Determination.

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Pensions Ombudsman Focus for the period December 2012 to February 2013

Welcome to the 36th edition of the Pensions Ombudsman Focus for the period December 2012 to February 2013.

Our aim is to provide you with a quarterly review of important determinations of the Pensions Ombudsman and alert you to Ombudsman-related issues of practical relevance. If you wish to discuss these issues and how they might affect you, please contact Mark Blyth, Partner of our specialist Pensions Litigation Group, on (+44) 20 7456 4246.

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Charges amounting to 40% of contributions imposed on a small self administered pension scheme were held not to be unreasonable as they were made in accordance with the policy's terms and conditions.

Rev McCabe against Aegon

Reverend McCabe was the sole member of a small self administered pension scheme (the "**Scheme**") which was established in July 1997. As sole member, the Scheme and policy were effectively controlled by him. Rev McCabe entered into a policy with Scottish Equitable (now Aegon). This arrangement involved the payment of annual premiums of £9,000 by his consultancy company, Connector Europe Limited. The Scheme was arranged through a firm of independent financial advisers, Rickards.

As Rev McCabe was self employed his income was inconsistent and therefore he contributed irregular amounts. In light of this Rickards decided that he should change to a "single premium contract" as they advised that this was more appropriate for someone with an irregular income. Rickards claimed that they verbally instructed a Scottish Equitable "link man" to make the change. However Aegon had no record of such an instruction.

Between 1997 and 1999 Rev McCabe made a number of contributions of varying amounts to the Scheme. By September 1999 the net amount invested in the policy amounted to £31,655. Around the same time Rev McCabe stopped his consultancy work and moved to a new address with his wife. After this move Rev McCabe said that he did not receive any statements from Scottish Equitable.

In July 1999, Rev McCabe failed to make the regular payment that was due to the Scheme. Under the terms of the policy this meant that it became paid up with effect from July 2000. From this point onwards a "specific member paid up" charge was imposed on the Scheme which varied from £1,000 to £1,360 per year.

Rev McCabe submitted that the next statement he received was in 2006 showing the value of his policy to be worth £30,322.21. In 2008, Aegon sent details of the charging structure to Rickards following a request by them and in an attached letter stated that the policy had become paid up in July 2000. Aegon sent further details about the policy in 2010 but they did not specify the rate of the charge and how it was calculated. In 2011, Rev McCabe wrote to Aegon challenging the nature of the charges stating that they were "unfair and unreasonable". By July 2012 the charges totalled £12,828 or 40% of the contributions made by Rev McCabe's consultancy company. He attributed this to the failure of Scottish Equitable's "link man" to follow his instructions to amend the policy.

The Ombudsman partially upheld Rev McCabe's complaint. He stated that Rev McCabe should not have relied on an oral communication from Scottish Equitable's "link man" as confirmation that his policy had been changed and should have sought written confirmation from Scottish Equitable. Under the terms and conditions of the policy Aegon was entitled to impose a "paid up charge" on the Scheme and whilst the charges were high the Ombudsman stated that it was not his role to "impose charging policies onto providers". However the Ombudsman did state that Aegon should have specified the rate of the "paid up charge" in its communications with Rev McCabe or Rickards even if they did not specifically ask for it. This failure caused Rev McCabe "modest inconvenience" and as a result the Ombudsman directed Aegon to pay £250 in compensation to him.

A pension scheme member who was incorrectly informed that his pension would increase in line with the Retail Price Index for "all time" was awarded £1,000 in compensation for the "inconvenience and distress" caused and a further £400 for having his expectations falsely raised.

Dr S Frankham against the trustees of the Akzo Nobel (CPS) Pension Scheme

Dr Frankham was employed by Akzo Nobel (the "**Company**") and was a member of the Akzo Nobel Pension Scheme (the "**Scheme**"). He was made redundant by the Company in 2004 and became a deferred member of the Scheme. In July 2004, the Company wrote to Dr Frankham informing him that his pension would increase in line with the Retail Prices Index ("**RPI**"), capped at 5%, for "all time".

In 2009, the Trustees of the Scheme sent a letter to all members stating that the Scheme had a guarantee that increases would occur in line with RPI for a period of 10 years expiring in April 2008, as an agreement with the previous owners (Courtaulds) had stipulated. The letter went on to state that benefits accrued after April 1999 would continue to increase in line with RPI but that benefits accrued before this date would be increased at 70% of RPI.

In 2009, when his pension did come into payment, Dr Frankham noticed that the increase was below the RPI rate of increase of 5%. In September 2009, he wrote to the administrators of the Scheme seeking an explanation and they replied stating that the guarantee had expired and hence the rate of increase was that set out in the Scheme rules.

Dr Frankham made a number of attempts to contact the Company to get further clarification. As the Company did not reply to his request he sought assistance from The Pension Advisory Service ("**TPAS**"). TPAS agreed to contact the Trustees on Dr Frankham's behalf however the Trustees failed to respond. In May 2011, TPAS advised Dr Frankham to refer the matter to the Pensions Ombudsman.

Dr Frankham submitted that his pension should have been increased by RPI up to a maximum of 5% for all time. He argued that the Trustees had therefore not applied the correct increases to his pension. Furthermore he submitted that the Trustees had failed to respond to his requests for clarification which caused him significant distress.

The Deputy Ombudsman partially upheld Dr Frankham's complaint. The administrator's letter in September 2009, which explained that the guarantee which stated pension increases would be made in line with RPI had expired, was correct and reflected the Scheme rules. This position therefore had to prevail. However, the letter from the Company in 2004 which stated that Dr Frankham's pension would increase by RPI capped at 5% was incorrect. This, combined with a further misleading letter sent by the Trustees in July 2004, meant that Dr Frankham's expectations as to what pension increase he would receive were wrong. Furthermore, the Trustees failed to respond to both TPAS and Dr Frankham when they raised this issue and also did not reply promptly to the Ombudsman's Office. The Deputy Ombudsman directed that the Company should pay Dr Frankham £1,000 in compensation for the "inconvenience and distress" caused and £400 for falsely raising Dr Frankham's expectations as to what increase he would receive.

Where a scheme fails to provide a member with their protected rights value and this leads to the member incurring a loss, the scheme may have to compensate the member for such a loss.

Mr H Crowden against the Cabinet Office

Mr Crowden was a deferred member of the Principal Civil Service Pension Scheme (the "**Scheme**") with a normal retirement date of 22 June 2007 (at age 60). In September 2006, Mr Crowden's IFA requested a transfer quotation and the administrators of the Scheme issued a quote for £276,459 which was later revised upward to £321,148. In March 2007, Mr Crowden was diagnosed with cancer and shortly after this his IFA reviewed all Mr Crowden's retirement options. The DWP, who had now become administrators of the Scheme, issued a revised quotation in June 2007 of £288,739. This quotation did not include the protected rights value ("**PRV**"). During this time Mr Crowden was undergoing surgery and chemotherapy and was informed that a detailed prognosis of his condition could not be obtained until October 2007.

In August 2007, Mr Crowden and his IFA complained that by not calculating the PRV the DWP precluded Mr Crowden from "transferring to an immediate vesting personal pension as no provider [was willing] to calculate this figure" without such information. The DWP reiterated on a couple of occasions that it was not its policy to calculate the PRV and added that the transfer value quotation from June 2007 had expired meaning Mr Crowden had to restart the process. The IFA requested quotes from 8 annuity providers, only one of whom (Tomorrow) was prepared to calculate the PRV. Mr Crowden accepted the DWP's latest transfer quote of £313,836 and purchased the enhanced annuity from Tomorrow. The sum was transferred in December and Mr Crowden elected to take 25% as a tax free lump sum (£78,459) whilst using the balance to purchase an annuity of £16,038.

During this period Mr Crowden complained through the internal dispute resolution process about the DWP's refusal to provide a PRV but at both stages his complaint was rejected. However following further correspondence the DWP accepted in August 2009 that they should have provided Mr Crowden with a PRV and requested that he submit evidence of his financial loss. However the parties were unable to agree the extent of the loss.

In September 2009, Mr Crowden's IFA asked 8 providers to quote enhanced annuity options for his client for the December 2007 transfer value based on Mr Crowden's age and health history. The quotes included London Victoria, who had acquired Tomorrow's annuity business. The quotes provided showed that Mr Crowden could have secured a pension 10% higher from a firm called Partnership than that proposed by London Victoria. On this basis Mr Crowden argued that had he been provided with the PRV by the DWP when it was first requested he would have been able to achieve an annual pension approximately £1,600 higher than the annuity provided by Tomorrow which had been in payment since December 2007.

Mr Crowden submitted that he had incurred financial loss as a result. He argued that he should receive compensation for a pension loss of £1,600 per year since December 2007, an award for distress and inconvenience and reimbursement of his IFA costs.

The Ombudsman upheld the complaint against the Cabinet Office. He stated that on “the balance of probability Mr Crowden would not have accepted the June 2007 quotation if it had included the PRV” as he had been advised by his IFA to await the prognosis for his cancer. The Ombudsman directed that the Cabinet Office should obtain a backdated enhanced annuity quote, effective from December 2007 from Partnership and in the event that this quote exceeds the annuity the Mr Crowden secured the Cabinet Office must set up an annuity to pay the difference including backdated instalments from December 2007. The Ombudsman also directed the Cabinet Office to pay Mr Crowden £1,000 for distress and inconvenience plus a contribution of £1,625 towards his IFA costs.

In order for a pension scheme member to establish estoppel he had to show that he relied, to his detriment, on a specific promise or representation made by the scheme to him individually.

Mr Metcalfe against Prudential Assurance

Mr Metcalfe was employed by the Prudential Assurance Company Ltd (the "**Company**") for a number of years and was a member of the Prudential Staff Pension Scheme (the "**Scheme**"). The Trustee of the Scheme is Prudential Staff Pensions Ltd (the "**Trustee**"). Under the Scheme Rules members were permitted to make additional voluntary contributions ("**AVCs**") and Mr Metcalfe chose to do so. He was made redundant in July 2000 and received a redundancy payment of £165,000 which he could either take as an after-tax lump sum or pay into his pension.

Mr Metcalfe stated that in a telephone call in May 2000 it was confirmed to him that if he were to put the redundancy payment into his pension its value would increase at the same rate as RPI. Having obtained a quote for this option he compared it with the Prudential's annuity rates and investing the sum in his wife's name as she was a non-tax payer. Based on these pieces of information Mr Metcalfe submitted that he elected to pay the lump sum into the Scheme along with his AVCs.

Once Mr Metcalfe's pension had been put into payment he received annual increases in line with RPI until 2006, at which point Prudential imposed a cap. Mr Metcalfe raised concerns about the cap being imposed and then in 2008 issued a formal complaint. Complaints were also made by a number of other Scheme members leading the Trustee to seek clarification from the High Court as to whether the Company's decision to limit increases breached an implied obligation of good faith and whether the Company was estopped from "denying that members were entitled to increases in line with RPI". The court held that members had no contractual right to increases linked to RPI and that there was no breach of the implied obligation of good faith.

Mr Metcalfe nonetheless decided to pursue his complaint and contacted the Ombudsman requesting that Prudential should be estopped from denying that members were entitled to increases in line with RPI. He stated that he had relied on the information given to him in the May 2000 telephone call and had put his redundancy payment into the Scheme on the understanding that he would receive RPI-linked annual pension increases. Furthermore Mr Metcalfe claimed that he chose to make AVC payments to the Scheme because a director of the Trustee "mentioned to him the value of the RPI linked pension which would be paid by the Scheme".

The Ombudsman dismissed the complaint. He stated that in order to establish estoppel Mr Metcalfe needed to show that he had relied, to his detriment, "on a specific promise or representation" that Prudential had made to him individually. The Ombudsman found that "Mr Metcalfe did not act in reliance on any promise, representation or shared understanding". He stated that neither the telephone call in May 2000 nor the conversation with a director of the Trustee amounted to a "clear statement or promise on which Mr Metcalfe could, or indeed did, rely". In addition the Ombudsman found that even if these had been clear promises, based on the evidence Mr Metcalfe did not rely on them. He therefore decided that the complaint could not be upheld.

The trustees of a pension scheme failed to ensure that all relevant material was considered prior to making a decision as to whether a member qualified for early health retirement.

Dr D N Winterbotham against Leeds City Council

Dr Winterbotham worked for Leeds City Council ("**LCC**") from November 2001 until May 2004. On 28 February 2011, he wrote to LCC requesting early payment of his deferred benefits on the grounds of ill health. Dr Winterbotham explained that he was suffering from diabetes, irritable bowel syndrome and cataracts. In order to meet the eligibility requirement for ill health retirement, Dr Winterbotham was required to show that he could not undertake the duties of his employment up to the age of 65.

LCC's Occupational Health Service requested information from Dr Winterbotham's GP and was sent confirmation of Dr Winterbotham's ailments, although they were unable to confirm the diagnosis of cataracts. In addition, his GP stated that Dr Winterbotham was suffering from occupational stress which was exacerbating his conditions in some respects and fully supported his application for retirement on health grounds.

On 28 June 2011, the independent medical practitioner signed a certificate stating that Dr Winterbotham was not permanently incapable of discharging the duties of his former post because not all avenues of medical and surgical treatment had been explored. In reliance on this statement, LCC wrote to Dr Winterbotham refusing his early retirement application. They enclosed a copy of the certificate and details of the internal dispute resolution ("**IDR**") procedure.

Dr Winterbotham appealed under the IDR procedure. In support of his application, he provided a comprehensive outline of his medical condition and treatment and requested copies of the occupational health records relied on. LCC rejected his appeal on the grounds that there was no conclusive medical evidence that on the balance of probabilities he was permanently incapable of discharging efficiently the duties on his former post.

In the meantime, Dr Winterbotham had obtained a report from a Consultant Physician in Diabetes outlining his condition and treatment and a further letter from his optician confirming his diagnosis of cataracts. Dr Winterbotham submitted a further appeal which was also rejected on 3 May 2012. Dr Winterbotham submitted that the LCC did not properly consider his request.

The Ombudsman upheld the complaint. He stated that it was unclear whether all of Dr Winterbotham's medical history had been received by the LCC and that it was not sufficient simply to state that not all medical avenues had been explored without specifying which alternative treatments Dr Winterbotham could try. The Ombudsman therefore directed the LCC to consider all medical evidence available to them and also to specify which alternative treatments Dr Winterbotham could investigate. The Ombudsman also directed the LCC to pay him £250 for "distress and inconvenience".

Trustees of private sector pension scheme were not estopped from changing the index on which pension increases are based from RPI to CPI simply because it stated in the scheme booklet that RPI increases were “guaranteed”.

Mr D Houghton against Innospec Limited

When Mr Houghton began employment with Innospec Limited (the “**Company**”), he was required to join the Innospec Ltd Pension Plan (the “**Plan**”). Mr Houghton started to draw his pension from the Plan in July 2000 and, on 5 July, he was sent a letter which set out that his Guaranteed Minimum Pension (“**GMP**”) would increase by the lower of RPI or 3% each year and his pension in excess of the GMP would increase by the lower of RPI and 5% each year compound.

On 29 January 2012, the Company wrote to current pensioners and offered them the opportunity to receive a higher pension in exchange for future increases on part of the existing pension. Mr Houghton did not take up the Company’s offer.

Following the Occupational Pensions (Revaluation) Order 2012 which replaced RPI with CPI for the determination of the percentage increase in the general level of prices, the trustees of the Plan (the “**Trustees**”) wrote to all the members informing them of the change. In that letter, the Trustees explained that the Plan rules did not specify a particular index, but instead made reference to the “increase in the cost of living”. They also said that in line with previous years, they had decided to adopt the Government’s interpretation of “cost of living” and therefore CPI would be used from April 2011 to calculate pension increases.

Mr Houghton argued that the pension booklets and other correspondence he had received stated that pension increases would be in line with RPI up to a maximum of 5% and, as such, it was reasonable for him to expect that RPI would always be the measure used. He thought that the Trustees had been opportunistic in changing to CPI as the Government had not made the change compulsory and other schemes had not implemented the change. Mr Houghton thought that the Trustees should be estopped from applying CPI going forward.

The Ombudsman dismissed the complaint. As the Plan rules did not specify a particular index but made reference simply to the cost of living, it was for the Trustees to decide what the appropriate measure of cost of living was. The Trustees’ decision to follow the Government’s interpretation of cost of living was not unreasonable.

Whilst pensions booklets had referred to RPI, they had all stated that they were not intended to replace the rules, and all other statements were given for information only and there was no indication or promise that RPI was the measure which would always be used. As such, it was not reasonable for Mr Houghton to have assumed that pension increases would always be RPI linked. Whilst the wording could, in the opinion of the Ombudsman, have been more carefully considered by, for example, stating that the rules of the Plan related to the cost of living as opposed to a specific index, the Plan literature could not have referred to the use of CPI as it had not been anticipated before June 2010. As RPI had been in use for a number of years, it was not unusual or indicative of wrongdoing that the Trustees, or indeed the Company, referred to it in literature, which was there to provide general and succinct information about the Plan to the members.

As there was no statement by the Trustees or the Company that was sufficient to constitute a clear and unambiguous representation in relation to the continued use of RPI, Mr Houghton had not acted in reliance on the alleged representation and there was no consideration, there could not be estoppel by representation. Similarly, estoppel by convention did not apply because, while Mr Houghton may have assumed that RPI would always be the measure used to calculate his increases, it was not as a result of communication by the Trustees.

Repeated failures to provide a member with correct information as to whether their benefits would be reduced for early retirement amounted to maladministration.

Mrs S-L Wainwright against NHS Pensions

Mrs Wainwright was a member of the NHS Pension Scheme (the "**Scheme**"). Under the Scheme rules, a "Special Class Status" ("**SCS**") member was entitled to retire at the age of 55 without actuarial reduction. Otherwise, there would be an actuarial reduction on retirement before age 60. When Mrs Wainwright retired in November 2011, she was not entitled to SCS.

In July 2010, Mrs Wainwright was sent a statement of her benefits which showed that her benefits would be actuarially reduced on her retirement at age 55. In August, she queried her position in relation to SCS. In September, the Scheme responded that she was in fact eligible to retain SCS due a special consideration that could be given to General Practice staff. In April 2011, Mrs Wainwright wrote to the Scheme to confirm her intention to retire at age 55, but was informed that she was not entitled to SCS. When she queried this, it was confirmed that the Scheme had made an error and that she was in fact entitled to SCS.

On 27 July, the Scheme provided a retirement quotation as at Mrs Wainwright's 55th birthday showing unreduced figures. In that letter, it was set out that "as per earlier communications, Special Class Status is now applied to your record, enabling you to retire at age 55 without penalty". On this basis, Mrs Wainwright duly retired on her 55th birthday with 3 months' notice.

On 15 November 2011, Mrs Wainwright received a statement of her benefits which showed an actuarial reduction. When she queried this, she was told that her record had not been adjusted to account for the SCS and that she would receive a revised award.

In early December, Mrs Wainwright was informed that she did not hold SCS and that she was entitled only to the reduced figures. Mrs Wainwright complained under the Scheme's internal dispute resolution procedure. She was awarded £400 for distress and inconvenience caused and was told that if she was able to return to the NHS in a similar position on a similar salary that they may have been in a position to cancel the payment of her pension and allow her to resume contributions.

Mrs Wainwright argued that she had taken reasonable steps to establish that she held SCS and that she had been incorrectly informed on three occasions that she held such status.

The Ombudsman did not think that Mrs Wainwright had suffered direct financial loss, but that she was deprived of the opportunity to make her decision based on full information. The fact that on three separate occasions it was confirmed to Mrs Wainwright that she was entitled to SCS and that they provided the July 2011 quotation on this basis clearly amounted to maladministration.

The Ombudsman accepted that Mrs Wainwright’s decision to retire at age 55 was based on the fact that she could take an unreduced pension at that age. However, the difference amounted to only £932 per annum which was not of overwhelming significance. Due to the fact that she had rejected the possibility of regular work and that she had not seen the unreduced figures before deciding to retire, the Ombudsman inferred that the actual income was not critical to her, though it may have influenced her decision. For the distress Mrs Wainwright had suffered the Ombudsman directed that she should be paid £600 in compensation in addition to the £400 award already made by the NHS.

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