

Snapshot

November 2023

Overview

- **Pensions Ombudsman is not a 'competent court'**

The court has held that the trustees must apply to the County Court to enforce any decision of The Pensions Ombudsman (the **Ombudsman**) for recoupment in the case of overpaid benefits, where the member has challenged the amount of that set-off. The Ombudsman is not a 'competent court' for the purposes of the relevant legislation and therefore the trustees cannot recoup benefits based on the decision of the Ombudsman alone.

- **Pensions Ombudsman's first determination on new Transfer Regulations**

The Ombudsman has given its first determination in respect of the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021 (**Transfer Regulations**). This determination provides some assistance to trustees considering a transfer which involves 'overseas investments' in the receiving scheme.

- **Guide for trustees on buy-ins and buy-outs**

The Pensions and Lifetime Savings Association has drafted a guide aimed at trustees considering embarking on a buy-in and/or a buy-out. It includes useful steps and considerations that trustees should take into account.

- **Returning surplus to a sponsoring employer on a scheme wind-up**

The Ombudsman has considered a challenge to a trustee's decision to return scheme surplus to an employer on a wind-up. The decision of the Ombudsman provides useful guidance to trustees on steps they should take when considering taking this route. In particular, the case highlights the importance of minuting trustees' reasons for making a decision to return a surplus; seeking appropriate professional advice, including actuarial advice, when making a decision; and of ensuring that any decision taken is in accordance with the rules of the scheme or section in question.

- **Clara Pensions takes over Sears Scheme in first UK 'superfund' deal**

Clara-Pensions (**Clara**) has announced that it has reached an agreement with the trustees of the Sears Retail Pension Scheme (**Sears**). Sears' members will be the first to enter a UK pension superfund through a formal transfer that is scheduled for the end of November. Clara will be taking over Sears' £590mn assets and providing £30mn of new capital which will benefit member security and assist with Sears' progression towards an insured buyout.

In more detail

Pensions Ombudsman is not a 'competent court'

It is not uncommon for trustees to find, for various reasons, that there has been an overpayment of benefits to members of a defined benefit pension scheme. One way to rectify this is for trustees to set-off the overpayment against a member's future benefits, through recouPMENT.

Section 91 Pensions Act 1995 (**PA95**) provides that no set-off can be exercised in respect of a member's benefits unless an exemption applies. One exemption is to allow a set-off where this is to correct a payment made to the member in error. However, where the member disputes the amount of the set-off, then the set-off cannot be exercised unless "the obligation in question has become enforceable under an order of a competent court..."

In the case of *the Pensions Ombudsman v CMG Pension Trustees Limited*, the appeal court was asked to consider the meaning of 'competent court', and, in particular, if the Ombudsman was a 'competent court' for these purposes.

The judge held that any determination or direction from the Ombudsman will be final and binding on the member and trustees of the scheme, subject to an appeal on a point of law. The County Court cannot revisit the substance of the dispute and determinations and directions of the Ombudsman are enforceable without the need for further judicial input.

The Ombudsman is not, however, a competent court for the purposes of section 91 PA95. Therefore, where a member disputes the amount of a set-off, the trustees will need to seek enforcement of the Ombudsman's determination by getting an order from the County Court. This is, however, an administrative step only and there is no requirement for the court to consider the merits of the matter.

Pensions Ombudsman's first determination on new Transfer Regulations

The Ombudsman has published its determination in relation to [Mrs W](#). The Ombudsman rejected a complaint against the trustee of a scheme that the member's transfer had been unnecessarily delayed by the unreasonable identification of an "amber flag" for overseas investments in the receiving scheme. The member was referred by the trustee to MoneyHelper. The member had contended that this was the incorrect interpretation of the Transfer Regulations and had resulted in a delay that meant the member's transfer value was reduced by the time the transfer was effected.

Observing that it was not unreasonable for the trustee to determine that an amber flag was present, the Ombudsman referred to guidance from the Pensions Regulator (**Regulator**) and the Department for Work and Pensions (**DWP**) which states that the purpose of the Transfer Regulations is to catch "investments in assets or funds where the jurisdiction is lax, non-existent or allows opaque corporate structures". As such, it is possible to apply a wide definition to "overseas investments" and therefore apply the amber flags framework to protect members from scams.

This judgment will come as welcome news for trustees who have to apply the Transfer Regulations in an industry which still cannot agree on which "overseas investments" constitute an amber flag. It would support the idea that trustees can err on the side of caution, having regard to the information provided to them by the member and the guidance of their legal advisers. The Ombudsman observed that determining whether or not there are overseas

investments is a decision which is reserved to the trustee of the scheme and that the member had failed to demonstrate that in reaching the decision, there had been improper performance of the trustee's duties (i.e. failure to consider all relevant matters). The Ombudsman also opined that the current wording of the Transfer Regulations may not be aligned with their intended practical application but observed that this was not sufficient to find the trustee's decision to be unreasonable or incorrect in this case.

Guide for trustees on buy-ins and buy-outs

The Pensions and Lifetime Savings Association has drafted a [Buy-in or Buy-out: Made Simple Guide](#). This guide is aimed at trustees considering embarking on one of these de-risking solutions. It provides a useful overview of some of the key considerations that trustees should take into account, as well as the key steps of a transaction. In particular, the guide discusses:

- What a buy-in and buy-out is;
- The benefits and considerations that trustees should take into account;
- The crucial elements of the transactions;
- Investment strategies – for example considering risk and liquidity management in light of a buy-in or buy-out; and
- Member communication.

In terms of key steps, trustees should:

1. **Assess the needs of the scheme** – this will include considering the funding level of the scheme and investment strategy to determine if the buy-in or buy-out is appropriate;
2. **Data and benefit accuracy** – the guide highlights the importance of data accuracy. This is needed for a successful transaction and to obtain an accurate quote from insurance companies;
3. **Engage with insurers** – understand what the insurer wants;
4. **Conduct due diligence** – trustees are likely to obtain professional advice to assist with this stage. This will involve a review of the scheme's benefits and liabilities. Due diligence will also need to be undertaken in respect of the insurance providers;
5. **Negotiate terms and agreement with the insurers** – legal advisers can assist with this;
6. **Member communication** - in a buy-out, certain mandatory communications must be sent to members. Trustees are, however, likely to want to provide further communication with members. Trustees should consider what approach to member communication they will be taking from the outset; and
7. **Implementation** – this will include, amongst other things, benefit specifications, data transfers and validation, approvals and administrative transitions.

The guide provides a useful overview for trustees, together with a checklist of points to consider when conducting due diligence on insurance companies. In the ever-competitive de-risking market, schemes need to make themselves as attractive as possible to insurers. One key factor in this is ensuring that data is accurate and up to date. For any trustees considering these options, it is worth having a look at this guide. The Stephenson Harwood de-risking team are on hand to guide trustees through these projects in a seamless manner.

Returning surplus to a sponsoring employer on a scheme wind-up

The Ombudsman case of [Mr S](#) case provides a good illustration of best practice for trustees when considering returning a scheme surplus to a sponsoring employer on wind up of a scheme. In this case, Mr S was a member of the Bristol Water section (the **Section**) of the Water Companies Pension Scheme. Bristol Water plc (**Bristol Water**) was the sponsoring employer.

In 2018, the trustee entered into an agreement with Aviva to purchase bulk annuities to secure the liabilities of the Section, after which the Section would be wound up. In July 2021, the trustee issued a letter to members notifying them that the wind up of the Section had been formally triggered, that there would be surplus assets after all the section liabilities had been secured, and that the trustee proposed returning that surplus to Bristol Water after the liabilities had been secured. It invited comments from the Section members on this proposal. Mr S opposed the decision, feeling that the surplus should be passed on to members, and made complaints through the trustee's internal complaints process before lodging a complaint with the Ombudsman.

In making its decision, the trustee had considered the various causes of the surplus and held that one of the main reasons the Section was in surplus was due to the fact that Bristol Water had made significant additional contributions into the Section between 2005 and 2016 at the trustee's request. The trustee sought actuarial advice which confirmed that Bristol Water's additional contributions, rather than other factors, were primarily responsible for the Section surplus.

Mr S argued that the surplus was primarily attributable to returns on the Section's investments, that in returning the surplus to Bristol Water the trustee had not acted in the best interests of Section members, and that employee contributions had previously been increased at a time when Bristol Water were not contributing to the Section. He also argued that the member booklet stated that any residue after wind-up would be returned to members, that the trustee's memorandum of association stipulated that no surplus would be returned to the sponsoring employer, and that the trustee's consultations with Bristol Water had biased its decision making.

The Ombudsman did not uphold the complaint, holding that the memorandum of association was irrelevant as it related to the assets of the trustee company rather than those of the Section, which were governed by the scheme rules. Under the scheme rules, the power to augment members' benefits was clearly described as discretionary, and that it should be exercised 'in consultation with' Bristol Water. There was no indication that the trustee had fettered its discretion to favour Bristol Water, and minutes of trustee meetings confirmed that the views of Bristol Water had been taken into account, alongside other factors. Moreover, the scheme rules clearly indicated that Bristol Water could receive funds from the Section. The Ombudsman accepted the trustee's actuarial evidence that Bristol Water's additional contributions were the main reason for the existence of the surplus.

The Ombudsman also held, following *Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd [2015] EWHC 448 (Ch)*, that the trustee would be acting in accordance with the purpose of the trust in returning a surplus to Bristol Water after the members' payments had been secured in full following wind up. Again, the minutes of trustee meetings provided evidence that the trustee had taken into account all relevant information in reaching its decision. Finally, the Ombudsman noted that as a matter of law, information provided to members such as member booklets are not considered to override the formal provisions of the scheme. The Ombudsman therefore held that the trustee had interpreted the scheme rules correctly in reaching its decision.

The case is a good example of how to approach the decision-making process when returning a surplus to the employer. In particular, the case highlights the importance of minuting trustees' reasons for making a decision to return a surplus; seeking appropriate professional advice, including actuarial advice, when making a decision; and of ensuring that any decision taken is in accordance with the rules of the scheme or section in question.

Clara Pensions takes over Sears Scheme in first UK 'superfund' deal

On 06 November 2023, Clara announced that they have reached an agreement with the trustees of Sears. Clara was established in 2017, as the member-first consolidator for defined benefit pension schemes. Through consolidation, Clara has expressed its aim of bringing together schemes and replacing existing sponsors in order to give greater security to members whilst the schemes progress towards buyout.

Sears' members will be the first to enter a UK pension superfund through a formal transfer that is scheduled for the end of November. Clara will be taking over Sears' £590mn assets and providing £30mn of new capital which will benefit member security and assist with Sears' progression towards an insured buyout.

Both the DWP and the Regulator have expressed their delight at the transfer, although the Regulator has maintained its position that an insurance deal is preferable for members' security and that schemes should only transfer to a superfund if there is no realistic prospect of buy-out in the foreseeable future.

Clara has been affected by the rise in interest rates and the significant drop of defined benefit schemes in deficit. Experts have indicated that Clara will need to engage in further transactions in the near future, in order to demonstrate the viability of its business model and retain its usefulness in the market. Clara is currently the only superfund to have received authorisation from the Regulator, with Pension Superfund, a rival to Clara, being side-lined after failing to achieve this.

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