

Freedom of Information Act

Two recent decision notices from the Information Commissioner have focused local authorities minds on the FOIA implications of investing in private equity.



In both cases, involving Hertfordshire County Council and Wolverhampton City Council, information was requested about the pension fund's commitment to private equity funds, the actual contributions made, distributions received and information on the funds' rates of return. In both cases the Information Commissioner decided that the public interest in disclosing this "fund level information" overrode any duty of confidence owed by the Councils. The Information Commissioner was not asked to decide on the potentially more commercially sensitive issue of disclosing the nature of private equity funds' underlying investments.

Both decisions reflect a shift towards the disclosure of private equity fund performance figures under the FOIA. It is key that investment providers and public sector investors deal with this issue upfront. Many limited liability partnership agreements restrict the disclosure of even the most basic fund level information with potentially draconian penalties for any investors who breach these provisions. It is therefore key to ensure that any confidentiality clauses are appropriately worded at the outset to deal with any potential FOIA requests

Age Discrimination – a transitional period

Schemes have now had several months to get used to operating in a non-age discriminatory way for benefits accruing from 1 December 2006. But despite the long list of exemptions for pension scheme practices, there are still some features of benefit design which don't appear to fall within them, and so need objective justification if an

employer wants to continue them. These include long service requirements for benefits (over 5 years), and the so-called "rule of 85" where members can take an unreduced pension (often on or after age 60) when their age and service adds up to 85.

The high profile Unison challenge to the Local Government Pension Schemes (LGPS) phasing out the rule of 85 showed how controversial the issue is. However, our view remains it is age discriminatory, as the age at which someone can take their pension depends on their age on joining the scheme.

Interestingly in the Unison case, the Court appeared to approve the approach of phasing-out the rule of 85. Hopefully this is a good sign for employers and trustees that where immediate action to comply with the anti-age discrimination legislation is likely to lead to serious workforce issues, a transitional period can be justifiable. Schemes should however keep any transition periods as short as possible.

Where "passport" schemes taking people from the LGPS are still required by the Government Actuary's Department (GAD) to provide benefits on the rule of 85 basis, it would be prudent for trustees to seek clarification from the employer that it believes it can objectively justify continuing the benefit (at least for a period). In practice it seems to us this should be arguable, as employers would not win contracts from Local Government without the certificate from GAD.

Local Government Pension Schemes

Case Summary

In two separate Ombudsman decisions, two local authorities have been found guilty of maladministration in connection with providing incorrect information to members about widow's pensions.¹

These cases show the ease (and frequency) by which incorrect information may be given to members, especially when a standard form of letter is sent in response to queries about what level a widow's pension will be in the event of the member's death. In addition, although the Ombudsman found in both cases that no financial loss had been suffered by the widows in question, there is a sense of unfairness and bad publicity which would be best avoided by giving members correct information (or at least by avoiding sending standard letters) in the first place. The cases also demonstrate that the Ombudsman will apply a test of financial loss before upholding any such claim.

The circumstances giving rise to these cases were broadly that a member was incorrectly informed by the authorities that a widow's pension would be paid. In each case, in fact, no pension was payable to the member's widow under the Local Government Scheme Regulations due to the fact that the member had married after retirement.

In one case, Mrs Lewis's husband asked for confirmation of what his widow's pension would be and was informed that his wife would be entitled to a pension of half his pension for life for the date of death. After his death, however, the authority explained to Mrs Lewis that she was not

in fact entitled to a widow's benefit under the Regulations. The Ombudsman was not able to conclude that had Mr Lewis known the true position at the date of his request, that he or Mrs Lewis would have entered an arrangement outside the scheme to provide a widow's benefit in the event of his death. As a result the Ombudsman concluded there was no financial loss. He awarded compensation in respect of distress and inconvenience of £250.

In the case of Mrs Holloway, she claimed that her husband had made specific financial arrangements in his will on the understanding that she would be entitled to a widow's pension. If he had been correctly told that she was not entitled to a widow's pension, she claimed that he would have left more of his estate under his will to her. Again, although he found maladministration the Ombudsman's could not on the evidence conclude that Mr Holloway would have increased his wife's share of his estate when he made his will. Since no financial loss has been suffered, the Ombudsman did not uphold the complaint. He did however make a direction to compensate Mrs Holloway for distress and inconvenience in the sum of £250.

While in both cases the complaints were not upheld, it is important to note the serious consequences that may follow from individual requests for information relating to widow's pensions. Clearly there is a significant risk of distress and inconvenience. In both cases, this could have been avoided by clarification from the member as to whether he married his wife after the date of retirement or not.

Lessons should be learned in order to avoid similar mistakes arising in the future.

¹ re Mrs Lewis (R00077) and Mrs Holloway (Q00547).

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