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Pensions in dispute

Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent court rulings and Pensions Ombudsman determinations which have practical implications for schemes generally. If you are reading this in hard copy and would like more information, or to receive future issues by email, please contact pensions.team@allenovery.com.

A high price for poor communications

The Pensions Ombudsman frequently has to consider complaints about communications with members, such as incorrect benefit statements which members may have relied on in making redundancy or retirement choices. Recent decisions have featured wider communications issues, with substantial compensation being awarded in some instances for, in some cases, easily avoidable errors.

Explaining retirement processes – are your explanations clear enough? Morgan

A DC scheme member complained that, despite having agreed an early retirement date of 31 March 2010 with his employer and having contacted the scheme in good time, his annuity purchase did not take place until 4 June.

The Ombudsman found that, for acceptable reasons, the employer's standard payroll processes did not allow official notification of the member's retirement to be sent to the administrator until mid-April. This was processed at the end of April, with disinvestment in mid-May and the annuity purchase on 4 June. He commented that where an annuity is purchased on the open market, an element of delay may be inevitable; if the member had been given a clear explanation of the process, he would have understood that this was a potential disadvantage of exercising the open market option, rather than choosing a scheme pension. However, the member had not suffered financial loss as a result.

Direction: the trustee was directed to pay £500 compensation for distress and inconvenience: retirement was a significant lifetime event and the explanations it had provided were unclear and inadequate [Read more](#)

Opportunity to make retirement decision based on full information was valued at £1,000: Wainwright

Another case concerned a member who was given incorrect information about the age at which she would be able to take early retirement with no reduction in her benefits. In this case, the Ombudsman found that the member had not relied on the misinformation. However, she had been deprived of the opportunity to make 'a significant, irreversible decision at a highly important stage of her life' based on full information.

Direction: the trustees were ordered pay the member compensation of £1,000 for this failure. [Read more](#)

Comment: *In both of these cases, the award was made purely for a communication failure – incorrect or inadequate information, but with no element of reliance or financial loss – supplied in the run-up to a retirement decision. Standard explanations about entitlements and processes should be reviewed periodically to make sure they remain accurate and up to date.*

Dealing with complaints – getting service standards right: Frankham

Mr Frankham's core complaint was about incorrect pension increases. The Deputy Pensions Ombudsman dismissed that complaint, finding that the calculations had probably been correct, although the information provided had been confused, had not reflected the scheme rules and had falsely raised the member's expectations. More significantly, however, the trustees had failed to respond to the member or to The Pensions Advisory Service, had not followed their own internal dispute resolution procedure, and had delayed four months in responding to enquiries by the Ombudsman's office.

Direction: the trustees were directed to pay the member £400 for distress and inconvenience resulting from their failure to make sure that the correspondence sent accurately reflected the scheme rules; and a further £1,000 for distress and inconvenience resulting from their failure to respond to the complaint. [Read more](#)

Dealing with members – getting the tone right: Connolly

The Ombudsman criticised the tone of letters sent by the administrator to Mrs Connolly in relation to mis-stated and overpaid benefits as 'peremptory'. In addition, the letters contained errors, and the scheme's responses under its internal

dispute resolution process were not compliant with the regulations and were cursory in tone and length. As well as making a relatively high compensatory award, the Ombudsman went out of his way to castigate the administrator for its failure to show 'the respectful, sympathetic treatment that is deserved by the scheme members [it] should regard as... customers.'

Direction: the administrator was directed to pay £750 compensation for non-financial injustice. [Read more](#)

Comment: *These two cases illustrate the need for schemes to respond to complaints properly even if they feel their time is being wasted by a complaint or complainant.*

In the overall context of the Pensions Regulator's ongoing drive to improve governance standards (especially for DC arrangements), schemes should take note of these four determinations: an audit of processes and standard letters might reveal some quick fixes to avoid future problems.

Discrimination and costs issues – where are we now? *O'Brien v Ministry of Justice*

Can cost factors justify, or help to justify, discriminatory treatment? In the context of age discrimination, the courts have appeared to be moving to a view that, although saving money can't be the sole aim of a discriminatory practice, it might not be particularly difficult to find a non-cost reason to go with it. If an employer can do that, then balancing cost factors against the effect of the treatment might allow an employer to justify discriminatory actions. This was the position taken by the Court of Appeal in *Woodcock v Cumbria Primary Care Trust*. It ruled that, where an employer had taken a genuine decision that a worker was redundant, it was justifiable to implement that decision in such a way as to save money.

The Supreme Court has now called this 'cost plus' approach for justifying discrimination into question. *O'Brien v Ministry of Justice* concerned discrimination against part-time judges in relation to pension entitlements. The Supreme Court took note of specific guidance given to it by the Court of Justice of the European Union that 'budgetary considerations cannot justify discrimination'. The UK's Ministry of Justice, as the employer in the case, argued that, on the basis of *Woodcock*, cost plus other factors could justify discrimination. The Supreme Court, however, said that cost could not be a factor justifying discrimination, noting that 'the fundamental principles of equal treatment cannot depend upon how much money happens to be available' or on how it is allocated between different responsibilities, either by the state or by a private employer. That will make 'cost plus' arguments more difficult to run in future. [Read more](#)

Comment: *The ruling also underlines the need for employers to consider and document the reasons for their decisions, and the basis on which they consider that potentially discriminatory treatment may be justifiable. The Supreme Court would, it said, 'treat with greater respect' a justification for a policy which was 'carefully thought through by reference to the relevant principles at the time when it was adopted'. If an employer cannot demonstrate that the exercise of examining alternatives or gathering necessary evidence to inform its decision was carried out at the time, then it will be more difficult to justify the proportionality of the means chosen to carry out an aim, however legitimate that aim may be.*



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