

# news

## Costs and the Pensions Ombudsman

The Pensions Ombudsman has recently taken a significant step into what has been for him relatively uncharted territory – that is, awarding a complainant their legal costs. On at least two occasions within the last few months, he has ordered the respondent (usually the scheme trustees or the employer) to pay either the whole, or part, of these costs. Here we consider two recent determinations and their potential ramifications.

### The PO's purpose

Why awarding costs is unusual

- The Ombudsman is intended to be a cost-effective alternative to the courts.
- As a largely paper-based process, the aim is that complainants have access to the Ombudsman without usually needing legal advice.
- Thus, the Ombudsman should not generally need to award costs - unlike the courts where the general rule is that they are awarded to the successful party.

### The PO's current powers

Can he award costs?

- The Ombudsman has no express power under legislation to grant costs.
- However, the High Court in *Nicol & Andrew v Brinkley* confirmed that the Ombudsman may award compensation for legal expenses incurred by a complainant (as part of his general power to give directions).
- But this power does not extend to ordering the complainant to pay the costs incurred by the respondent in defending the complaint.

### The first complaint

Mrs O'Connor

Costs resulted from maladministration

- Mrs O'Connor brought several complaints of maladministration in relation to the Darwin Clayton Limited Small Self Administered Retirement Benefit Scheme.
- The Ombudsman upheld the main complaints (including that Mrs O'Connor was entitled to a guaranteed pension) but dismissed the remainder.
- The trustees were directed to pay a proportion of Mrs O'Connor's legal costs which the Ombudsman felt related directly to the proven maladministration.

## The second complaint

Mr Newbould

Costs for contesting the matter

- Mr Newbould complained that his invalidity pension from the Armed Forces Pension Scheme (awarded in 1977) was incorrectly assessed.
- The Ombudsman agreed and directed the Ministry of Defence to pay the legal costs which Mr Newbould had "*reasonably incurred in contesting the matter*".
- In addition, if the parties were unable to agree, the Ombudsman said that either might ask him to assess the costs.

## The PO's powers

Are they being widened?

- There is a distinction between compensating a complainant for legal costs resulting from maladministration and awarding legal costs simply because a complainant has won.
- The Newbould decision made no specific reference to the costs having resulted from the maladministration.
- It is also unclear under which of his existing powers the Ombudsman could assess costs if the parties cannot agree them.

## Lessons to be learnt

Some practical implications

- At present, it is still relatively unusual for complainants to the Ombudsman to instruct solicitors to act on their behalf.
- But where they do, respondents may be at risk for legal costs if a finding of maladministration is made.
- Trustees should therefore check the exoneration and indemnity provisions in their scheme rules to ensure that they are protected from personal liability should such an order be made.

## Conclusions

The likelihood of developments

- In between the O'Connor and Newbould decisions, a spokesman for the Ombudsman commented that the Ombudsman is prepared to award costs in favour of complainants where it is *reasonable* for those costs to have been incurred (rather than where it was strictly necessary).
- This places respondents in a difficult position and guidance is clearly needed as to the circumstances in which the Ombudsman will award costs.