Recent Determinations from the Pensions Ombudsman

It is always worthwhile keeping an eye out for new Determinations from the Pensions Ombudsman, as these not only clarify how the Ombudsman is likely to view future cases but also help to confirm what is likely to be considered acceptable or standard practice within the pensions industry – or, perhaps more importantly, what is not.

For this month's Aries Insight, then, we will take a look at a few recent Determinations and consider what key messages these may contain.

A reasonable request for documentary evidence?

In our first case the scheme member was approaching her Normal Pension Age and applied to the scheme for the payment of her pension benefits. In response, the scheme administrator asked her to provide evidence of age in the form of her birth certificate or passport, as well as her marriage certificate and her husband's birth certificate. The scheme also confirmed that it would accept certified copies of the last two documents here, provided that these were certified in accordance with the official guidance on certifying documents.

The only document that the member initially provided was a copy of her marriage certificate, which had not been certified correctly. The scheme administrator contacted the member to request the outstanding documents, however the member raised a formal complaint against the scheme on the basis that her benefits were not being paid to her.

The scheme responded to the complaint by saying that an application for the payment of benefits was not valid in the absence of the requested certificates.

Whilst the benefits were eventually settled, with arrears of pension being paid back to the member's Normal Pension Age, the member raised a complaint with the Pensions Ombudsman, which was initially considered by one of the Ombudsman's Adjudicators.

The Adjudicator concluded that, within the pensions industry, it is a requirement that pension scheme administrators obtain evidence of key dates, such as a member's date of birth. In addition, where benefits may become payable to a member's spouse on the death of a member, evidence of marriage and the spouse's date of birth are also key pieces of information.

The Adjudicator went on to say that there is no standard approach across the pensions industry in terms of which documents are considered as acceptable evidence of a member's date of birth, but that the evidence that the particular scheme had requested was not inconsistent with the rest of the pensions industry. On this basis, the Adjudicator dismissed the complaint.

Still unhappy with this, the member did not accept the Adjudicator's opinion, so the case was referred to the Pensions Ombudsman.

The Ombudsman also dismissed the complaint, noting that the scheme was acting fairly in requiring the member's date of birth to be validated before the payment of the benefits could begin and that the (limited) forms of evidence that the scheme was prepared to accept here were not unreasonable.

Key Messages

All pension schemes will require certain evidence of entitlement before putting benefits into payment, so it is probably unsurprising that the Ombudsman dismissed this case on the basis that the delay in settlement of the benefits was mainly due to the member's unwillingness to provide the documents requested.

It is, however, comforting to know that schemes are indeed acting correctly when requesting reasonable evidence from members to support their claim for benefits, and to refuse any claim where that evidence is not provided.

Issues with an Earmarking Order

Our second case concerns an Earmarking Order (Pension Attachment Order) that had been made against the member's benefits.

The terms of the Order included the following (fairly standard) provisions:

- Upon drawing of a lump sum payable to the Respondent *[the member]* upon his retirement under the terms of his pension with [the provider] the Respondent will commute 50% of the benefits capable of commutation under the said pension.

- The Trustees or Managers of the Respondents said pension do pay or cause to be paid to the Petitioner *[the member's ex-spouse]* on behalf of the Respondent a sum equal to 50% of the maximum lump sum payable to the Respondent upon his retirement under terms of the said pension.

Now, when the Earmarking Order was made in 2000, the member's pension plan had two 'sub-policies' – one holding the non-Protected Rights and the other holding the Protected Rights. At that time, Protected

Rights were not commutable for a 'tax free cash sum', however this restriction was later removed, with Protected Rights being completely abolished with effect from 2012.

Shortly before reaching age 60, the member transferred the benefits into a Self-Invested Personal Pension (SIPP) with the same provider (a point we will return to shortly), and then crystallised part of the benefits, including taking a Pension Commencement Lump Sum of £14,763, all of which was paid to the member.

Subsequently, the member's ex-spouse contacted the provider, pointing out that the Earmarking Order also included a provision that "AND UPON the Respondent *[the member]* undertaking to the Court that he will not transfer his pension rights from his policy number ... with [the provider] to any other pension policy or scheme without the consent in writing of the Petitioner *[the member's ex-spouse]* such consent not to be unreasonably withheld." As such, the transfer to the SIPP should not have proceeded without the ex-spouse's consent and, according to the ex-spouse, she would not have given her consent to the transfer. The ex-spouse also stated that she required payment of her share of the lump sum that had been paid to the member, in accordance with the Earmarking Order.

Following protracted correspondence between the member and the provider, the case was raised with the Pensions Ombudsman, where it was considered by one of the Ombudsman's Adjudicators. The member's key arguments were that:

- His ex-spouse should not be entitled to any lump sum arising from what were Protected Rights. In applying the current law to the case, the provider is effectively rewriting the divorce agreement.
- He would not return any part of the Pension Commencement Lump Sum that he had received to the provider. He argued that, as the provider had made an error in paying him the entire lump sum, the provider should be responsible for paying the ex-spouse her share of the lump sum due under the Order.

The Adjudicator's view on these points were that:

- The original Earmarking Order made no distinction between any Protected Rights and non-Protected Rights element of the member's benefits. Although at the time the Order was made, Protected Rights could not be commuted for a lump sum, under the current pensions regime this restriction no longer applies. As such, on the commutation of any former Protected Rights, the Order requires that the ex-spouse must receive 50% of the lump sum due. The provider has, therefore, correctly interpreted the Order and is intending to apply it correctly to the benefits (by paying the ex-spouse 50% of any lump sum derived from the former Protected Rights).

- The member has received an overpayment of his benefits (as a result of him receiving the entire lump sum) and the provider has a right to seek to recover the overpayment. It would have been open to the member to raise a defence against the attempted recovery, including a 'change of position' defence, but the member had declined to do so. In addition, it is the provider's responsibility, rather than the ex-spouse's, to recover the overpaid amount from the member.

The Adjudicator did, however, also conclude that there were significant failings in the way that the provider dealt with the case, including ignoring the requirements of the Earmarking Order when the benefits were transferred and when the Pension Commencement Lump Sum was paid out to the member. This constituted maladministration on the provider's part, causing the member a serious level of distress and inconvenience and for which the provider should pay the member £1,000.

The member did not accept the Adjudicator's opinion, so the case was considered by the Pensions Ombudsman, who agreed with the Adjudicator's findings.

Key Messages

There are, perhaps, two key points that arise from this Determination. Firstly, Earmarking Orders need to be interpreted in light of current pensions legislation, rather than as the legislation stood when the Order was made.

As the Ombudsman observed, "*The wording of the Order fails to distinguish which part of the pension* [the ex-spouse] *is entitled to benefit from which causes the problem. I accept that the law, as it stood, meant that it did not need to be specific. But* [the provider] *now must follow the wording of the Order. To not do so would be to risk acting in contempt of court.*"

Secondly, the provider overlooked the requirements of the Order, both when making the transfer and when paying out the Pension Commencement Lump Sum to the member. It is vital that scheme administrators check for the existence of any form of Order against the benefits and, where one exists, settle the benefits as required by that Order.

We can, perhaps, have some sympathy with the provider in terms of making the transfer to the SIPP, as it is not particularly common for Earmarking Orders to include a requirement that the ex-spouse's consent is obtained for any transfer. This requirement is not, however, completely unknown, so this also serves as a

reminder that the terms of any existing Order should be checked before making a transfer.

No good deed goes unpunished

Our final case concerns a member who changed his mind at retirement and now wants to change it again.

On the approach to retirement in 2015 the member was offered several options, in terms of the way in which he could take his benefits. The options provided for various different levels of 'tax free cash' and how much of the pension attracted annual increases in payment.

The member completed a Benefits Claim Form, selecting Option 2 and returned this to the scheme administrator on 17 July 2015. The Benefits Claim Form included a statement that "*I* [the member] *understand that, in electing to receive the aforementioned benefits, my decision is irrevocable*".

On 6 August 2015, the member telephoned the scheme administrator to say that he wished to change his mind and select Option 5 instead. The administrator confirmed to the member that this would indeed be possible and asked the member to, in effect, confirm his revised choice in writing.

The member responded by e-mail, including a 'screen shot' of his retirement options and saying "*… if you can allow me to change to Option 5 it would be very much appreciated.*"

The benefits were duly put into payment from 1 September 2015 in line with Option 5.

Now we come to February 2018, when the member contacted the scheme and asked to change his retirement option back to Option 2, but was told by the scheme that this was not possible.

Following a protracted exchange between the scheme and the member, the case was raised with the Pensions Ombudsman. In essence, the nub of the member's case was that, as the Benefits Claim Form said that his decision was irrevocable, the scheme should not have allowed him to change from Option 2 to Option 5 in the first place, so he should be entitled to benefits in line with Option 2.

Perhaps unsurprisingly, the Ombudsman's Adjudicator rejected the complaint, noting that the original change from Option 2 to Option 5 was only possible because the benefits had not been put into payment when the change was requested. (Changing to Option 2 now would result in a reduction in the scheme pension in payment, which would not be permitted under the *Finance Act 2004* and would mean that all future instalments would be unauthorised payments.)

The member was not happy with the Adjudicator's conclusions, so the case was considered by the Pensions Ombudsman, who agreed with the Adjudicator's position. In particular, the Ombudsman observed that "[the member] *then confirmed his understanding of* [the scheme administrator's] *reply by sending a screenshot of the Retirement Quotation and by saying, "...if you can allow me to change to Option 5 it would be very much appreciated." On that basis I find there was no requirement for* [the scheme administrator] *to send a new benefits claim form to* [the member] *for completion before processing his revised instruction. The issue here is not with the completion of the benefits claim form but rather that pension legislation does not allow benefits that are already in payment to be changed. As* [the member] *had not been paid any benefits at the time he requested a change from Option 2 to Option 5, the change was permissible. I find that the Trustee has correctly concluded that* [the member] *cannot now reverse his decision to claim Option 5, because his benefits have been in payment since 2015."*

Key Messages

We doubt that many would disagree with the Ombudsman's conclusions here – members cannot change their retirement decisions five years after the event. The scheme, in accommodating the member's original request to change from Option 2 to Option 5 was trying to be as accommodating as possible. It seems unlikely that they ever expected that, as a result of being helpful, they would end up having to defend their actions to the Ombudsman.

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