

## Pensions & Investment Litigation Briefing

September 2016

Sackers' Pensions & Investment Litigation team reviews recent case law and examines the practical lessons for trustees and employers



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## Abbreviations

**IDRP:** Internal dispute resolution procedure

**NRA:** Normal Retirement Age

**PO:** Pensions Ombudsman

**PPFO:** Pension Protection Fund Ombudsman

**SIPP:** Self Invested Personal Pension

**SSAS:** Small Self-Administered Scheme

**TPAS:** The Pensions Advisory Service

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## Lessons from the Ombudsman

“The new PO’s first full year in office has been a busy one, with a number of changes to the structure of his team, as well its processes and procedures. We start this edition with a look at some of the steps taken by Anthony Arter to streamline the PO’s methods for dealing with complaints. We also note the top ten types of complaint which come before the PO. With pension liberation still in the headlines, it is no real surprise that this area now grabs top spot, up from second place in 2014/15.

Complaints concerning death benefits continue to provide a steady stream of work for the PO, once again making it into the top 10 list of most common grievances. On pages 4 and 5, we examine three recent decisions in this area, highlighting the importance of due process in decision making, as well as lessons learned which can help keep trustees and administrators on the right side of the PO’s judgment.

As trustees, administrators and providers continue to embrace technology as a means of making pensions more accessible, it is perhaps unsurprising that occasional glitches occur. A recent decision of the Deputy PO on this subject emphasises just how important it is to ensure that information made available online comes with appropriate health warnings – see page 6 for details.

Finally, we consider time limits and explain why it is important to assess early on whether or not a complaint is time barred – something which could save a lot of time and effort in the long run.”



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# The Ombudsman's caseload

In 2015/16, the PO (and PPFO)'s office handled some 5,000 enquiries – up 18% on the previous year. The PO cites “fundamental changes to pensions provision and the publicity around the reforms” as a major contributor to the increase.

## Streamlining the complaints process

The PO now uses separate teams to deal with complaints depending on their complexity – a “90 day team” and a longer investigations team. The teams include specialist groups which focus on specific types of scheme, such as education, local government and health, SIPPS and SSASs, as well as different types of complaint, including ill-health, overpayments and underpayments.

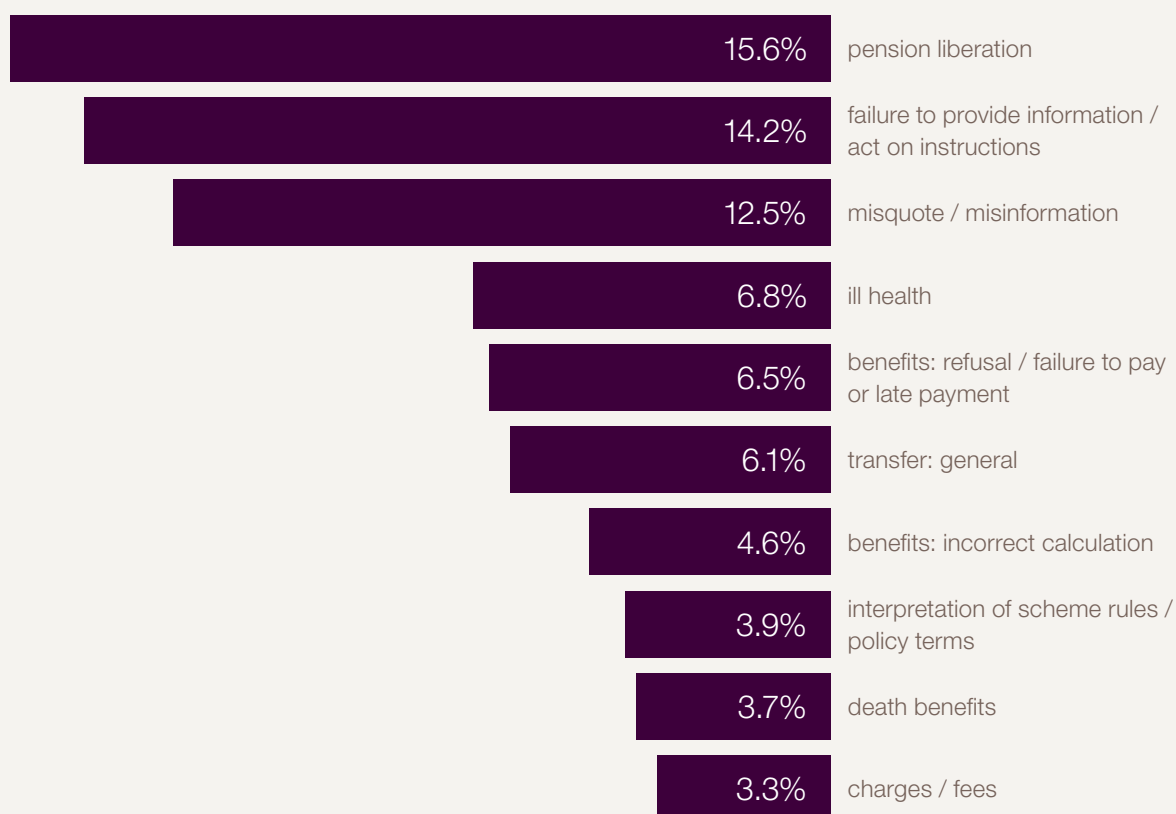
More cases are now resolved informally (63%, up from 44% in 2014/15) with adjudicators (previously known as “investigators”) taking on an enhanced role with the making of adjudicator opinions. The traditional route of a provisional decision followed by a formal determination is now used much less frequently.

**Adjudicator opinions** are now published alongside determinations if they are appealed (to the PO or his Deputy) or are generally considered to be of interest. As opinions are informal, both complainants and respondents still have the right to an Ombudsman determination.

## Awards for non-financial injustice

The report includes a reminder of the PO's **2015 guidance** on redress for non-financial injustice, such as distress and inconvenience. Such awards are not automatic but, if conferred, the usual starting point is £500, in line with industry practice. In most cases awards range from £500 to £1,000 but up to £5,000 has been awarded in extreme cases.

## Subject matter of new investigations: top ten



Source: Pensions Ombudsman Service – **Annual Report and Accounts 2015/16**



# Death benefits – the importance of due process

Death cases regularly feature in the PO's top 10 subjects for investigation. Here we look at three recent decisions which highlight some common themes.

## Take all necessary steps before reaching a decision



A decision relating to an [AJ Bell SIPP](#) provides a useful illustration of what not to do when exercising discretions in relation to the distribution of death benefits.

Mr Scott, who died suddenly, had been in relationship with Ms V for four years. He owned a house with his partner and had made a will which provided for her and other family members. Before entering into the relationship with Ms V, Mr Scott had completed a nomination form under the SIPP, nominating himself as sole beneficiary for any death benefits due. This self-nomination was an unusual step which, if followed, would result in benefits due being paid to his estate.

AJ Bell (the trustee) had absolute discretion to decide how the lump sum death benefit should be distributed. They decided that the death benefits should be paid to Mr Scott's estate. Ms V was left out and complained about the decision.

## When can the PO step in?



Broadly, the PO can only interfere with the exercise of a discretion if trustees have acted improperly in reaching their decision or without due reference to the scheme rules.

In this case, the PO found that, instead of asking the correct questions and following the rules, the trustee had tried to second guess Mr Scott's intentions and focused mainly on whether he had intended to change his nomination form. The PO observed that, whilst Mr Scott's wishes in the nomination form were a valid and important consideration, they accounted for only one of several factors for the trustee to consider.

Having established that Ms V was an "Eligible Recipient" under the rules, the trustee should have gone on to consider whether she should receive all or any part of the death benefits. The fact that she was a dependant under the scheme rules should have been sufficient to indicate that she ought to be considered. AJ Bell's failure to do so amounted to maladministration.

Ms V was awarded £1,000 for distress and inconvenience and AJ Bell were directed to reconsider their decision.

## No scope for PO to substitute own decision



Getting trustees to reconsider their decision can sometimes be the only direction available to the PO. Where, for example, trustees have reached a decision which could reasonably have been arrived at in the circumstances, it will not be perverse. As such, the PO will not substitute his own decision for that of the trustees – he will only do this in "extreme cases".

## Death benefits – the importance of due process cont.

### A case involving the [Hargreaves Landsdown \(HL\) Vantage SIPP](#) had a similar outcome



HL had awarded the death benefit lump sum due from the scheme to the member's current partner, with whom he was living at the time of his death. Mrs N, to whom the member was still married, was overlooked in the decision making process. She complained to the PO in 2014 and again in 2016.

HL had failed to consider whether or not Mrs N was financially dependent on the member and had not asked her to state her case, even though they had already been directed to do so by the PO's adjudicators in both 2014 and 2016. Despite this, HL's decision was not perverse, as his partner was an eligible beneficiary under the SIPP rules in relation to the lump sum.

In the circumstances, the only reasonable direction for the PO to make was to ask HL to review its decision yet again, making sure that Mrs N was first given a fair opportunity to state her case. Despite this not being the first direction to HL to reconsider the case, the PO was satisfied that that, "mindful of its professional obligations as the administrator of the SIPP", HL was in a position to "conduct a proper review with total objectivity".

### No scope to uphold complaint where due process followed



In the next example, the PO was unable to uphold a complaint against the [F. Hinds Pension Scheme](#).

The scheme rules provided that to qualify for a spouse's pension, the member and his or her spouse needed to have been married for at least six months. Although Mr and Mrs R had been living together since before Mr R retired and started receiving his pension in 1997, they had been married for just under the six month threshold when Mr R passed away in 2013.

The principal employer had a discretion under the scheme rules to fund a spouse's pension which would not automatically be awarded. Having been approached by the trustees, the employer duly considered the case carefully. But it decided that it did not want to create a precedent of funding discretionary pensions and that any extra monies paid to the scheme should be used to reduce the scheme's deficit.

Whilst the PO was very sympathetic to Mrs R's situation, there was no scope for him to uphold the complaint. There had been no maladministration on the part of the trustees, who had acted in accordance with the rules, and the decision reached was not perverse. As the PO notes, "neither the Trustees nor the Principal Employer are obliged to act in Mrs R's best interests, they are quite entitled to prefer wider interests and/or take into account the interests of other Scheme Members when reaching their decision".

### Sackers' verdict



Due process is key when dealing with the exercise of any discretion under pension scheme rules. Trustees should ensure that they:

- gather all the information they need to enable them to make a decision, taking into account only relevant factors
- act in accordance with the scheme rules
- keep a record of all information taken into account and at least the key conclusions or assumptions drawn from the evidence that informed their thinking.

See our "[Top tips in death benefits and incapacity cases](#)" for more practical guidance.

# Use of online portals for pensions accounts



The Deputy PO found that a member should have obtained a formal benefit quotation and heeded warnings not to rely solely on an online projection.

## Background



A deferred member of the [Motorola Pension Scheme](#), Mr N, accessed the scheme's online portal and obtained a projection showing his benefits as if he were to take early retirement at age 60 (NRA in the scheme is 65). Unfortunately the projection was incorrect, as it did not properly take account of a period of transferred-in service.

Mr N decided to retire early on the basis of the online projection. At this point he asked the scheme administrator for a formal benefits illustration. Just over a month after Mr N had left his employer and retired, he received the requested formal benefits illustration which showed the correct figures. His pension went into payment shortly afterwards and he contacted the scheme to query the reduction in his pension.

Responding to Mr N's complaints under the scheme's IDRP, the trustees explained that whilst the online portal contained a retirement calculator which allowed members to run early retirement quotations, there were "several warnings clearly displayed" which advised members not to rely on information provided in the quotations. In particular, it specifically stated that members should obtain a formal benefit illustration before making any decisions and that they should not rely on online projection figures in isolation.

The trustees apologised for the errors in the online calculation and offered Mr N £500 by way of compensation.

## Decision



The case adjudicator found that the provision of incorrect information amounted to maladministration. However, Mr N had suffered no direct financial loss as he had no entitlement to the higher, incorrect amount of pension.

The Deputy PO agreed, finding that on the basis of the "very clear warnings and disclaimers", it was not reasonable for Mr N to have reached his decision to take early retirement solely on the basis of those figures and before obtaining a formal benefit quotation. She did "not view the clear warnings provided about the use of figures provided in the on-line projection as 'small print', but rather a very sensible inclusion to advise users that the amount payable at retirement may differ from the on-line projection."

The Deputy PO was satisfied that £500 was an appropriate level of compensation to offer in the circumstances and in line with awards in similar cases.

## Sackers' verdict



Given the increasing prevalence of web portals for accessing pensions and other personal financial information, it is unsurprising that we are beginning to see complaints of this nature.

As in this case, trustees and administrators should take care to ensure that where automated, online information is made available, it is always accompanied by clear and easily spotted warnings for members to seek formal confirmation of their benefits before taking and acting on any decision.

# Complaints that are out of time – the limitation defence



In a decision relating to the [Ford Pension Fund](#), a member's complaint was rejected by the PO because the subject matter was too old.

## Background



Mr E first worked for Ford between 1971 and 1987. He returned in 1990, until his retirement in 2014. On leaving in 1987, he had transferred his benefits from the Ford Pension Fund to a section 32 buyout policy, a result, Mr E claimed, of “significant pressure” from the scheme administrator. He asked to transfer his benefits back into the Ford scheme when he re-joined in 1990 but was unable to do so. He complained to the PO and asked to be reinstated into the Ford scheme in respect of his first period of service.

## Decision



Because Mr E's claims related to acts or omissions which occurred in 1987 (albeit he only became fully aware of their impact later on), his claim was out of time. This meant that the Deputy PO could make no findings of fact, as she could not award a remedy even if she were to find Mr E's allegations proven.

The Deputy PO explained that she was bound by the High Court's decision in [Arjo Wiggins v Ralph](#), in which it was held that “in determining disputes of the law, the Pensions Ombudsman cannot take a less restrictive approach to time limits than the courts would take”.

## Sackers' verdict



Limitation periods define the time limit within which legal proceedings must be brought or in which notice of a claim or dispute must be brought. Generally, in civil litigation, a claim must be brought within six years for contract and sometimes longer for claims in negligence (subject to a longstop of 15 years), or it will be time barred.

A shorter limitation period applies to the PO. In most cases, complaints must be made within three years of the occurrence of the act or omission which is the subject of the complaint. This may be extended if the complainant was not aware of the act or omission at the time it occurred. In such cases, time only begins to run when the complainant knew, or ought reasonably to have known, that the act or omission occurred. The PO will normally disregard time spent during the scheme's IDRPs when considering whether a complaint is made within his time limits.

The PO also has a general discretion to extend the time limit in cases where he considers it both reasonable for the complaint not to have been made within the normal time limit and the complaint was made to him within a reasonable time.

Therefore, the first step that trustees should always take on receiving a complaint is to check whether it is within the relevant time limit and seek advice if this take is not clear.

## Contact

Sackers' market leading Pensions & Investment Litigation team is consistently ranked in the top tier by both Chambers UK and the Legal 500. Sackers is experienced in handling cases before the Pensions Regulator, High Court and Pensions Ombudsman, with Chambers UK commenting that it is the "go to firm in this area of law".

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