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.

A delicate matter of construction

The interpretation (or 'construction') of Scheme Rules can be a complicated matter.

In a recent Determination, the Ombudsman was asked to establish whether a particular scheme's Rules should be read in the context of the relevant legislation as it stood when the Rules were drafted or, alternatively, in light of any subsequent changes to that legislation.

In the case in question, the member (Mrs S) was entitled to a 'State Scheme Supplement' (what we might call a bridging pension) which is, under the Rules, payable until 'State pension age'.

The Rules went on to define the term 'State pension age' by reference to Paragraph 1 of Schedule 4 of the Pensions Act 1995.

At the time that the Rules were executed (in February 2001), the Pensions Act 1995 provided that "A woman born after 5th April 1955 attains *[State]* pensionable age when she attains the age of 65."

Since February 2001, however, amendments have been made to Schedule 4 of the Pensions Act 1995. At the point that Mrs S retired (October 2018), Schedule 4 provided that "A person born after 5 October 1954 but before 6 April 1960 attains *[State]* pensionable age when the person attains the age of 66."

The central issue, then, is what age should be used for 'State pension age' in this case?

In essence, the Trustee's position was that the Scheme Rules could not be interpreted as allowing for new legislation to amend the provision, otherwise such a change could automatically alter benefits in the Scheme in a way that was beyond its control.

As such, the Trustee contended that the reference to 'State pension age' in the Scheme Rules should be taken to be the age specified in Schedule 4 of the Pensions Act 1995 at either:

- the date on which the Rules were signed, or

- the date on which the member ceased pensionable service under the scheme.

(For Mrs S, the result of either of these approaches would be the same, with 'State pension age' being age 65.)

Perhaps unsurprisingly, Mrs S did not agree and contended that her 'State pension age' must be the date on which she is eligible to receive her State pension, so age 66.

The Adjudicator within the Ombudsman's office had to consider whether the Scheme Rules should be interpreted as being:

- 'static' – meaning that they should be read in accordance with the legislation as it stood when the Rules were executed (the Trustee's contention), or

- 'dynamic' – meaning that the Rules should be read in the context of the legislation, as amended, at any particular point in time (the member's position).

The Adjudicator concluded that there was no provision within the Scheme Rules that served to restrict the definition of 'State pension age' to just the applicable age at any particular point in time.

Instead, the reference to 'State pension age' in the Scheme Rules should be considered to mean the age at which the member becomes eligible to receive their State pension, even though the subsequent legislative changes may not have been foreseen by the Trustee.

The Trustee did not accept the Adjudicator's findings, so the case was passed to the Ombudsman for consideration.

In a detailed analysis of the merits of the 'static' or 'dynamic' arguments, the Ombudsman finally agreed with the Adjudicator that, in the absence of any contradictory 'interpretation provisions' within the Scheme Rules, the 'dynamic' construction is to be preferred.

As such, the Ombudsman ordered the scheme to:

- reinstate Mrs S's 'State Scheme Supplement' until she reaches age 66;

- make good any 'State Scheme Supplement' payments that should have been made after the member reached age 65 (with interest);

- If necessary, make up any additional income tax liability that the member may incur as a result of the back-payments made under the point above; and

- pay Mrs S £1,500 for distress and inconvenience.

Aries Comment

As we said above, the interpretation of Scheme Rules can be a delicate matter.

Even with the best will in the world, those who draft Scheme Rules cannot always foresee how legislation will change in the future.

In some instances, including a cross-reference to legislation within the Scheme Rules can be helpful (particularly where the legislation is not overriding), as there is no need to consider amending the Rules each time the legislation changes.

In other instances, however, such a cross-reference can leave the Scheme being a hostage to fortune, as occurred in this case. Even though the original drafter did not foresee the subsequent changes to the Pensions Act 1995, the scheme is bound by those changes.

This Determination is helpful in that the Ombudsman has concluded that, in the absence of any contradictory 'interpretation provisions' within the Scheme Rules, the 'dynamic' construction is to be preferred.

An unreasonable delay?

The time taken to process a member's instructions, particularly concerning transfers out, is a common source of complaints to the Ombudsman.

In this Determination, the member (Mr Y) asserted that the scheme had failed to action his transfer request within a reasonable timescale and that he had suffered a financial loss as a result.

As a brief timeline of events:

- the member received a CETV for his defined contribution (DC) benefits in January 2022, showing a non-guaranteed CETV of £67,475 and, on 24 January 2022, authorised his IFA to arrange the pension transfer;

- on 7 March 2022, the scheme received the relevant paperwork to transfer the member's pension;

- on 8 March 2022, the scheme notified the member that he would be required to go through a 'pension scam check' with a third party contracted by the scheme provider to operate this service;

- although this 'pension scam check' was completed on 14 March 2022, it was not until 5 April 2022 that the scheme received the completed pension scam report from the third party;

- the scheme began the disinvestment process for the member's funds on 6 April 2022. On 14 April 2022, the scheme wrote to the member to confirm the amount that was due to be transferred (£65,140);

- the transfer was completed on 20 April 2022.

The member's complaint centered on the following issues:

- the transfer process was complicated due to delays and poor communications;

- he had transferred other pensions in 2021, which took around 10 days to complete, however in this case it took around 80 days;

- his pension was previously valued at £67,475, however only £65,140 was transferred, so he had suffered a financial loss.

The scheme had already acknowledged that there had been a delay in the scheme receiving the completed pension scam report and had offered the member £500 in recognition of this.

When considering this complaint, the Ombudsman took account of the fact that the scheme provider had set Service Level Agreements (SLAs) in place, specifying the period within which certain processes should be completed.

As the Ombudsman observed, any such SLAs form the basis of how a pension administration function approaches its work on a daily basis.

In this case, the SLA specified that the member's transfer should be completed within 40 working days of the relevant paperwork being received on 7 March 2022.

Whilst the member considered that the transfer should have been completed within 10 days, based on previous transfers, the Ombudsman concluded that the transfer in this case was indeed completed within 40 days (so, within the SLA), which the Ombudsman did not consider to be unreasonable.

The Ombudsman also commented that:
"The timescales set by the Trustee and the Administrator are targets and the intention is for the Administrator to aim to perform certain agreed actions within a given timeframe. Even if Mr Y was informed of a different timescale than the 40 working days, the timescales are not legally binding and missing them by a short amount of time does not automatically constitute maladministration. In Mr Y's case, the transfer was completed within the given SLA."

With regard to the fall in the value of the member's fund, the Ombudsman also concluded that the member was invested in a DC pension scheme and the value of the pension can, therefore, go up and down depending on market conditions. At the time of the transfer, the value of the pension was £65,140, so the amount transferred was correct.

As such, the Ombudsman rejected the member's complaint.

Aries Comment

Perhaps the most interesting aspect of this Determination is the weight that the Ombudsman put on the scheme's SLAs.

SLAs have become increasingly common in pensions administration across recent years and schemes might be able to take some comfort from the fact that the Ombudsman was happy to take any such SLAs into account when considering whether any delay was reasonable or not.

It is also interesting to note that the Ombudsman also concluded that, even where a SLA is not met by a short amount of time, this does not automatically constitute maladministration.

Negligent misstatements and 'estimates' or 'illustrations'

In a very interesting(although quite lengthy) Determination, the Ombudsman considered the position where a member has been given incorrect information by a pension scheme and the circumstances in which this might be considered to be a negligent misstatement.

A brief history of the case is as follows:

-in April 2014, the member received a benefit statement from the scheme showing the *estimated* benefits that might be available to him at age 65 as being:

- a full pension of £7,048 a year, or
- a reduced pension of £4,995 a year and a lump sum (PCLS) of £31,272;

- in November 2018, the member received a further benefit statement from the scheme showing the *estimated* benefits that might be available to him at age 65 as being:

- a full pension of £6,971 a year, or
- a reduced pension of £5,047 a year and a lump sum (PCLS) of 33,646;

- in March 2020, the member received a benefit *illustration* from the scheme, estimating his benefits in the Scheme, accounting for actuarial factors, if he retired at 65. There were:

- a full pension of £6,991 a year, or
- a reduced pension of £5,057 a year and a lump sum (PCLS) of 33,719.

These figures were stated as being based on the scheme's current actuarial factors, the current statutory revaluation Order and an estimated future inflation rate of 0%.

- in April 2020, the Trustee contacted the member to confirm that there had been an error in the calculation of his pension options and that the maximum lump sum available to him was actually £18,851.

Perhaps unsurprisingly, the member raised a complaint, asserting that:

- he had been given incorrect information relating to his lump sum;
- as far back as 2014, he had been advised that his lump sum would be over £30,000;
- on the basis of this, he had made irreversible lifestyle decisions (notably, closing his accountancy practice in 2019 and letting his professional accreditations lapse);
- given his age and the irreversible decisions that he had made, he had no way to make up the lost funds.

The scheme rejected the member's complaints and the case was raised with an Adjudicator within the Ombudsman's office.

The Adjudicator considered several features of the case, including an analysis of when a negligent misstatement may arise. He commented that:

- there was no doubt that the scheme had provided the member with incorrect information, which constituted maladministration and that the member had been disadvantaged as a result;
- a complaint of negligent misstatement must be based upon an inaccurate statement, usually called a 'representation'. The representation must have been a statement of past or present fact or, in some circumstances, of the law. It must also have been clear and unequivocal;
- the representation must have been made by a person who owed a duty of care to the individual and must have been something that could not have been made by someone exercising reasonable care. The representation must have been relied upon by the individual and it must have been reasonable for them to do so, in the circumstances;
- the individual must also be in a worse position than they would have been in if the representation had not been made and the cause of the individual's worse position must be the representation. The loss caused by the representation must have been reasonably foreseeable;
- where a negligent misstatement has been made, financial compensation may be payable for the loss suffered by the individual.

In assessing whether (and, of so, when) any negligent misstatement may have been made, the Adjudicator concluded that:

- there had been a clear representation or promise of the benefits due to the member in March 2020 when the Trustee provided the member with an illustration taking account of actuarial factors;
- pension illustrations or quotations are very different from pension estimates. Pension estimates (such as benefit statements) are usually automatically generated and may reflect the scheme's then current actuarial factors and, possibly, a projection of future statutory revaluation. Such illustrations, then, would not be considered safe to rely on when making financial decisions;
- pension illustrations (which are likely to be produced shortly before a member's actual retirement) may not be automatically generated and are, therefore, accompanied by an expectation of greater reliability. The information within the illustration should reasonably have been considered to be fact;
- the representations in the benefit illustration were made by people who owed a relevant duty of care to the member and that the information supplied had come within the extent of their duties towards the member.

The Adjudicator went on to consider whether a claim for negligent misstatement might be successful in this case. He concluded that, for a claim of negligent misstatement to be successful, the member must have reasonably relied on the misstatement and the claimed loss must have been as a direct result of the misstatement.

In this case, the Adjudicator found that there had been a negligent misstatement, and that the member had experienced a loss of expectation as a result.

However, the negligent misstatement occurred in March 2020, when the member was provided with a benefit illustration and not at any point before that. This was because each statement received prior to March 2020, was an estimate and it was not considered reasonable for the member to rely solely on the information contained within them.

The dates here are significant, as the Adjudicator went on to conclude that the member made the decision to begin closing his accountancy practice in 2019, following the pension estimate he had received in November 2018.

The negligent misstatement occurred in March 2020, but the financial decision made by the member predated that event. So, the negligent misstatement was not the direct cause of the alleged financial loss.

There was no doubt that maladministration had occurred, causing the member distress and inconvenience. In the Adjudicator's view, an award of £1,000 would be in keeping with The Pensions Ombudsman's guidance on non-financial injustice.

The member did not accept the Adjudicator's view, so the case was referred to the Ombudsman who, after considering further representations by the member, agreed with the Adjudicator's assessment.

Aries Comment

This is another helpful Determination, in that it brings out the significant difference between a 'pension estimate' and a 'pension illustration'

As a starting point, 'estimates' should not be relied on, however 'illustrations' are accompanied by an expectation of greater reliability and the information within an illustration can reasonably be considered to be fact.

The Determination also helpfully outlines the grounds on which a successful claim for negligent misstatement can be made and the interaction with any duty of care to the member.

It appears that the member's claim in this case failed because he had decided to close his accountancy business in 2019 – before the actual negligent misstatement was made in March 2020. As such, it could not have been the negligent misstatement itself that caused the member any financial loss.

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