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.

Early Retirement Factors

The application of Early Retirement Factors (ERFs) is a common feature of Defined Benefit pension provision. Such factors serve to reduce a member's pension entitlement if they retire before a specified age.

In a recent Determination, the Ombudsman considered a complaint raised by a Ms Y concerning the ERF that had been applied to her pension.

The background to the case was that Ms Y was being made redundant from her employment and a provisional termination date of 17 March 2017 was initially assumed.

Ms Y requested an early retirement quotation from the scheme, based on this retirement date and the quotation was provided on 17 March 2017 showing:

- a full pension of £33,970.44 a year, or
- a maximum pension commencement lump sum (PCLS) of £207,278.55 plus a reduced pension of £27,412.44 a year.

The quotation detailed the ERF that had been applied when calculating these benefits and also included a disclaimer to the effect that that "*This statement is based on the information currently held by the administrator of the scheme and is produced for information only. It is not proof of entitlement and confers no right to benefits.*"

During a subsequent meeting with the employer to discuss her possible redundancy, a 'Knowledge Transfer" (KT) process was discussed. This was a process under which Ms Y would be required to pass on information to a colleague who would be taking over her role, before leaving employment. A proposed termination date of 31 May 2017 was also discussed during the meeting.

On 31 May 2017, Ms Y attended a further meeting during which the employer said that Ms Y would be made redundant on 12 July 2017, after completion of her KT responsibilities.

On 12 July 2017, Ms Y left the employer through redundancy and became a deferred member of the pension scheme.

In November 2017, Ms Y received a further early retirement quotation from the scheme, this time based on a retirement date of 12 July 2017. The quotation showed the benefit options as being:

- a full pension of £33,062.44 a year, or
- a PCLS of £201,506.56 plus a residual pension of £26,552.28 per year.

Not surprisingly, Ms Y contacted the scheme to ask why there had been a reduction of almost £900 per year between the full pension quoted in March 2017 and that set out in the November 2017 quotation.

She was informed that this was a result of the scheme adopting new (less generous) ERFs from 1 July 2017.

After going through the scheme's Internal Dispute Resolution Procedures, Ms Y brought her complaint to the Ombudsman, which was initially considered by an Adjudicator.

The Adjudicator concluded that there was no requirement for the pension scheme, the employer, or the administration provider to honour the commutation factors or benefits that would have been applicable had Ms Y been made redundant on 31 May 2017.

Ms Y did not accept this finding and the case was referred to the Ombudsman, who noted that there was a particular provision within the Scheme Rules which stated that, for pension on early retirement in cases of redundancy "*the pension will be reduced by the Early Retirement Factor previously notified to the Member to take account of early payment* …".

In addition, the Scheme Rules defined the term "Early Retirement Factor" as follows:

> "*Early Retirement Factor means the factor applied to the pension entitlement of a Member who retires from the Scheme on or after his Minimum Pension Age and before his Early Retirement Age, which is notified to him on an individual basis.*"

The Ombudsman also concluded that Ms Y had ***not*** been notified of the change in the ERFs from 1 July 2017 and, as a result, the quotation issued on 17 March 2017 was the most recent notification to Ms Y of the early retirement factor for the purposes of the Scheme Rules and the definition of Early Retirement Factor.

As such, the Ombudsman directed that:

- Ms Y's pension from 12 July 2017 should be recalculated using the early retirement factor specified in the March 2017 quotation;

- the scheme administrator shall pay to Ms Y a lump sum of arrears on her pension instalments from 12 July 2017 to the date of the payment, including Interest on that lump sum calculated at the base rate for the time being quoted by the Bank of England;

- The employer shall pay an additional £2,000 to Ms Y in recognition of the serious distress and inconvenience she has suffered.

Aries Comment

It is generally considered that there is no legal requirement to notify members of the ERFs applicable under a pension scheme, or to notify the members if those factors are changed.

The **Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013** [SI 2013 / 2734] do require schemes to provide new and prospective members with certain 'basic scheme information' and to notify members if there is any change to that basic scheme information', however this information does not extend to providing the actual ERFs that the scheme uses.

In this particular case, however, the Scheme Rules themselves provided that the appropriate ERF must be one that has been notified to the member.

As the scheme had not notified Ms Y of the changes to the ERFs from 1 July 2017, it follows that the factor notified in the March 2017 quotation must still stand.

Whilst the requirement to notify members of the appropriate ERF may be unusual, this case may not be unique and it serves as an important reminder of the importance of understanding and complying with the Scheme Rules when determining a member's benefit entitlement.

Transfer Value Calculations

Our next case concerns a Determination relating to the case of a Mr E.

Mr E is a deferred member of a defined benefit occupational pension scheme and, in June 2021, received a Cash Equivalent Transfer Value (CETV) statement showing a transfer value of £352,296.

In May 2022, he received a further CETV statement, this time showing a transfer value of £315,704.

Mr E queried how the 2022 CETV had been calculated and why the CETV had reduced compared with the 2021 figure.

The scheme administrator explained to Mr E that CETVs can decrease as well as increase and that the figures quoted were based on his deferred benefits within the scheme.

Not satisfied with this, Mr E requested a detailed breakdown of the calculations so that he could understand the difference in the two figures.

The scheme administrator duly provided Mr E with an explanation from the Scheme Actuary as to the difference in the two values.

Still unsatisfied, Mr E raised a complaint under the scheme's Internal Dispute Resolution Procedures on the basis that he had clearly detailed the information that he wanted and that this information had not been provided to him.

The scheme rejected Mr E's complaint, but did explain that:

- the calculation of a CETV required the Trustees to place a capital value on the member's benefits;

- a CETV must be the Trustees' best estimate, at the time of calculation, of how much money would be needed to provide the member's expected benefits under the scheme;

- this is a very complex assessment and requires the Trustees to make a number of assumptions, including about future rates of inflation and for how long the pension was expected to be payable;

- these assumptions changed continuously, based on the financial conditions when the calculation is made;

- a CETV is guaranteed for a period of three months, however after that period the Trustees can re-calculate the figure to take account of any changes in financial conditions.

In addition, the scheme explained that there is no simple formula for calculating a CETV but that it had hoped that the Scheme Actuary's explanation provided previously would have helped him to understand the calculations and why his two CETVs showed materially different amounts.

The scheme also explained that, under the Scheme Rules, the Trustees do not have the power to calculate a CETV on any basis other than that required by legislation (meaning in line with **The Occupational Pension Schemes (Transfer Values) Regulations 1996** [SI 1996 / 1847] – the "transfer value Regulations").

Mr E then raised his complaint with the Ombudsman, who ultimately concluded that:

- the transfer value Regulations prescribe what information the Trustees must provide in response to a CETV request. This does ***not*** include detailed calculations of how the CETV is arrived at;

- despite the fact that the information provided by the Scheme Actuary was not in the format that the member had requested, the Actuary and the Trustees had provided detailed explanations as to how CETVs are calculated;

- the fact that MR E did not accept the Actuary's and the Trustees explanations does ***not*** mean that any maladministration had occurred.

As such, the Ombudsman rejected Mr E's complaint.

Aries Comment

Members are understandably less than happy when their CETV is reduced. This case is, however, a useful demonstration that, whilst a member may wish to receive certain information (in this case, a detailed breakdown of how the CETVs were calculated), they are not always entitled to such information.

In our view, in this case, the Trustees and the Scheme Actuary did all that was reasonably possible to explain to the member how CETVs are arrived at, going well above and beyond the requirements under the transfer value Regulations.

Service Level Agreements

This Determination also concerned a member's request for a CETV statement.

The background to the case is that, on 19 August 2021, the member - a Dr H - received a CETV quotation from the scheme administrator.

The administrator also issued a letter to Dr H where he was informed that he would be required to pay a fee if he made an additional request for a CETV quotation within 12 months of having received a quotation previously.

On 2 February 2022, (so, within the 12 month period) Dr H requested a second CETV quotation from the scheme administrator.

On 16 February 2022, the administrator sent a request to Dr H for additional personal information as his initial request of 2 February 2022 did not provide sufficient personal information to properly identify him. Dr H provided the requested information on the same day.

On 2 March 2022, the administrator informed Dr H that it required a payment for a second CETV quotation, as he had previously been issued a CETV quotation within 12 months of his request. Dr H made the requested payment for the second CETV quotation on the same day.

On 24 March 2022, the administrator issued a non-statutory CETV quotation to Dr H.

The member then raised a formal complaint with the administrator as he was unhappy with the time taken to produce the CETV quotation.

The Administrator rejected this complaint, on the basis that it had not caused an unreasonable delay, as the CETV quotation was issued within three weeks of the date that the fee for the CETV was paid by Dr H.

After going through the scheme's Internal Dispute Resolution Procedures, Dr H raised his complaint with the Ombudsman. Part of his submission here was that the scheme had failed to respond within the expected Service Level Agreement (SLA)timeframes of five working days on two occasions.

In a further submission he contended that he considers that the SLA between the Trustee and the Administrator is a contract and thus it is subject to contract law.

In considering the complaint, the Ombudsman concluded that:

- he did not find that the administrator caused unreasonable delays in providing Dr H with a CETV quotation;

- the administrator issued the CETV quotation to Dr H in accordance with the Trustees' expected timeframe of three weeks, and also well within the three-month statutory timeframe that would have been expected for statutory CETV requests;

- as Dr H was not entitled to a statutory CETV quotation in this instance, as it was his second request within a 12-month period, the statutory timeframe did not, in any event, apply.

In addition, on reviewing the SLA, the Ombudsman observed that:

- it is an agreement between the scheme, the Scheme's Actuary and the scheme administrator;

- the SLA says that the performance targets quoted in the agreement are "*Our envisaged turnaround times and service* *levels for the specified administration functions* ...". As such, the timescales are not legally binding and missing them by a short amount of time does not, in the Ombudsman's view, automatically amount to maladministration;

- the agreement states that none of the terms of the service agreement (which includes the SLA) shall be enforceable by any person who is not a party to it. The Ombudsman therefore found that this wording prevents Dr H from successfully arguing that he has a contractual right to enforce the provisions of the agreement.

As such, the Ombudsman rejected Dr H's complaint.

Aries Comment

This case is a valuable demonstration of the scope of SLAs and the extent to which they may be enforceable by members.

Whilst each case must be considered on its own merits, in this instance:

- as the SLAs here were described as being "*targets*" and "*envisaged turnaround times*", they are not legally enforceable; and

- as the agreement itself states that anybody who is not a party to that agreement cannot enforce it,

the member's assertion that a failure to meet the SLA should be viewed as being a breach of contract seemed destined to fail.

Schemes and providers may, however, wish to review the wording of any SLAs they have adopted, to ensure that they expressly preclude scheme members from attempting to enforce them.

Pension Sharing under Scottish Law

Our final case concerns a Pension Sharing Agreement between the parties to a divorce under Scottish Law.

Before looking at the Determination itself, it will be helpful here for us to explain that, under Scottish Law, pension sharing can be achieved not only by way of a Court Order, but also by way of a mutual agreement between the parties: see Section 28 (1) (f) of the *Welfare Reform and Pensions Act 1999* ('the Act').

Importantly, however, Section 28 of the Act goes on to provide that:

"*For the purposes of this section, an order or provision falling within subsection (1)(e), (f) or (g) shall be deemed never to have taken effect if the person responsible for the arrangement to which the order or provision relates does not receive before the end of the period of 2 months beginning with the relevant date -*

(a) copies of the relevant documents, and

(b) such information relating to the transferor and transferee as the Secretary of State may prescribe by regulations under section 34(1)(b)(ii)."

(The reference to Section 34(1)(b)(ii) here is, in effect a reference to Regulation 5 of **The Pensions on Divorce etc. (Provision of Information) Regulations 2000** [SI 2000 / 1048]).

For the purpose of this case, the relevant date is the date of the extract of the decree of divorce.

Finally, Section 28 (10) of the Act goes on to provide that:

"*The Court of Session or the sheriff may, on the application of any person having an interest, make an order -*

(a) extending the period of 2 months referred to in subsection (7), and

(b) if that period has already expired, providing that, if the person responsible for the arrangement receives the documents and information concerned before the end of the period specified in

the order, subsection (7) is to be treated as never having applied."

With this background, we can now consider the case in question.

On 7 February 2011, as part of their terms of separation, Ms Y and her ex-spouse, Mr Z, registered a negotiated settlement in the form of a Minute of Agreement (a mutual agreement) in the Books of Council and Session in Scotland. Attached to this agreement was a schedule for pension sharing for the full transfer of Mr Z's pension benefits in the Scheme in favour of Ms Y.

It appears that this is where things stood until March 2016 when Ms Y's new solicitor contacted the pension provider to notify them that a Minute of Agreement, including a provision for a pension sharing, had been entered into.

On 30 March 2016, the pension provider wrote to Ms Y and said that it had received a copy of a pension sharing agreement from the solicitors. It attached a notice which set out what further information it required to implement the pension sharing agreement, including:

- a copy of the Decree Absolute;

- details of the pension scheme Ms Y had nominated to receive the pension credit; and

- payment of the charges for implementing the agreement.

Ms Y's divorce was finalised on 8 December 2017 and a decree of divorce was issued by the Sherrif Court. The date of the extract of the decree of divorce was 2 January 2018.

On 4 April 2019, Ms Y contacted the pension provider, to discuss where to transfer her pension credit. The pension provider asserts that this was when Ms Y first shared the decree of divorce.

Some protracted correspondence followed until 6 May 2021, when Ms Y contacted the pension provider to confirm that she was ready to transfer the value of her pension credit.

At this point the pension provider referred the case to its Technical Team or advice on implementation.

The Technical Team then identified that, as the case involved a mutual agreement under Scottish Law, Ms Y was required to provide all the information it required to implement the pension sharing agreement within two months of the date of the extract of the decree of divorce (that date being 2 January 2018).

Ms Y made a successful application to the Court for an extension to the two month time limit, at a cost of approximately £3,500, and the pension provider implemented the pension sharing agreement.

Ms Y raised a compliant with the pension provider to the effect that the provider should have advised her that, as the pension sharing agreement was made under Scottish Law, she had to provide the required documents within two months of the decree being extracted, otherwise the agreement could not be implemented.

Ultimately, this complaint was referred to the Ombudsman, who concluded that:

- the pension provider owed a duty to Ms Y to activate the pension sharing provision under the mutual agreement on receipt of all the relevant information; but

- the provider was not under any duty to notify her that she had to provide copies of all relevant documents within two months of the date of the extract of the decree of divorce. This was the responsibility of her solicitors and, as such, the Ombudsman could not attribute the additional Court costs incurred in applying for an extension to the pension provider.

In addition, however, the Ombudsman concluded that there had been a number of failures on the part of the pension provider (including the use of template letters designed for pension sharing under English and Welsh law), which amounted to maladministration.

As such the Ombudsman directed the pension provider to pay Ms Y £500 for her distress and inconvenience.

Aries Comment
This case is helpful in confirming the scope of a pension scheme's responsibility in terms of explaining the provisions of legislation to the parties to a divorce, which may be very welcome, especially where the additional complications of Scottish Law are involved.

Schemes and providers may, however, wish to review their pension sharing processes to ensure that these do reflect those additional complications and support the possibility of cases falling under Scottish Law.

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