

Aries regularly monitors Determinations from the Pensions Ombudsman. Whilst they do not set legal precedents, they are a good indication of how pension practitioners might approach the same situation.

For this month's Aries Insight, we will review a few recent Determinations to identify any key learning points for pension providers, Trustees and administrators.

Transfers to a QROPS

In a very interesting recent Determination ([CAS-83019-G2S0](#)), the Ombudsman considered a complaint raised by Mrs N, who wished to transfer her benefits from a registered occupational pension scheme ('the scheme') to a QROPS based in Malta.

The administrator of the scheme, acting on behalf of the Trustees, notified Mrs N that, before they could consider the transfer request, it would require written confirmation from a law firm (or firms) qualified to advise on both English and Maltese law that the proposed receiving scheme met all of the necessary conditions to be a QROPS.

These legal confirmations would have to be provided at Mrs N's own expense.

Legal advice can be notoriously expensive, so it is not surprising that Mrs N was not entirely happy with this requirement.

She managed to get around the problem by firstly transferring her benefits to a UK-based SIPP and then transferring the benefits from the SIPP to a QROPS.

Mrs N did, however, raise a complaint with the Ombudsman because of the additional costs and delays arising from having to make a 'two-stage' transfer and asserting that the scheme had no basis for requiring the legal confirmations requested (so blocking her statutory right to take the transfer direct to the QROPS).

The primary question before the Ombudsman, then, was whether or not it was permissible and reasonable for the Trustees of the scheme to require the legal confirmations as a precondition for making the transfer to a QROPS.

In assessing this, the Ombudsman considered the requirements under [Section 95](#) of the *Pension Schemes Act 1993*, which details the various ways in which a member can exercise their statutory right to take a transfer.

Section 95 (2) (d) here provides that a member of a funded occupational scheme may use their cash equivalent "for subscribing to other pension arrangements which satisfy prescribed requirements".

Those prescribed requirements are contained in [Regulation 12](#) of The **Occupational Pension Schemes (Transfer Values) Regulations 1996** [[SI 1996/1847](#)] and include:

that the pension arrangement to which it is proposed to subscribe-

(a) is an overseas arrangement;

The Ombudsman concluded that:

- *"the Trustee of the scheme needed to determine that the requirements of section 95 of the Pension Schemes Act 1993 had been met;*
- *if the intended receiving scheme was an overseas arrangement, the Trustee needed to be satisfied, as a minimum, that it was a QROPS within the meaning of [Section 169 \(2\)](#) of the Finance Act 2004 and that all other conditions of Regulation 12 of SI 1996/1847 were met;*

- If the receiving scheme did not meet these requirements, the Trustee of the scheme was not under any legal obligation to pay the transfer to it and indeed paying the CETV to such a scheme might not discharge its obligation to provide benefits under the Scheme."

As a result, the Ombudsman considered that it was necessary for the Trustee of the scheme to be reasonably certain that the receiving scheme was a QROPS.

The Ombudsman also observed that determining whether a scheme is a QROPS is not straightforward as a transferring scheme would need to consider:

- the status of the QROPS;
- the country of its establishment and, if this was in fact Malta;
- the status of the scheme in Malta; and
- the income tax and pension tax relief rules applicable in Malta.

In the Ombudsman's view, these are not reasonably matters which are within the expertise or responsibility of the Trustee or administrator of the scheme but are matters on which they were required to satisfy themselves as a condition of paying Mrs N's CETV to the QROPS.

As such, the Ombudsman concluded that it was entirely proper for the Trustee of the scheme to ask for the legal opinions as a condition of transferring to the QROPS because it could not otherwise know whether the transfer met the requirements of under Section 95 of the Pension Schemes Act 1993 and related Regulations. In other words, without the legal opinions, it would be difficult for the scheme to have a reasonable view as to whether or not it could or should pay Mrs N's CETV to the QROPS.

The Ombudsman also commented that, whilst HMRC maintains a [list](#) of schemes which have notified that they are recognised overseas pension schemes and capable of being QROPS, the list cannot be relied on as HMRC may not verify that the listed schemes do in fact meet the requirements to be recognised overseas pension schemes and may remove schemes from the list retrospectively.

As such, the Ombudsman did not uphold Mrs N's complaint.

Aries Comment

Dealing with requests to transfer to a QROPS can indeed be rather difficult.

Not only may there be a perceived increased risk of a pension scam, there is also the difficulty of establishing whether the proposed receiving scheme meets all of the conditions necessary to be a QROPS.

Whilst requesting two sets of legal confirmation might seem a little extreme (and Aries has not come across any other schemes that have required this), the Ombudsman has upheld the scheme's right to do so in this case.

It will be interesting to see whether other schemes decide to rely on this Determination and start to request similar legal confirmations before making transfers to a QROPS.

Distribution of Death Benefits

The payment of death benefits is a common source of complaints to the Ombudsman.

In another recent Determination ([CAS-77631-N7V4](#)), the Ombudsman considered a complaint raised by Mrs Y (the widow of Mr Y) concerning the way in which the scheme had exercised its discretionary powers as to how the death benefits due would be distributed.

By way of background here:

- Mr Y joined the scheme in March 2016;
- in March 2017, Mr Y updated his 'expression of wish' form to nominate his future wife (Mrs Y) to receive 50% of any death benefits that may become due;
- Mr and Mrs Y married in March 2018;
- during 2019, Mr Y updated his will to make Mrs Y the sole beneficiary of his estate in the event of his death;
- Mr Y died in September 2020, and Mrs Y notified the scheme of this in November 2020.

In January 2021, the scheme notified Mrs Y that she would be receiving 50% of the death benefits due from the scheme.

It was at this point that things rather kicked-off as, later in January the solicitor (who appears to have been acting for both Mr Y and Mrs Y) contacted the scheme to say that, shortly before his death, Mr Y has expressed (to the solicitor) a wish that Mrs Y should receive 100% of the death benefits.

The solicitor followed this up in February 2020 with a complaint on behalf of Mrs Y that the scheme did not take into account the relevant factors when settling the death benefits because Mr Y intended that Mrs Y should receive 100% of the death benefits.

In subsequent correspondence, the scheme detailed the evidence it had reviewed when considering how to distribute the death benefits, including:

- Mr Y's 'expression of wish' form;
- the beneficiary of Mr Y's will;
- information the scheme had previously obtained concerning Mr Y's family members and dependants.

The scheme also confirmed that it would be willing to review its decision if Mrs Y would provide further evidence of the financial relationship between her and Mr Y.

Although further evidence was provided as requested, the scheme responded to say that it could only consider reviewing its decision if evidence could be provided to demonstrate a change in circumstances after March 2017, (when Mr Y updated his 'expression of wish' form).

No such evidence could be provided and, in April 2021, the scheme confirmed that it had completed a review of its original decision as to the distribution of the death benefits and that the original decision remained unchanged.

Eventually, the case was brought to the Ombudsman, who dismissed the complaint.

In doing so, however, the Ombudsman made some helpful observations, including:

- *“Generally, a decision maker properly directing itself must consider all the relevant evidence and decide how much weight to apply to each piece of evidence to reach a decision that is not perverse, this can include, at times applying no weight at all to information it may receive.*
- *based on the evidence, I am satisfied that [the scheme administrator] made reasonable and sufficient enquiries for it to proceed with making a decision. Indeed, [the scheme administrator] gave Mrs Y another opportunity to submit further*

information to support her argument that she should receive the full benefit, before proceeding with its decision.

- where a decision-maker has discretion, the weight attached to the information it receives is for it to determine. Ultimately, I find that [the scheme administrator], having identified the potential beneficiaries, considered relevant factors. Furthermore, I do not find that [the scheme administrator] relied on irrelevant information, nor that its decision was perverse, meaning a decision that no other reasonable decision-maker could have reached."

Aries Comment

As we have said, the payment of death benefits is a common source of complaints to the Ombudsman.

In this particular case, it seems that the scheme administrator went 'above and beyond' in terms of allowing Mrs Y to submit further evidence to support her position and its willingness to review the decision if such evidence was provided.

The Ombudsman's comments here are a useful reminder of the principles that a decision-maker should apply - i.e. to consider all relevant evidence, not to rely on irrelevant evidence and not to reach a decision that no other reasonable decision-maker could have reached.

In doing so, however, it is for the decision-maker to decide how much weight it applies to each item of evidence considered. In this particular case, the decision-maker considered that the 'expression of wish' form should still attract significant weight and this was not an unreasonable view to take.

Recovery of Overpaid Benefits

The overpayment of benefits and subsequent attempts by schemes to recover the overpaid amounts is another common source of complaints to the Ombudsman.

In a rather lengthy Determination ([CAS-44682-N7X6](#)) - even by the Ombudsman's standards - a complaint by Mr N (no relation to the previous Mrs N, as far as we know) was considered.

This case is interesting for several reasons, which we will touch on briefly below.

Caveats

During the course of his membership of the scheme, Mr N had received numerous benefit statements and, on the approach to his retirement, benefit illustrations.

Most of these included a caveat along the lines of "THE FIGURES QUOTED IN THIS STATEMENT ARE NOT GUARANTEED". Crucially, however, Mr N was sent one set of figures shortly before his retirement that were not caveated in any way.

As the Ombudsman observed, "On the face of it, the caveats would generally be sufficient to negate a duty of care. However, the 1 October 2010 Package was uncaveated and this is the quote Mr N arguably relied on in making his decision."

The Ombudsman, however, went on to conclude that "I am not convinced that the difference between the figures quoted for his pension and PCLS were sufficiently great to make any difference to his decision to retire."

Breach of Contract

Mr N contended that his employer acted in breach of contract in not honouring the terms of a Severance Package in relation to pension, or that the exclusion amounts to an unfair contract term.

As the Ombudsman observed, however "The employer is not a party to the complaint, and any such claim is likely, in any event, to be out of time under the [Limitation Act 1980](#). In relation to a claim against the Trustee, the unfair contract terms legislation has no application to the Trustee as there is no contractual relationship between them and Mr N."

The Ombudsman's powers and procedures

In some ways here, Mr N was his own worst enemy. In response to a Preliminary Decision by the Ombudsman, the Ombudsman noted that:

- "Mr N does not accept my findings of fact in the Preliminary Decision;
- Mr N contends that the Ombudsman has not correctly understood the financial information provided;

- Mr N contends that the Ombudsman has not determined his case in accordance with established legal principles and has come up with a different conclusion from the conclusion a court would have come to if a court had been deciding the matter."

This prompted the Ombudsman to go into considerable detail as to how the Ombudsman's procedures work, including the rather barbed comment that "I would observe and it has been explained to Mr N, on more than one occasion, that the manner in which he sought to approach the investigation (seeking to require answers to his questions before responding those [sic] raised by my team) is not how the Ombudsman investigation and determination process works."

This was followed by a statement that "To the extent that the investigation process is not prescribed by the [\[Pension Schemes Act 1993\]](#) or the [\[Personal and Occupational Pension Schemes \(Pensions Ombudsman\) \(Procedure\) Rules 1995\]](#), the procedures for conducting an investigation shall be such as I consider appropriate in the circumstances of the case, and I may in particular obtain information from such persons, in such manner and make such inquiries as I see fit."

The Ombudsman went on to say that “*I, and my team, have had considerable difficulty throughout the investigative process in obtaining information on Mr N's overall financial position and on whether he potentially had a change of position defence available to him. The information supplied has often been incomplete and did not adequately address the points I was seeking to establish, to my satisfaction, to determine whether Mr N had changed his position so that it was equitable not to recoup the overpayment.*”

Recovery of overpayments and possible defenses

The Determination also considered in some detail the methods by which a scheme can attempt to recover past overpayments and the possible defenses that a member can raise against this. This provides a useful summary of the position here.

It is also worth noting that the Ombudsman observed that it “*is not a competent court for the purposes of [section 91](#) [of the Pensions Act 1995]. It follows that, until the law is changed, following the issue of a determination by the Ombudsman, the trustees will still need an order of a competent court before starting to recover them from future pension payments under any right of set-off.*”

The reference to “*until the law is changed*” here refers to the current Pension Schemes Bill, which includes (in Clause 123) a provision that will provide that a Determination by the Pensions Ombudsman will be sufficient for a scheme to recover past overpayments from future benefits.

The Ombudsman's Determination

The Ombudsman largely dismissed Mr N's case, however the Ombudsman did direct that a payment of £1,500 should be made to Mr N to compensate him for the distress and inconvenience he has sustained in calculating his benefits incorrectly and issuing him a series of inaccurate estimates of his benefits.

Aries Comment

It is rather rare to see an Ombudsman's Determination of this length and complexity.

It is equally rare to see the sort of comments about the complainant as were made in this case.

Telling the Ombudsman that he has not correctly understood the financial information provided, or that he has not determined his case in accordance with established legal principles was always unlikely to do Mr N any favours here.

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