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 and due diligence

The issue of pension transfers to 'dubious' receiving schemes and the associated due diligence requirements on the Trustees or managers of a transferring scheme are a regular source of complaints to the Ombudsman.

In a recent Determination, the Ombudsman considered a complaint raised by a Mr N, who had transferred his benefits (of around £165,000) from 'Scheme A' to 'Scheme B' in July 2013.

Unfortunately, in 2016 Scheme B apparently 'entered liquidation' and Mr N complained to the Ombudsman that the Trustees of Scheme A had not carried out sufficient due diligence before making the transfer.

Whilst such cases are, sadly, all too common, there are a few interesting points that arise from this particular Determination.

Firstly, the Ombudsman confirmed his previous view that such cases cannot be considered with the benefit of hindsight, but must instead be viewed in line with the circumstances at the time of the transfer.

It is worth noting that this transfer took place in July 2013. This is relevant because the Pension Regulator's 'Scorpion' leaflet (the first incarnation of their anti-scams warning material) was published in February 2013.

Whilst the transfer took place several months after the publication of this leaflet, by which time all transferring schemes should have been providing the leaflet to all members requesting a transfer, there is no clear evidence that the transferring scheme here did, in fact, provide the leaflet to Mr N (this was one part of Mr N's complaint).

It emerged during the earlier Internal Dispute Resolution Procedure (IDRP) under Scheme A that, before the transfer was completed, Mr H had, in fact, received a copy of the Scorpion leaflet from another provider.

On this point, the Ombudsman observed that:

> *"However, it is accepted that the Scorpion Leaflet was issued to Mr N by the other provider, and given the timing of that being issued, on 10 July 2013 … I consider Mr N would have had access to the Scorpion leaflet at the relevant time. The Scorpion leaflet did contain risk warnings which were relevant to the transfer, including: overseas investment and high investment returns. These are factors which Mr N may have recognised as being relevant to his proposed transfer and might have prompted him to reconsider."*

Another limb of Mr N's complaint was that Scheme B was newly registered with HMRC and that this should have acted as a warning sign for the Trustees of Scheme A.

Here, although the evidence is again not entirely clear, it appears that Scheme A did initially refuse Mr N's transfer request – a decision that Mr N then queried with Scheme A.

On this point, the Ombudsman's view was that:

> *"The risk factor that* [Scheme A] *ought to have been aware of was that* [Scheme B] *was newly established. Given the Trustee's*

initial refusal of the transfer, as Mr N describes, it seems likely that [Scheme A] *had taken steps to consider the transfer in detail.*"

The Ombudsman also made the following comment:

"… *at the time* [of the transfer]*, Mr N was over 55 years old and therefore not at risk of receiving an unauthorised payment from* [Scheme B]. *This is significant because the 2013 Scorpion Leaflet's primary focus was to counter a growing number of individuals seeking pension benefits prior to age 55. Therefore, it is justifiable that the Trustee would consider this a lower risk transfer despite the new establishment of* [Scheme B]."

On these grounds, and others, the Ombudsman rejected Mr N's complaint.

Aries Comment

This case demonstrates the Ombudsman's continuing view that issues relating to transfers must be considered in light of the circumstances prevailing at the time, not in light of any subsequent developments in 'best practice'.

It is, perhaps, a little surprising that the Ombudsman took into account the fact that another provider had given Mr N a copy of the Scorpion leaflet, such that Mr N was aware of the content of the leaflet even though there is no evidence to confirm that Scheme A provided him with a copy. It is also, perhaps, fortuitous that this fact emerged during the IDRP process.

It is also interesting to reflect on the fact that, back in 2013, the emphasis was more on preventing 'pensions liberation' (obtaining money from a pension scheme before age 55), rather than on the issue of 'pension scams' in the wider sense.

Errors and an unwillingness to engage

Another rather interesting recent Determination (also involving a complaint by a Mr N, although we assume that this is a different Mr N) concerned a member of a Small Self-Administered Scheme.

The Trustees of the scheme were all of the members (the 'Member Trustees'), plus an independent Trustee (Company R).

Under the Scheme Rules, "*Decisions at Trustee meetings…must be unanimous. If the Trustees cannot reach a unanimous decision on any matter…the matter shall be referred to an expert unanimously appointed by the Trustees whose determination shall be binding on the Trustees. The costs of any such expert shall be an expense of the Scheme.*"

In July 2017, Mr N transferred his benefits from the scheme to another provider. The transfer value (calculated by Company R) was £579,399.

In 2018, Mr N queried the amount of the transfer payment and in March 2019 Company R agreed that the transfer value had been undercalculated by £24,839.

Company R then attempted to arrange a Trustee Meeting so that the Member Trustees could give their authority for the additional transfer payment to be made.

There was further correspondence between Company R, Mr N and the Member Trustees, although in essence the Member Trustees were taking the view that, as the error in the original calculation was made by Company R, then Company R should make good the underpayment in respect of Mr N.

The Ombudsman's office made several attempts to engage with the Member Trustees, however no response was received from them.

When considering the complaint, the Adjudicator observed that:

- It was agreed that Company R had made an error in the calculation of the value of Mr N's share of the fund (and that it appeared

the value of the other members' share of the fund had been overvalued as a result).

- Company R had tried to take steps to correct the error but seemed to have met with resistance from the Member Trustees.

- In the Adjudicator's view, the Member Trustees were not deliberately withholding their authority to make the additional transfer payment with a view to benefitting themselves. Rather, they believed that, as Company R had made the error, Company R should make up the shortfall. Whether or not this position was reasonable, is not, however, something that the Adjudicator could consider as it was not part of Mr N's complaint. It was, instead, a matter between the Member Trustees and Company R. The Member Trustees could consider bringing a complaint against Company R.

- Mr N is entitled to a larger share of the fund than had been paid and it is the Trustees' duty to administer the scheme for the benefit of the members. On the evidence available, there is no reason for the Member Trustees to withhold their authority to make the additional payment.

Although Company R and Mr N accepted the Adjudicator's opinion, the Member Trustees did not, so the case was referred to the Ombudsman.

The Ombudsman agreed with the Adjudicator's opinion, but also observed that:

- As the Scheme Rules require that all Trustee decisions must be unanimous, Company R cannot make the additional payment without the agreement of the Member Trustees.

- Company R has tried to resolve the position, however the other Member Trustees have failed to cooperate. This is unacceptable and cannot be allowed to continue.

- The Ombudsman can see no reason for the other Member Trustees to reach a unanimous decision and has set out his Directions accordingly.

In those Directions, the Ombudsman stated that, within 28 days:

- Company R must recalculate the shortfall for Mr N and pay him £250 for the distress and inconvenience caused by their maladministration;

- The Member Trustees must pay Mr N £750 for the distress and inconvenience caused by their maladministration;

- Within a further 28 days, the Member Trustees and Company R must authorise the payment of the shortfall in Mr N's transfer value.

Aries Comment

It is an unfortunate truth that errors do sometimes occur and that, when they do, all parties involved should attempt to resolve the situation as quickly as possible.

The Member Trustees' refusal to agree to the making of the additional payment due, and their refusal to engage with the Ombudsman clearly exacerbated the difficulties faced by Nr N. (A fact that may be reflected in the differing amounts of 'distress' awards made against Company R and the Member Trustees.)

It is interesting to note the Adjudicator's comment that, even if the Member Trustees feel that as Company R had made the error, Company R should make up the shortfall, this is not relevant for Mr N's complaint. 'Pointing the finger' at another party does not absolve the Member Trustees of their duty to administer the scheme correctly and ensure that Mr N receives the correct benefits.

It is also interesting to note how the Ombudsman has managed to resolve the potential issue with the requirement for all Trustee decisions to be unanimous: he simply directed that they must authorise the additional payment required.

Seeking redress for mis-selling

This Determination concerned the mis-selling of an annuity provided by an insurer, Company L, and the member's attempts to obtain compensation for this.

In 2009, Mr S received advice from an adviser (R I Ltd) recommending that he transfer his benefits from his Armed Forces defined benefit scheme to a with-profits annuity with Company L.

Several years later, Mr S considered that he had been mis-sold the annuity, however at this stage R I Ltd was no longer trading. Mr S then brought a claim against the Financial Services Compensation Scheme (FSCS), who subsequently confirmed to Mr S that:

- He had a valid claim against R I Ltd as that company had breached its duty of care to Mr S and had provided unsuitable advice;

- Mr S's total loss was £98,077;

- The maximum compensation that the FSCS could offer the member was £50,000: this being the maximum available under the FSCS rules.

As a result, Mr S still suffered a loss of £48,077.

In June 2022, Mr S complained to Company L, seeking to recover his remaining shortfall from them.

In September 2022, Company L notified Mr S that it did not uphold his complaint on the following grounds:

- The signed paperwork that Company L had received confirmed that Mr S intended to transfer his Armed Forces Pension Scheme defined pension benefits to Company L to purchase a with-profits annuity.

- Mr S had been invited to read the policy information and, by signing the discharge form, he had agreed to be bound by the information and declaration.

- Company L had never provided any financial advice in relation to the transfer and as the product provider it had no obligation to check the suitability of the advice received. By checking whether R I Ltd was regulated at the time, Company L had discharged its obligations towards Mr S.

Mr S then brought a complaint to the Ombudsman, seeking to obtain his additional losses from Company L as he held them jointly responsible with R I Ltd.

The complaint was considered by an Adjudicator, who concluded that:

- Company L, as the receiving scheme and product provider, was under no duty to check the suitability of any advice given to Mr S.

- Ensuring that any advice given was suitable was the responsibility of R I Ltd.

- The FCA register showed that R I Ltd was authorised and regulated at the time of the transfer and Company L had no reason to be suspicious of R I Ltd or the transfer.

The Adjudicator concluded that no further action was required by Company L.

Mr S did not agree with the Adjudicator's opinion, so the case was considered by the Ombudsman, who rejected Mr S's complaint on the following grounds:

- Before accepting the transfer, Company L had checked that the firm that had provided Mr S with advice was registered with the FCA. As the firm was registered, Company L was satisfied that the advice received was from a regulated firm, and so it had no concerns or reasons not to proceed with the transfer.

- Company L, as the product provider, was not required to check the suitability of the advice given to Mr S and was simply acting on Mr S's instructions regarding the transfer, who himself was following advice from a

regulated firm. So, while the advice was thereafter found to be unsuitable, in these circumstances, Company L is not liable regarding the advice or the subsequent transfer.

- While, Mr S has indeed suffered additional losses that have not been recovered from the FSCS, Company L did not cause these losses and so cannot be found accountable for them.

Aries Comment

Again, this is an unfortunate case and it is clear the member has indeed suffered a loss as a result of poor advice.

Whilst the member was able to recover part of his losses under the FSCS, there is still a considerable shortfall.

This Determination, however, does help to clarify the extent to which a product provider may be responsible for any unrecovered loss that the member has suffered.

Although Section 48 of the *Pension Schemes Act 2015* now requires that members may need to obtain 'appropriate independent advice' before transferring defined benefits, this was not a requirement at the point of this transfer. Even if this requirement had been in place at the time, the responsibility for ensuring that such advice has been received falls on the transferring scheme, not the receiving scheme / provider.

In addition, although *The Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021* [SI 2021 / 1237] now require that even more conditions must be met before a member has a statutory right to transfer their benefits, the responsibilities here also fall on the transferring scheme rather than on the receiving scheme / provider.

Even if all of these extra conditions had been in place at the time of this transfer, it is not clear whether they would have actually prevented the transfer in this case from proceeding.

Mirror benefits following transfer

Another recently published Determination concerned a case where the benefits for a Mr H were transferred in January 1998 from one occupational scheme to another on the promise that his benefits in the receiving scheme (the New Scheme) would 'mirror' those from the transferring scheme (the Previous Scheme). The transfer was linked to an internal re-organisation at Mr H's Employer that resulted in an amalgamation of the company's benefit plans. Announcements were drafted at the time for affected scheme members to notify them of the changes being made.

For Mr H, this covered the benefits that would apply to him in the New Scheme and those that would be granted if he agreed to transfer his benefits from the Previous Scheme. He had been the sole 'special member' of the Previous Scheme as an executive member. His communication noted that the New Scheme would offer similar benefits to the Previous Scheme. It went onto say that his membership terms would mirror those under the Previous Scheme. This 'mirroring' of benefits was also confirmed to Mr H in a meeting he had with the firm acting as actuarial and benefit consultants at the time.

Mr H resigned from the Employer in June 1998. He was provided with a leaving service statement setting out his preserved benefits, which reiterated the mirroring of benefits. In 2014, he chose to take his benefits, and it is here that matters went awry over the increases applied to his pension in payment. It didn't help that he was misclassified as a New Scheme member with his status as a special member of the Previous Scheme being overlooked.

Over the next year, the Trustees of the New Scheme separately sought legal Counsel on how it should be administering the New Scheme. Although, the request to Counsel did not specifically ask for guidance about the increases Mr H was entitled to, the legal opinion provided stated that members who had transferred from the Previous Scheme to

the New Scheme did not have a right to increases under the rules of the New Scheme other than those required by statute. The Trustees decided to act on the advice from Counsel, believing the lack of documentation meant they had no power to pay the increases promised.

Following a communication to scheme members in May 2017 about the review of the scheme rules and the revaluation of pensions, Mr H made a complaint to the Trustees under stage one of the scheme's IDRP. This initial complaint was rejected and stage 2 of the IDRP restated the Trustees' position. Mr H then took his case to the Ombudsman with his complaint being made against the Employer and the Trustees of the New Scheme. His complaint related to the decision of the Employer and the Trustees to remove all future annual increases to his pension as communicated to him in May 2017. This led Mr H to contend that the increases he would receive did not match those that were promised to him in 1998.

This undoubtedly represents a complex case as evidenced by a Determination running to 69 pages. In short, the Ombudsman found:

- There had been maladministration and breach of law by the Employer in failing to properly document and maintain Mr H's contractual entitlements for almost 18 years after promising to mirror his Previous Scheme benefits.

- The Trustee was in breach of trust by failing to administer the scheme in accordance with the relevant scheme rules, including its own transfer-in provisions.

These findings led the Ombudsman to make several directions, including:

- Back payments with interest must be paid to Mr H to address historical underpayments.

- The Employer must ensure future pension increases are calculated correctly.

- The Employer must pay £1,000 compensation to Mr H for serious distress and inconvenience.

Aries Comment

You could say this case demonstrates the value of schemes properly documenting changes. In this situation, it related to benefits promised on transfer to Mr H following a scheme merger with the Ombudsman ruling that the documentation issued was clear enough to create a continuing contractual obligation. Essentially, benefits were granted to Mr H under the 'transfer in' rule, which meant he was able to enforce this right directly against the Trustees without a limitation defence.

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