

## Pensions & Investment Litigation Briefing

Lessons from the Ombudsman

December 2015



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## Abbreviations

**DC:** Defined contribution

**PO:** Pensions Ombudsman

**PPF:** Pension Protection Fund

**PPFO:** Pension Protection Fund Ombudsman

**SIPP:** Self-invested personal pension

**TPAS:** The Pensions Advisory Service

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## Lessons from the Ombudsman

“In a world of perpetual change, pension scheme trustees and administrators have to grapple with growing complexity and an ever increasing workload.

Getting things right is crucial. But it isn't enough simply to reach reasonable decisions. Ensuring that the correct process is used is essential to the smooth running of a scheme.

It isn't surprising that transfers, misquotes and delays are the subject of many a complaint brought before the Ombudsman. There can be many factors in play which make each of these tricky to manage. In this issue, we look at some of the PO's recent decisions in these areas, examine how the experience of others can be put to good use in practice and give our top tips for managing the issues.

And, as we gear up to the new pensions levy year, we look at a recent decision on the rejection, by the PPF, of a parent company guarantee. The case brings to the fore some key points to bear in mind when certifying contingent assets.

We hope you enjoy our new briefing and welcome your feedback.”



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## In this issue

The Ombudsman's caseload	3
Transfers: what is a reasonable timeframe?	4
Misquotes: relying on an incorrect benefit statement	5
PPF guarantees: PPFO jurisdiction	6
Death benefits: delays	7

# The Ombudsman's caseload

In his first [annual report](#) as Pensions Ombudsman (and also the PPF Ombudsman), Anthony Arter highlighted some of the challenges faced by his office, in particular the increasing volumes of work. He notes that “Over the last three years our workload has risen quite significantly. In the coming year, we are predicting we will take on over 1,300 new investigations compared to 915 five years ago (a 42% increase).”

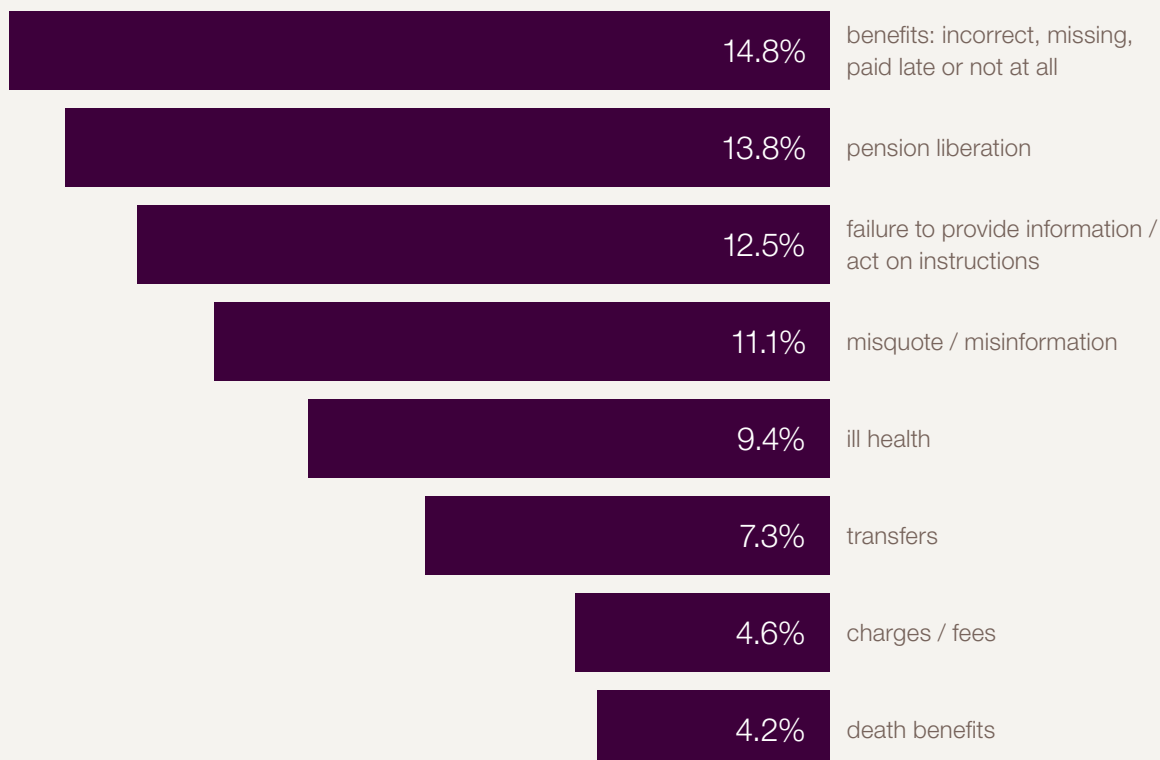
In 2014/15:

- the PO took on 1,281 new investigations – 21% more than 2013/14 and 22% more than planned
- investigations took 9.8 months on average to complete
- 38% of complaints were upheld, at least in part.

Pension liberation (widely referred to as pension “scams”) continues to dominate the headlines. The majority of cases come from individuals who have been unable to transfer their pension due to concerns that it may not be in their best interests (for example, for tax reasons, because of investment risk or because of scams). A much smaller number come from individuals who have transferred their benefits and afterwards become concerned about the safety of their money, arguing that their benefits should not have been transferred. In some of these cases, the complaints received by the PO are against the transferring scheme and, in other cases, against the receiving scheme.

The PO has also recently published a factsheet about [redress for non-financial injustice, such as distress and inconvenience](#). The PO notes that the usual starting point for awards is now £500 or more, bringing the PO into line with industry practice. In most cases, awards will range from £500 to £1,000 but up to £5,000 has been awarded in extreme cases.

## Subject matter of new investigations: the top eight



Source: Pensions Ombudsman Service – Annual Report and Accounts 2014/15



# Transfers: what is a reasonable timeframe?



The PO found that **Mr Pollet's** transfer request was not actioned within a reasonable timeframe.

## Background



Optimum Capital Limited (OCL) was the principal employer/provider and a trustee of the Optimum Internal Pension Plan, a workplace DC scheme.

The plan's original administrators (also a trustee) had failed to provide adequate services to OCL and was suspended from these roles following investigation by HMRC. By the time of Mr Pollet's transfer request, there had been two further administrators but some service issues remained and OCL wanted more time to action the transfer.

When the transfer was eventually actioned, OCL asked Mr Pollet to sign a declaration, in addition to their standard discharge form, which set out a number of disclaimers, including that Mr Pollet would:

- take no action against OCL or one of its directors in connection with the transfer
- indemnify OCL and the director against all costs, losses, penalties, fines, liabilities and expenses it incurred or suffered as a result of the transfer.

Mr Pollet refused to sign the declaration because of the disclaimers.

## Decision



The PO upheld the complaint on the basis that the reasons for delaying the transfer were not reasonable. The change of administrator and problems encountered as a result were not an excuse for the delays by OCL in carrying out the transfer request.

The additional discharge form which Mr Pollet had been asked to sign was seen as an attempt to "settle" any potential claims in connection with the transfer, which they had no reason to demand. As such, this second disclaimer was unreasonable and Mr Pollet was not required to sign it. It should also not have been used as a reason to delay the transfer.

OCL was ordered to pay the substantive financial loss suffered and £500 for distress and inconvenience. But it was not required to pay for the financial advice that Mr Pollett had obtained in respect of the period of delay. As the PO explained, Mr Pollet could have approached TPAS for free assistance and advice.

## Sackers' verdict



In some situations there may be circumstances beyond your control which mean that more time is needed to process a transfer. The legislation allows up to six months – but what is reasonable will depend on the facts.

In this case, the PO found that one month would have been a reasonable period within which to disinvest Mr Pollet's holdings and make the transfer.

Whether one month will become the norm remains to be seen, but the decision lays down an important guide for dealing with transfer requests from DC schemes.

# Misquotes: relying on an incorrect benefit statement



Mr Sherratt took early retirement on redundancy having relied on pension statements which turned out to be incorrect. He was awarded £750 for distress and inconvenience caused.

## Background



Following a management reshuffle, and the removal of his post as Head of Environmental Services, Mr Sherratt agreed to take early retirement and a redundancy package from Cheshire East Council.

Mr Sherratt received a pension statement in September 2011, which showed estimated benefit figures as at 31 December of an annual pension of £28,987 and a lump sum of £50,542. The Council said that he would also have received an annual statement in October, showing lower figures. Mr Sherratt checked and double checked the September statement figures with the Council, which confirmed they were correct. Shortly afterwards, he accepted the voluntary redundancy package and his employment ended on 31 December 2011.

In January 2012, the Council informed Mr Sherratt that the quoted figures had been incorrect. The revised annual pension figure was lower, at £22,054, although the lump sum was higher, at £57,341.

Mr Sherratt complained that he had calculated the amount he would need to get by on the basis of the original benefit figures and that he would have stayed on at the Council had he known the correct position.

## Decision



The PO accepted that Mr Sherratt had relied on the incorrect pension statement. However, he was not persuaded that Mr Sherratt had done so to his detriment.

Because of the management reshuffle, Mr Sherratt knew that he may not have got another job with the Council and that accepting the redundancy package may have been the best option. The PO concluded that there was no certainty of continued employment for Mr Sherratt as he would have had to apply for a new position, with no guarantee of success. As such, he could not claim loss of potential earnings as compensation.

## Sackers' verdict



The case highlights the need to check thoroughly the figures that a member will rely on, and check them against other information provided to them which may bring to light a discrepancy.

It also demonstrates the importance of analysing what, if any, detriment has been caused to the member if a mistake is made. In cases of early retirement and/or redundancy, this should be tested carefully before accepting that there has been substantial financial loss.

# PPF guarantees: PPFO jurisdiction



The trustees of the [Land Rover Pension Scheme](#) complained that the risk-based element of the PPF levy did not include allowance for a parent company guarantee (Type A contingent asset). The guarantee had been rejected by the PPF as it did not meet the “guarantor strength” requirement.

## Background



The PPF Levy Determination provides, broadly, that the PPF can accept a guarantee as a contingent asset if it is satisfied that the guarantee reduces the risk of compensation being payable from the PPF in the event of employer insolvency, and that the reduction in the scheme’s levy is reasonably consistent with the level of reduction in risk.

The trustees argued that the guarantor was able to meet its full commitment under the guarantee and that they had taken a thorough and robust approach when certifying the guarantee with the assistance of experienced professional advisers. But the PPF was concerned that the guarantor’s net asset value related predominantly to its investment in the employer. In the event of the employer’s insolvency, the guarantor was unlikely to have sufficient non-employer related assets to meet its obligations under the guarantee.

## Decision



The PPFO’s jurisdiction is limited to deciding whether the PPF, in reaching its decision, has acted in accordance with the applicable Levy Determination.

In applying the test of guarantor strength, the PPF must assess whether it can accept the trustees’ certification that they have no reason to believe the guarantor could not meet its commitment under the guarantee. Although the trustees had tried to explain how assets would be realised by the employer in the event of its insolvency, the PPF had correctly recognised that recovery by the scheme was not evidence of the guarantor’s ability to meet its obligations. This was not a relevant consideration in the circumstances.

The trustees had also requested a meeting with the PPFO to “explore the evidence”. The PPFO may hold an oral hearing to help him reach his decision in certain circumstances, such as where:

- there are differing accounts of a particular material event and the credibility of witnesses needs to be tested
- the honesty and integrity of a party has been questioned and that party requests a hearing, or
- there are disputed material and primary facts which cannot be properly determined from the papers.

None of these circumstances applied here.

## Sackers’ verdict



The PPFO’s decision suggests he is unlikely to hold an oral hearing in most cases. This means that the written evidence to demonstrate how a guarantor will meet its commitment will be critical.

The PPF was also asked whether it would exercise its power to recognise the guarantee in part, but decided against doing so on the evidence. The PPFO was satisfied that the PPF had at least considered this power but that its decision not to recognise the guarantee at all had been properly made.

# Death benefits: delays



In this case, the trustee of a SIPP had not acted unreasonably when it delayed reaching a decision regarding the distribution of death benefits.

## Background



Mr Bunn died leaving a partner, Mrs Barnicoat, as well as two adult children (and several grandchildren) from a previous marriage.

Several months before his death, Mr Bunn had nominated his partner to receive death benefits under a SIPP. Mrs Barnicoat was not a beneficiary under his will, for which the two children were executors.

Before reaching its decision regarding the death benefits due from the SIPP, Hargreaves Lansdown Asset Management (HLAM – the trustee of the SIPP) had allowed Mr Bunn’s children time to seek and provide evidence which may have been relevant to HLAM’s decision. Given the children’s allegations of fraud and financial irregularities, HLAM thought it appropriate to allow time for this.

HLAM offered to make an interim payment to Mrs Barnicoat from the SIPP while its review was ongoing, which she declined.

Mrs Barnicoat complained that HLAM had failed to exercise its discretion in a timely manner regarding the distribution of the death benefits due from the SIPP.

## Decision



The PO found that HLAM had considered all relevant information both fairly and appropriately before reaching its decision. The time taken to perform this task was understandable in the circumstances, especially when waiting to receive information from third parties involved in separate disputes relating to the member’s estate.

HLAM’s offer of an interim payment had been reasonable, as was its offer of £500 compensation for not keeping Mrs Barnicoat up-to-date in the early stages of its review.

Mrs Barnicoat’s engagement of a solicitor to address the alleged delay in paying the death benefit was Mrs Barnicoat’s personal choice and not essential to the process. She therefore had to bear her own costs.

## Sackers’ verdict



The PO here was acutely aware that the trustee had to deal with some very emotive issues and to be objective about the allegations being made by potential beneficiaries.

As is typical when it comes to the distribution of discretionary death benefits, the trustee had to weigh up the interests of different parties. In this case, that included weighing up the need to allow further time for one side to produce additional evidence against the impact that any unnecessary delay might have on the financial well-being of a dependant.

In these circumstances, keeping potential beneficiaries informed of the process, and explaining any potential impact on the timetable for payment, is key. As well as ensuring potential beneficiaries understand what is happening, it can also help trustees justify the time taken to reach their decision.

Another important issue is to consider what level of detail can be provided to explain the steps that a trustee is taking, without revealing confidential information. The PO commented that a more proactive approach by the trustee might have been preferable in this case.

## Contact

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Sackers is the UK's leading commercial law firm for pension scheme trustees, employers and providers. Over 50 lawyers focus on pensions and its related areas. For more information on any of the articles in this briefing, please get in touch with Katherine or any of the team below, or your usual Sackers' contact.



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- [Managing Complaints - IDRPs and the Pensions Ombudsman](#)
- [Death benefits and incapacity cases](#)
- [Recovery of overpayments](#)