share of the assets.

The complainant filed a complaint with the Pensions Ombudsman against Mr N Grievson, Calberto Ltd and the Plan administrators, claiming his transfer value was not calculated on the previously agreed actuarial basis. The Ombudsman dismissed the complaint. The complainant appealed to the High Court.

The High Court judgment held that in the Plan rules the allocation of assets between the two members of the Plan was only a notional allocation giving no beneficial entitlement. The 2006 transfer value was correctly calculated in accordance with the scheme rules and the 50/50 allocation of assets had no direct bearing on this calculation. However, the appeal was allowed in relation to whether the respondents were estopped from going back on the previously agreed values and, as the Ombudsman had not deal with this question, the matter was remitted back to him for a determination on that basis.

In the remitted complaint, the complainant submitted in his capacity as a Plan member that the employer and Mr N Grieveson, as a scheme trustee, were estopped from denying that he was entitled to a transfer value based on a 50% share of the scheme assets, as stated in the 2003 assets statement and 2004 valuation. The complainant submitted that he had relied on the 2003 and 2004 information and would otherwise have made alternative pension provisions.

The Ombudsman dismissed the remitted complaint. An essential requirement of estoppel was “unconscionability”; that is, that it would be unconscionable to allow one party to go back on a representation or on a common understanding upon which the other party has relied to his detriment.

The complainant was a trustee of the Plan at all relevant times and was therefore jointly and severally liable for the contents of statements and valuations issued by the trustees, including the 2003 assets statement (which he signed) and the 2004 valuation. He was also the company secretary of the employer between 1 January 2000 and June 2004. This therefore undermined any argument that it would be unconscionable or unjust for Mr N Grieveson to go back on any representations in trustee documents, or for the employer to go back on any related statements in the company accounts.
If a member of a defined benefit ("DB") scheme receives enhanced benefits under a severance package, they are not “money purchase benefits” within section 181 of the Pension Schemes Act 1993 ("the Act") as it currently stands if they are received “in exchange for” a special employer contribution, rather than “calculated by reference to” it.

Mr W M Marshall and Independent Trustee Services Ltd ("ITSL")

Mr Marshall was a director of Marshall Food Group Ltd and a member of its defined benefit scheme (the “Scheme”). In 1998, the company was acquired by Grampian Country Foods Group and it was agreed that Mr Marshall would leave service and receive a severance payment.

Mr Marshall indicated he would like to use the bulk of his severance payment to enhance his pension in the Scheme. Letters from the Scheme actuary to Mr Marshall and his solicitors before he left service stated that the “cost” of enhancing his Executive Scheme pension benefits was “approximately £320,000 of the severance payment”, leaving a balance of £30,000 for Mr Marshall to draw as a tax-free termination payment. Letters between the parties’ solicitors and financial advisers, as well as a Scheme trustee resolution, described the £320,000 as either “ring-fenced” or “earmarked” for Mr Marshall’s benefit. They said this would be achieved by treating it as an additional voluntary contribution ("AVC") which under the Scheme rules would have priority if the scheme was wound up.

Mr Marshall’s employment with the company ended on 30 September 1998. In 2001, Mr Marshall’s benefits were transferred to the Grampian Country Pension Fund (the “Grampian Scheme”) and he began receiving an early retirement pension of over £70,000 from December 2005. His normal pension age was 60, which he would have reached in July 2008. However, in 2007 the Grampian Scheme, which was in deficit, entered a Pension Protection Fund ("PPF") assessment period. The Grampian Scheme’s trustee, ITSL, chose to treat the £320,000 as an augmentation of Mr Marshall’s DB benefits and it was therefore subject to the PPF’s 90% compensation level and overall compensation cap (which at the time was £26,050 a year).

Mr Marshall complained that the sum should have been treated as a money purchase benefit and therefore should not have been reduced. In the alternative, he submitted that if the first part of his complaint was not upheld, there had been a failure to ring-fence his benefits as intended, which amounted to maladministration.

The Ombudsman dismissed the complaint. The definition of money purchase benefits under the Act was “benefits the rate or amount of which is calculated by reference to a payment or payments made by the member or by any other person in respect of the member and which are not average salary benefits”. Mr Marshall’s additional benefits could not be said to have been calculated “by reference to” the £320,000 payment. The relationship between the two was never clearly set out and the actuarial basis could not have been exactly £320,000, which was “too round a sum” and “too convenient”, being the severance total of £350,000 less the £30,000 he could receive tax free. The enhanced benefits were “in exchange for a particular sum”, rather than “calculated by reference to a sum” – a “significant difference” – and any relationship was merely as “a convenient and pragmatic way of compensating Mr Marshall” when he left the company.
In relation to Mr Marshall’s alternative complaint, the Ombudsman agreed that the evidence indicated that the parties shared a common understanding in 1998 that the £320,000 was to be “ring-fenced” or “earmarked” in some way for Mr Marshall, including on any winding-up in deficit. Unfortunately for Mr Marshall, nothing was in fact done to give the £320,000 any protection on winding up. Further, the £320,000 could not be protected as an AVC because it had not been paid out of earnings and exceeded the amount allowed for AVCs by the Scheme rules then in force.

However, any maladministration in relation to the implementation of the common understanding related to a different scheme long before ITSL were appointed as trustee to the Grampian Scheme. It therefore had “no consequences for the present treatment of Mr Marshall’s benefits in the Grampian Scheme”.
If the rules of a pension scheme provide that bonus payments are non-pensionable by agreement between the member and the employer, passive acceptance of bonus payments described as non-pensionable by the employer does not amount to such agreement.

Ms C was a member of the WBB Minerals Final Salary Pension Scheme (the “Scheme”). Under the Scheme rules, benefits were based on “Final Pensionable Earnings”, the calculation of which depended on the member’s “Gross Earnings”, which was defined in the rules as:

“gross earnings from the Employers excluding benefits in kind, cash alternatives to benefits in kind and amounts paid on or in connection with the termination of the Member’s employment and such other amounts paid to the Member on or after 1 January 1999 as may from time to time be agreed between the Member and the Employer”.

Under the December 2000 Scheme booklet, “Gross Earnings” were defined as:

“gross earnings (before income tax) excluding termination payments, benefits in kind, cash alternatives to benefits in kind and any other amounts you agree with the Company.”

Ms C was also part of an incentive scheme under which she received yearly bonuses based in part on the company’s profit and in part on her performance. Yearly bonus notices from the company stated that her bonuses were not pensionable (and one letter was silent on the matter).

In 2007, Ms C became a director of the Trustee and as a consequence became aware that the Scheme’s definition of “Gross Earnings” did not, in fact, exclude bonuses. In 2008, as part of a wider grievance, Ms C argued that her bonuses should be included in her final pensionable earnings; but a new contract of employment she signed in May 2008 was again silent on the point. When she resigned from the company in July 2008, her benefits were calculated by reference to a gross earnings figure that excluded bonuses.

Ms C complained that the benefits should have been calculated by reference to a gross earnings figure which included bonuses. The Trustee argued that as Ms C’s bonuses were calculated as a proportion of her basic/gross salary, they could not form part of that gross salary nor, therefore, of her Gross Earnings. It also argued that Ms C’s consistent acceptance of bonuses stated to be non-pensionable amounted to an agreement to exclude them from her Gross Earnings (as provided for in the Scheme rules).

The Ombudsman upheld the complaint.
The first issue he dealt with was whether or not bonuses were included in the definition of “Gross Earnings”. He concluded that they were on the basis that “earnings” should retain its ordinary meaning, “which would include any bonus because normally (and clearly in this case) bonuses are earned.”

The second issue was whether, despite bonuses being included in the definition of Gross Earnings, there had been an agreement or understanding that the bonuses were not pensionable. The Ombudsman’s conclusion was that there was not. This was because there was no explicit agreement between Ms C and the company to exclude bonuses, nor did her passive acceptance of bonuses stated to be non-pensionable amount to an agreement to exclude them. Until she became a director of the Trustee, it is unlikely she would have seen the Scheme rules and it was not obvious from the Scheme booklet alone that bonuses were pensionable unless excluded.

The Ombudsman directed the Trustee to recalculate Ms C’s benefits on the basis that her bonuses were pensionable.
A top-up pension paid to an executive who leaves service before normal retirement can include the benefit of added years granted by his employer to maximise his benefits from a formerly approved scheme, even if not expressly provided for in the documents establishing the top-up scheme.

Mr J Yates and Life Assurance Holding Corporation Limited Number Four Private Retirement Trust (the “Unapproved Scheme”)

Mr Yates was employed by Life Assurance Holding Corporation Limited from 1 December 1992 and on the same date joined the company’s defined benefit scheme (the “Main Scheme”), which had a normal retirement age of 65. The Main Scheme allowed early retirement by deferred members at age 60 without reduction.

Mr Yates later received added years in the Main Scheme totalling 6 years 7 months of additional pensionable service. These comprised a service credit (from a transfer-in) of 4 years 8 months and an augmentation of 1 year and 11 months. His 1996 contract of employment explained that the augmentation was intended to lift his benefits to 40/60ths of final pensionable salary “should the Executive remain in the Company’s employment until age 65” (since 33 years 5 months actual service to age 65 + 4 years 8 months service credit + 1 year 11 months added years = 40 years).

In 2003, the Company wrote to Mr Yates saying that his contract of employment provided for his pension to be “calculated by reference to your full salary”, but the Inland Revenue earnings cap then in force meant his Main Scheme benefits would be restricted to a lesser amount.

The Company had therefore established the Unapproved Scheme to meet its “obligation to provide a final salary pension based on [his] earnings above the permitted maximum on retirement or leaving service...”. The new 2003 service contract, which also contained a separate entire agreement clause, stated that the Unapproved Scheme would provide “a pension which when added to the pension provided under [the Main Scheme], shall be sufficient to make the pension payable to the Executive on his retirement at age 65, 40/60ths of his final salary”.

Mr Yates left the Company on 31 December 2009 with 17 years and 1 month actual service. In calculating the top-up pension benefits due to Mr Yates, the Company included the 6 years 7 months of added years in calculating his pensionable service under the Main Scheme (totalling 23 years 8 months). But the Company did not give Mr Yates the full benefit of the two-thirds promise in calculating its total pension: this was calculated as 40/60th of his uncapped salary, but with the overall pension pro-rated for the fact he worked only 17 years 1 month, not the 33 years 5 months actual service needed to age 65. The exclusion of those additional years from the total pension promise therefore reduced the level of the balance of the pension promise payable under the Unapproved Scheme. The Company later submitted that the pension payable from the Unapproved Scheme should also be further reduced for early retirement if taken before age 65.
Mr Yates complained that the Company should have applied his service credit and added years to the whole of his pension promise, meaning his overall pension should be calculated by reference to his uncapped salary and pensionable service under the Main Scheme. The Company should also have permitted retirement at age 60 without reduction under the Unapproved Scheme, as was permitted under the Main Scheme.

The Company maintained that for the purpose of his overall pension promise, the added years should be earned over the period of service to normal retirement age and accordingly his overall pension pro-rated according to the proportion of actual service to future service to age 65. It claimed that if Mr Yates received the benefit of the two-thirds promise in full, he would receive a windfall.

The Ombudsman found in favour of Mr Yates for the most part.

From at least 2003, there was a shared assumption that Mr Yates was entitled to an overall pension promise calculated by reference to his uncapped salary. The effect of his 2003 service contract was that he was entitled to receive unapproved benefits at age 65 in addition to his benefits from the Main Scheme.

The benefits from the Main Scheme reflected the added years, but there was no express provision saying the added years must be reflected in Mr Yates’ benefits from the Unapproved Scheme. However, the clear implication of the relevant clauses in his service contract was that pensionable service for the purposes of the Unapproved Scheme was the same as the Main Scheme. It followed that the Company should treat Mr Yates’ added years as having fully vested when they were granted for the purpose of calculating his benefits under the Unapproved Scheme.
Mrs Few was a member of the Teachers’ Pension Scheme (the “Scheme”). In 1997, she applied to the Scheme administrators, Teachers’ Pensions (“TP”), for ill-health early retirement (“IHER”) under the Scheme. By her signed application she represented that she would inform the Teacher’s Pension Agency if she began employment in education at any time during retirement.

TP approved her application on 17 April 1997. TP later submitted that its records showed that at the time Mrs Few was also given a leaflet, explaining the conditions under which she could undertake part-time employment whilst retaining her IHER pension. It stated that she was required to return an enclosed form confirming that she understood her obligation to notify TP of any return to part-time or full-time employment. Mrs Few did not return the requisite form and later submitted that she never received it or the information leaflet.

Mrs Few subsequently set up a training agency in relation to which she worked on average six days a year. In October 2001, she applied for her agency to act as food hygiene tutor on a course run by a community college. She later submitted that she had contacted TP to explain her position and had been told that the work she proposed to undertake would not affect her IHER pension. TP submitted that it had no record of such a telephone conversation and that if it had occurred, its staff knew to inform members to put such requests in writing. Mrs Few accepted a position as tutor in 2002.

In March 2007, Mrs Few contacted TP to opt out of the Scheme. TP asked her to complete a certificate of re-employment, so it could assess her benefits. Mrs Few did not return the form until June 2009, when she confirmed re-employment from 1 April 2008 to 31 March 2009. This prompted TP to discover that the college had been submitting returns with Mrs Few’s details to it since 2002.

In September 2009, TP informed her that her employment as a tutor since 2001 constituted employment as a teacher for the purposes the TP Regulations, which provided that if a member takes up employment or otherwise ceases to be incapacitated, upon the person ceasing to be incapacitated the pension ceases to be payable. Accordingly, TP ceased payment of Mrs Few’s benefits and asked her to repay just over £60,000.

Mrs Few complained that TP’s demand that she repay over £60,000 in IHER payments since 2002 was incorrect. She claimed that TP had given her a verbal assurance in 2001 that taking the college job would not affect her benefits and it had only been in 2008 that she formally became a tutor.
The Deputy Ombudsman partially upheld the complaint. The Deputy Ombudsman did not accept that Mrs Few had informally told TP by telephone about her position as a tutor in 2001. But even if she had done so, under the TP Regulations, Mrs Few still had an obligation in 2002 to inform TP in writing about changes in her circumstances, including re-employment. The college should have been aware of Department for Education guidelines on appointing someone who was in receipt of IHER and should have advised Mrs Few to follow up the conversation with written confirmation.

The Deputy Ombudsman was also satisfied that Mrs Few received clear advice in 1997 that she should notify TP about re-employment but had made no attempt to contact TP in writing about her employment. Also, the fact that she gave April 2008, rather than 2002, as the date of her re-employment in the 2009 form did “not indicate someone who is not trying to avoid telling TP”.

However, the Deputy Ombudsman held TP should have taken action on the basis of the returns it received from the college from 2002 declaring Mrs Few was an employee and stopped her benefits at that point and, when it realised in 2007 that Mrs Few was employed by the college, it should not have allowed the overpayment to continue to accumulate. This administrative failure was held to have caused Mrs Few emotional distress. The Deputy Ombudsman therefore directed TP to pay Mrs Few £500 compensation for distress and inconvenience.
The “permanent incapability” test as to whether a member receives an ill-health pension should be assessed on the basis of existing and not speculative independent medical evidence.

Mrs R Taylor-Colclough and Nottinghamshire County Council

Mrs Taylor-Colclough (“Mrs Taylor”) was employed as a teaching assistant by Nottinghamshire County Council (the “Council”) and was a member of the Local Government Pension Scheme (the “LGPS”). She went on long-term sick leave in 2008 with chronic fatigue syndrome and fibromyalgia, aged 34.

Under the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007, before a member receives an ill-health pension, the employer must first decide whether the member is permanently incapable of discharging efficiently the duties of their current employment. “Permanently” is defined as until, at the earliest, the member’s 65th birthday. The level of benefit available then depends on the member’s prospect, if any, of obtaining any gainful employment in the future. Before making a decision, the employer must obtain a certificate from a suitably qualified independent registered medical practitioner (“IRMP”).

In June 2009 an IRMP concluded that it was too soon to advise that Mrs Taylor was likely to remain unfit for work until the age of 65 and that there was a reasonably good prospect that her condition would eventually improve sufficiently for her to return to gainful employment. The IRMP did not personally examine Mrs Taylor. The Council accepted the IRMP’s recommendation and terminated Mrs Taylor’s employment on 13 September 2009 without granting an ill-health pension.

Mrs Taylor appealed under the LGPS’s internal dispute resolution procedure (“IDRP”). A report from her rheumatologist in November 2009 stated that although there was palliative treatment for her condition, the condition itself was likely to be incurable and that it was impossible to determine long-term incapacity at that stage. However, the same rheumatologist later considered that some degree of recovery was possible in the near future.

A second IRMP advised that there was a reasonable prospect of Mrs Taylor being able to return to work in the longer term, noting that she was only 35 and that it was possible that further treatment options may become available. Mrs Taylor’s appeal was denied and she subsequently complained to the Ombudsman that the Council’s decision not to award her an ill-health pension was incorrect and, among other things, submitted that the first IRMP should have examined her before making his recommendations.

The Ombudsman upheld the complaint. The Council’s decision to reject Mrs Taylor’s application on the grounds that there were untried treatments that might help her return to work was incorrect. Her rheumatologist had in fact said that none of the treatment options would be anticipated to cure her condition. The Council should have clarified with him whether there were future treatment options and, if any were identified, it should have considered whether Mrs Taylor’s ill-health was likely to be permanent if the untried treatment options were undertaken.
But the Ombudsman noted that the first IRMP did not have to examine Mrs T personally as the decision whether to do so was a matter of judgement for the doctor concerned and there was in principle nothing wrong with the doctor making his report on the basis of reviewing the patient’s medical history. The Ombudsman remitted the decision back to the Council, directing it to obtain any further reports it might need.
Non-financial injustice arising from a material reduction in the quality of a member’s lifestyle caused by maladministration is, even in the absence of quantifiable economic loss, sufficient to warrant payments in compensation.

Mrs W McKinney against the trustees of the Howden Group Pension Plan

Mrs McKinney’s husband was a pensioner member of the Howden Group Pension Plan (the “Scheme”). He died in 1991, following which Mrs McKinney received a widow’s pension under the scheme. In April 2008 the Scheme administrators informed her that her widow’s pension had been underpaid from the outset as it was based on her husband’s pension on retirement, rather than on death. Her pension with indexation was adjusted to £21,773 a year, rather than the £17,619 she had been receiving, while arrears totalled £47,794. The scheme trustees paid Mrs McKinney these arrears, together with interest of £22,952 for late payment. They also provided information to HMRC to assist in her negotiations concerning the tax liability on the lump sum. In addition, the Scheme administrators offered to pay her £300 for her distress and inconvenience, which Mrs McKinney refused.

Despite this, Mrs McKinney complained to the Ombudsman that the trustees of the Scheme had not adequately compensated her for the underpayment, which had a detrimental effect on her living conditions. Lack of funds had obliged her to sell her apartment in Spain, downsize her UK home, cancel her tennis club membership and reduce her level of medical insurance. Now over 70, she could not use the arrears as she might have done when she was younger. In addition, she claimed her negotiations with HMRC, though ultimately successful, had been a trying, upsetting and stressful experience, especially at her advanced age.

The Deputy Ombudsman partially upheld the complaint. The miscalculation of Mrs McKinney’s widow’s pension was maladministration. The trustees had redressed her direct financial loss for this through the payment of arrears plus interest, and her potential extra tax liability had been settled with HMRC. The Deputy Ombudsman also held that at the time of the sale of the properties in Spain and the UK, the yearly underpayment of between £2,000 and £3,000 was too small to have been a determining factor in the sales. There was also no evidence that these sales, if at market rate, caused her any financial loss. The reduction in medical cover did not cause her any actual loss as it proved adequate for her medical needs over the period, including hip replacements.

Nevertheless, the Deputy Ombudsman found that Mrs McKinney had suffered non-financial injustice relating to the loss of enjoyment of her pension, noting that, in particular, the loss of tennis club membership amounted to non-financial injustice “at the higher end of the scale”. The Deputy Ombudsman directed the trustees to pay Mrs McKinney £1,000 in relation to this non-financial loss, together with a further £500 for additional non-financial injustice relating to the distress and inconvenience of having to settle her tax liability with HMRC.