

## Pensions Ombudsman Update

---

OCTOBER 2020

In this update, the Wrigleys pensions team provides a summary of recent determinations by the Pensions Ombudsman. Determinations provide a helpful insight into the approach taken by the Pensions Ombudsman to the resolution of common scheme problems and complaints.

### **Tenco Executive Pension Scheme (Mr T, August 2020)**

---

#### The Facts

Mr T held cash and stocks with Barclays Stockbrokers in a small self-administered scheme provided by the James Hay Partnership (James Hay). Following notification from Barclays Stockbrokers that it would be closing its pension trader accounts from the end of June 2016, Mr T instructed James Hay on 24 March 2016 to transfer the funds in the scheme to a Self-Invested Personal Pension.

The transfer of funds was completed on 3 October 2016, more than six months after Mr T's original request.

Mr T complained that due to James Hay's unreasonable delays in processing his transfer request, he lost the opportunity to invest in the stock markets immediately following the Brexit referendum result on 23 June 2016.

Mr T had chased James Hay several times and had pointed out the significance of the referendum and outlined his intended investment strategy. Despite this, James Hay did not commence transferring the funds until 11 July 2016 and it was not until 3 October 2016 that all funds had been transferred. By this time, the stock markets had recovered.

#### The Decision

The Pensions Ombudsman upheld the complaint and awarded £2,000 for distress and inconvenience. However, the Pensions Ombudsman refused to make an award for investment loss as the loss was not reasonably foreseeable as the specific investments planned by Mr T were not made clear. Further, it was impossible to calculate with any certainty the actual loss suffered by Mr T.

Mr T appealed to the High Court. The High Court held:

- The investment loss was reasonably foreseeable by the parties and in the reasonable contemplation of the parties.

*“When a customer asks for his pension pot to be moved from one provider to another it is obvious that it is for the purpose or the possible purpose of investment; and it is equally obvious that if there is a delay through maladministration of the transfer that the investor will or may lose the opportunity to invest over that period, and if there are spikes or perceived spikes in the market during that period that is likely or foreseeable to cause the investor loss.”*

- It was not necessary for Mr T to identify the specific shares he would have purchased, the prices of those shares nor the impact of the referendum result on those shares.
- The Pensions Ombudsman should have considered what would have happened if the funds had been transferred without negligence or maladministration.

The complaint was referred back to the Pensions Ombudsman. Adopting the approach outlined in the High Court’s decision, the Pensions Ombudsman found:

- had there been no maladministration, money would have been made available for investment on 23 June 2016, and
- on the balance of probabilities, Mr T would have invested the full amount of cash in the FTSE 100 Index immediately after the leave vote. If Mr T had invested the funds as planned, he would have made a profit of £43,700 following the recovery of the Index in August 2016.

James Hay was therefore directed to pay the £43,700 into the SIPP together with interest at 8% per annum from August 2016 to the date of payment.

### Comment

This decision highlights the importance of processing transfer requests without delay. Where delay results in the loss of investment opportunity, trustees could be required to pay significant amounts of compensation, i.e. far exceeding the nominal amounts awarded for distress and inconvenience.

The High Court’s comments suggest that trustees ought to assume that any transfer request is motivated by investment opportunities and that any delay is likely to result in loss. It will be interesting to see how the Pensions Ombudsman responds to similar complaints in the future. Will we see an increase in awards being made against trustees and providers where maladministration has led to the unreasonable delay of a transfer payment?

## **Dominator 2012 Pension Scheme, Donington MC Pension Scheme and Commando 2012 Pension Scheme (June 2020)**

---

### The Facts

The case concerned a number of complaints made by 31 members of three pension schemes whose assets were invested in a motorcycles business owned by the sole trustee of the schemes.

The members complained of various failings by the trustee including:

- the manner of investing the schemes' assets did not accord with the schemes' purpose,
- the trustee had acted under a conflict of interest,
- the trustee had breached his investment duties and had committed multiple breaches of trust,
- the trustee and the administrator had failed to provide an adequate administration process, bringing into question the accuracy of benefit statements and other information issued to members, and
- all of these failings had resulted in the loss of benefits.

### The Decision

Following an oral hearing, the Pensions Ombudsman held that the trustee had acted dishonestly, and in breach of his fiduciary duties to avoid conflicts of interest, to act with prudence and to not profit from his position as trustee.

In particular, the Pensions Ombudsman found that the trustee had breached statutory duties to have adequate controls in place to manage conflicts of interest and to ensure effective administration; he had breached his statutory duty to gain knowledge and understanding of the law around pensions and trusts; he was guilty of maladministration in respect of various matters, including his failure to manage conflicts of interest, to have regard to the schemes' Statements of Investment Principles and to follow certain of the Pensions Regulator's Codes of Practice.

The trustee was held personally liable and directed to repay the members' investment loss plus interest at 8% (at a reported cost of £14 million!). The trustee could not rely on the exoneration provisions under the schemes' trust deeds and rules or section 61 of the Trustee Act 1925 as he had failed to act in good faith, reasonably and honestly in committing those breaches of trust / acts of maladministration.

The trustee was also directed to pay £6,000 to each of the 31 complainants for distress and inconvenience, a significant award.

## Comment

This decision is a sober reminder of the significant personal liability which trustees can incur. It also offers a useful examination of the application of a scheme's exoneration provision and statutory trustee protection; all of which failed to protect the trustee from liability (in the face of his blatant breach of trusts and pensions law and disregard for regulatory codes of practice).

## **Yorkshire & Clydesdale Bank Final Salary Scheme and Bradford & Bingley Staff Pension Scheme 1991 (May 2020, PO-25899)**

---

### The Facts

Mr N was a member of the Yorkshire & Clydesdale Bank Final Salary Scheme (Clydesdale Bank Scheme) from 1975 to 1986 whilst employed by Clydesdale Bank. He moved to Bradford & Bingley in 1986 and joined their Staff Pension Scheme (Bradford & Bingley Scheme). He was subsequently employed by HSBC and HBOS.

In 2017, Mr N contacted the administrator of the Clydesdale Bank Scheme regarding his deferred pension. However, he was told that the administrator had no record of his membership of the scheme. After investigating the position of his contracted-out benefits with HMRC, it was concluded that Mr N had most likely transferred his benefits to the Bradford & Bingley Scheme.

Mr N contacted the Bradford & Bingley Scheme and was told that the scheme had no record of a transfer in. Consequently, his deferred pension benefits accrued under the Clydesdale Bank Scheme had not been included in the subsequent transfer of benefits from the Bradford & Bingley Scheme to the HSBC pension scheme.

### The Decision

It was the opinion of the Deputy Pensions Ombudsman that Mr N's deferred pension rights in the Clydesdale Bank Scheme were, on the balance of probabilities, transferred to the Bradford & Bingley Scheme. Accordingly, the trustees of the Bradford & Bingley Scheme were directed to reconstruct the transfer of Mr N's pension rights from the Clydesdale Bank Scheme and calculate the deferred pension available to Mr N in the Bradford & Bingley Scheme.

In reaching this decision, the Deputy Pensions Ombudsman undertook its own investigations with HMRC. These indicated that the contracted-out liabilities accrued by Mr N under the Clydesdale Bank Scheme were transferred to the Bradford & Bingley Scheme and subsequently to two other pension schemes. The transfer of contracted-out liabilities could only have happened if Mr N's deferred benefits in the Clydesdale Bank Scheme (including non contracted-out benefits) had initially transferred to the Bradford & Bingley Scheme.

The trustees' failure to allow for Mr N's transferred in benefits from the Clydesdale Bank Scheme when calculating the subsequent transfer payment from the Bradford & Bingley Scheme to the HSBC scheme constituted maladministration.

## Comment

The decision demonstrates the willingness of the Pensions Ombudsman's office to make enquiries and carry out its own detailed investigations. In this case, the Deputy Pensions Ombudsman was able to obtain HMRC records to answer the question of whether Mr N's benefits were transferred to the Bradford & Bingley Scheme even though his records were not provided or indeed retained by the Clydesdale Bank Scheme.

## **New Airways Pension Scheme (June 2020, PO-28262)**

---

### The Facts

The Pensions Ombudsman upheld the member's complaint. Mr S was employed as a pilot by British Airways plc (BA) and was a member of the New Airways Pension Scheme (Scheme). Since April 2016, Mr S was unable to fly due to ill health.

In order to qualify for an ill health pension under the Scheme, a member must have a recognised medical condition and be unlikely to recover from that condition in the foreseeable future. In July 2017, on the advice of a British Airways Health Services (BAHS) doctor, BA decided that it would terminate Mr S's employment on the grounds of medical incapacity as Mr S was not expected to recover. Another doctor, Dr Arkell (Mr S' own psychiatrist), agreed with this determination.

On 4 August 2017, BA authorised the Scheme administrators to pay Mr S an ill-health retirement pension. Later that month, Mr S attended another appointment with a different BAHS doctor, Dr Caddis. Dr Caddis concluded that Mr S did not meet the criteria for ill-health retirement as there had been a general improvement in his condition meaning he would likely recover within a period of two years.

BA informed the administrators that authorisation to pay the ill-health retirement pension had been issued in error and Mr S' pension payments were stopped from 1 November 2017.

### The Decision

The Pensions Ombudsman upheld the member's complaint. Given that Dr Caddis' opinion differed significantly from opinions expressed by the other doctors, the Pension Ombudsman would have expected Dr Caddis to provide a clear explanation as to why his opinion differed. This was particularly concerning since Dr Arkell was a specialist in Mr S' condition.

The Pension Ombudsman labelled the reports prepared by Dr Caddis as "confusing and contradictory". By proceeding to a final decision without asking for further clarification from Dr Caddis, BAHS had failed to act in a proper manner amounting to maladministration.

BAHS was directed to obtain further evidence from Dr Arkell and to reconsider Mr S' application for ill-health retirement. In addition, BAHS was directed to pay Mr S £500 for non-financial injustice arising out of its failure to reach a decision in his case in a proper manner.



## Comment

It is common for the Pensions Ombudsman to hear complaints relating to ill-health retirement. Both trustees and employers must be careful to follow the process set out in the scheme rules, and following this decision, medical advisors should be asked to explain any significant difference in their opinions.

*‘Wrigleys Solicitors LLP’s pensions advice is second to none. It has a team of highly competent technically able individuals who are approachable and personable.’*

*The Legal 500 (2020)*

*“They are a very clear and practical firm.”*

*Chambers and Partners (2020)*

If you would like to contact us please email  
[kate.buckham@wrigleys.co.uk](mailto:kate.buckham@wrigleys.co.uk)

[www.wrigleys.co.uk](http://www.wrigleys.co.uk)

