Pensions Dispute Resolution Practice

Disputes Agenda

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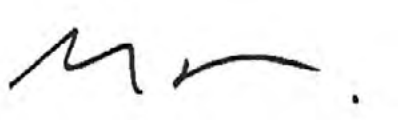
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Welcome to the Winter 2025 edition of Disputes Agenda

In this edition, we look at a recent case over statutory cross-references in rules. The advent of surpluses is also leading to cases - we consider a Court case blessing a trustee's approach over surplus on winding up and a situation where the Regulator enabled surplus to be paid to the employer. We also review recent regulatory investigation reports and look at how the Pension Schemes Bill will streamline trustee recovery of overpayments. We finally consider an Ombudsman case about trustee duties when processing transfer requests.

We hope you find this end of year edition interesting and useful.



Mark Blyth



Spirit (Legacy) Pension Trustee Limited v Alexis

This case was an appeal of a Pensions Ombudsman determination to the High Court. It considered whether a particular statutory cross-reference in a pension scheme's rules was "static" (i.e. referring to the legislation in place at the time of execution of the rules) or "dynamic" (i.e. referring to the legislation as subsequently amended over time).

Often rules will make specific provision for whether statutory cross-references are static or dynamic, but not always.

The Pensions Ombudsman took the dynamic interpretation. The High Court disagreed, preferring the static interpretation contended for by the trustee. Linklaters acted for the trustee in this case.

Background

The dispute involved a member of the Spirit (Legacy) Pension Scheme, Mrs Alexis, who was entitled under the scheme's rules to a temporary pension supplement (broadly a form of bridging pension), payable from her retirement *"until State pension age"*.

The scheme's 2001 rules defined this term as follows:

"For the purpose of this Rule, State pension age has the meaning given by the rules in paragraph 1 of Part I of Schedule 4 to the Pensions Act 1995 (rules for equalisation of pensionable ages for men and women)."

When the rules were introduced in 2001, this definition meant Mrs Alexis's supplement would stop at age 65. However, subsequent amendments to paragraph 1 of Part I of Schedule 4 to the Pensions Act 1995 increased her actual state pension age to 66.

Mrs Alexis argued that the statutory reference in the definition was dynamic and therefore her supplement should be paid until age 66. The Pensions Ombudsman agreed.

The trustee appealed successfully to the High Court.

The High Court judgment

In his judgment, Mr Justice Richard Smith made several key points, ultimately concluding that these militated firmly against a dynamic interpretation in this case:

- *No presumption*: the Court applied the principle that there is no presumption either way as to whether a legislative reference is static or dynamic. The key is to determine its function within the relevant scheme rules.
- *"Convenient shorthand"* vs *"normative"* reference: the Court drew a distinction between a legislative reference used as a "convenient shorthand" to define a factual condition (e.g. age) and one that performs a "normative" function by incorporating an evolving body

of law to ensure ongoing compliance. The Court found that the reference in this case fell *"more naturally on the 'convenient shorthand' side of the line"*. Its purpose was simply to define an age by pointing to a specific statutory provision, avoiding the need to reproduce complex and lengthy statutory text. Other legislative references in the same rules concerning matters like contracting-out and preservation were, by contrast, genuinely normative and intended to align with the law as it stands from time to time.

- *Simpler drafting alternatives could have been used to achieve a dynamic meaning:* the Court also observed that, if a dynamic meaning had been intended, the drafter of the rules could have achieved this far more simply. For example, the rule could have referred to the date the member "becomes entitled to receive their state pension", without any reference to the relevant legislation. The specificity of the reference indicated a static meaning was intended.
- *The importance of the draftsman's explanatory words:* a decisive factor was the interpretation of the parenthetical wording in the definition: "*(rules for equalisation of pensionable ages for men and women)*". The Court determined this signalled the specific and limited purpose of the legislative cross-reference. It indicated that the reference to the legislation was not intended to capture future changes, particularly those made for a different purpose to equalisation, such as the general increases to state pension age introduced from 2007 onwards.
- *The relevance of the statutory context*: there had been no change to the relevant legislation since it was originally enacted in 1995 and there was nothing in the statutory context (in 2001 when the rules were introduced) to suggest that increases to state pension age were anticipated, let alone by way of later amendment to that particular paragraph of Schedule 4.

Comments

It is important to note that the outcome in this case was highly dependent on the specific wording of the scheme rules and the statutory context at the time of drafting. However, this decision is helpful in clarifying the key points a court may consider and the principles of construction it may apply when determining whether a statutory cross-refence is static or dynamic, particularly where the reference involves the meaning of state pension age.



Kate Kerr-Davis



KO UK Pension Trustees v Barker

The High Court has approved a trustee's decision to vary insurance arrangements and wind up a scheme to distribute surplus. The judgment illustrates the approach of the courts to the approval of trustees' exercise of their powers.

Background

The trustee of the Coca-Cola Company Pension and Assurance Scheme, a defined benefit pension scheme, applied to the court for approval of two in principle decisions.

The scheme's assets consisted largely of an insurance policy with AXA covering the majority of scheme liabilities, which was reinsured by a Bermuda entity within the Coca-Cola corporate group. (The judge noted that this use of a "captive reinsurer" is relatively uncommon.) The scheme also had approximately £46 million of other assets.

The insurance policy provided for a termination payment in certain circumstances, including scheme wind-up, for which the group reinsurer was ultimately liable. This was estimated at £232 million, whereas the cost of a replacement buy-in policy would be only £150-160 million.

The trustee wanted to wind up the scheme, using the surplus and termination payment to augment members' benefits while there were still many living members.

However, only the principal employer could give notice to terminate the scheme.

The compromise agreed by the trustee and employer was that the insurance arrangement would be terminated consensually, and a lower termination payment agreed matching the current cost of a replacement policy. In return, the employer would give notice to terminate the scheme and member benefits would be augmented by up to 27%.

A member of the scheme was appointed to represent the interests of members. After independent legal advice, she concluded that there were no realistic grounds to challenge the trustee's decisions and therefore she did not oppose the trustee's application to court.

The test for court approval

There is a three-part test for the court to consider in approving the exercise of trustee powers:

- Have the trustees formed the opinion that they should act in the way proposed? (Here, this was evidenced by meeting minutes, so was not in dispute.)
- Could a reasonable body of trustees, taking into account all relevant and no irrelevant considerations, form this opinion?
- Is the opinion vitiated by any conflict of interest? (Here, the trustees had delegated the decision to trustee

directors who were not scheme members, and this was also not in dispute.)

It is not the court's role to consider whether it would have exercised the power differently.

The Court's decision

The Court was satisfied that the decision was one which a reasonable trustee could properly have arrived at, taking into account all relevant and no irrelevant considerations. It therefore made the order to approve the proposed decisions. The judge noted that the trustee would be taking a "bird in the hand" in the current surplus, while giving up the possibility of a greater surplus at a future date when there may be fewer beneficiaries to share in it. It was also relevant that the employer group could wait matters out in a way that members could not.

Comments

It may seem surprising that the trustees felt the need to apply to court, when all parties were in agreement. However, the trustees said this was because of the momentous nature of the decision, which would result in the winding-up of the scheme. This case is a useful illustration of the approach of the court to the approval of the exercise of trustee powers, and in particular that the court's role is not to substitute its own decision for that of the trustees.

It is also worth noting that the court process here was relatively quick, from issue of the claim on 5 April 2024 to hearing and oral judgment on 12 July 2024.



Max Norman



Littlewoods Pension Scheme surplus determination

The Pensions Regulator has made an order to allow the trustee of the Littlewoods Pension Scheme to modify the scheme to allow surplus remaining after all liabilities had been secured to be paid to the scheme's principal employer.

Background

The scheme had closed to future accrual from 2011, and in 2021 it entered winding-up. From the 2015 triennial valuation it had been fully funded on a technical provisions basis, but the principal employer continued to pay contributions into the scheme totalling £32.5 million.

All benefits were bought-out in 2023, including augmentations worth £15 million. These allowed for a spouse's pension to be paid to financial dependants where there was no spouse, and for insurance standard commutation factors to be used. The trustee took out residual risk insurance in relation to the scheme, and had an indemnity from the principal employer.

A surplus estimated at £10-12 million still remained in the scheme once the costs of the wind-up had been allowed for.

Scheme rules

Under the scheme rules, the trustee could direct surplus assets to be used following wind-up to provide a "just and equitable increase" in the benefits of members, but this was subject to principal employer consent which it was not willing to give.

There were also complexities in what a "just and equitable increase" would be, including who should benefit, since if the surplus was applied equally across all members, it would only give an annual increase in pension of less than £10 per member.

The trustee had explored with HMRC whether it would give clearance for one-off lump sums to be paid to members instead, but HMRC refused. The insurer had also said it would not be possible to augment since individual policies had already been issued.

There were no alternative provisions in the scheme rules allowing for surplus to be paid to the principal employer, and the amendment power prohibited one being introduced. The trustee had considered whether the surplus could be repaid on the basis of a resulting trust instead, under which assets automatically go back to the participating employers once the purpose of the trust is concluded. However, the trustee had been advised that this would involve an application to court due to the number of participating employers over the years and so it applied to the Regulator to modify the scheme.

The Pensions Regulator's powers

Under Section 69 of the Pensions Act 1995, the Regulator can make an order to authorise trustees to modify a scheme to enable assets remaining after the liabilities have been discharged to be distributed to the employer. It must be satisfied that the purpose cannot be achieved by another means, or can only be achieved with a procedure which would be unduly complex or protracted, or involves obtaining consents which cannot be obtained.

The trustee's initial application was made in July 2023, but the Regulator considered further evidence was needed. In March 2024 the final application was submitted, and this was considered by the Regulator's Determinations Panel in January 2025.

Having considered the trustee's application, the Determinations Panel agreed to make the modification order requested. This was for the following reasons:

- Surplus seemed to have arisen because the principal employer continued paying contributions in even after the scheme had a surplus on a technical provisions basis.
- Scheme benefits had been insured in full and benefits had then been augmented as part of the buy-out.
- Insurance policies and an indemnity from the principal employer were in place.
- The trustee had considered alternatives, including the possibility of further augmentations, but even if this had been possible it would be costly and challenging to achieve, and in any event the consent needed from the principal employer had not been given.
- The amount of surplus relative to the liabilities was such that any further augmentation would have very limited effect on members' benefits.

Comments

Once the provisions on surplus in the Pension Schemes Bill come into force, this type of issue is less likely to arise as it will provide an alternative route to address surplus. Until then, this shows an alternative approach to that seen in the 2023 abrdn case in relying on the Regulator's powers rather than automatic operation of a resulting trust. You can read more about the abrdn case in our Autumn 2023 edition of Pensions Case Law Update. The regulatory process seems to have taken some considerable time. Therefore, it is worth noting that it is not necessarily the case that using this route would be quicker than the alternative court process considered (although this may depend on the specific facts in any given case).



Sarah Opie



Regulatory update

The Regulator has released a number of regulatory intervention reports in relation to the exercise of its regulatory powers over the last few months. Here is a round-up of those cases:

NOW: Pensions

The Regulator has imposed the maximum statutory penalty of £50,000 on NOW: Pensions Limited and its trustee company, NOW: Pensions Trustee Limited for their failure to report "significant events" in relation to the NOW: Pensions Trust, one of the UK's largest master trusts.

The NOW: Pensions entities are required to notify the Regulator if certain significant events occur in relation to the scheme. The Regulator investigated multiple failures to report significant events (concerning member communication failures) and breaches of law to the Regulator between 2018 and 2022. The NOW: Pensions entities discovered three separate incidents where over 65,000 member communications failed to reach members due to missing or invalid email addresses, but they either delayed reporting these failures to the Regulator or failed to report them altogether, with some incidents taking over a year to be disclosed.

This case marks the first time the Regulator has taken enforcement action against an authorised master trust for statutory failures to report significant events. The Regulator made clear that it expects these events and breaches to be reported as soon as reasonably practicable, and that strong communication systems must be maintained and accurate member records kept. The Regulator flagged the following learning points:

- Failure to send timely and accurate communications to members put them at risk, and in this case had caused both financial and non-financial harm to members.
- Failure to tackle problems early could lead to more risk for savers, and so problems should be rectified quickly to avoid issues escalating.
- Trustees should monitor their systems and processes. Administrative and governance failures could indicate other issues or shortfalls.
- Trustees, administrators, employers and scheme funders should be clear about what a significant event is, and who has the duty to report.

The Edinburgh Woollen Mill Ltd Retirement Benefits Scheme

The Regulator took action in relation to the Edinburgh Woollen Mill Ltd Retirement Benefits Scheme following its sole sponsoring employer's insolvency in November 2020, due to concerns about the circumstances leading up to that entity's insolvency.

The Regulator engaged with the entity that had acquired the sponsoring employer's business from administration (PurePay), along with the Pension Protection Fund. PurePay's engagement was noted to be "pivotal" in securing a scheme rescue, resulting in the scheme's exit from the PPF and providing greater security for members. Under the terms of the rescue, PurePay became the ongoing sponsoring employer of the scheme. PurePay also paid a lump sum cash contribution into the scheme, agreed to a recovery plan up to March 2028 and agreed to a suite of covenant protections and downside mechanisms.

The Regulator noted that PurePay's proactivity eliminated the need for it to pursue a formal anti-avoidance case, which would have led to years of uncertainty for members. As a result of this collaborative approach, the Regulator noted that the scheme is now funded well above the PPF funding level, and should achieve full funding on a low dependency basis within three to four years. The Regulator stressed the need for sponsoring employers to keep trustees fully up to date with the employer's financial position and prospects, especially when the employer is facing financial distress.

Boxclever Group Pension Scheme

In our Summer 2025 edition of Disputes Agenda, we reported that the Regulator and ITV had agreed to a settlement, under which members of the Boxclever Group Pension Scheme would be transferred to the ITV Pension Scheme, and receive their full Boxclever Scheme benefits (which were capped at PPF levels while the scheme was in the PPF assessment period).

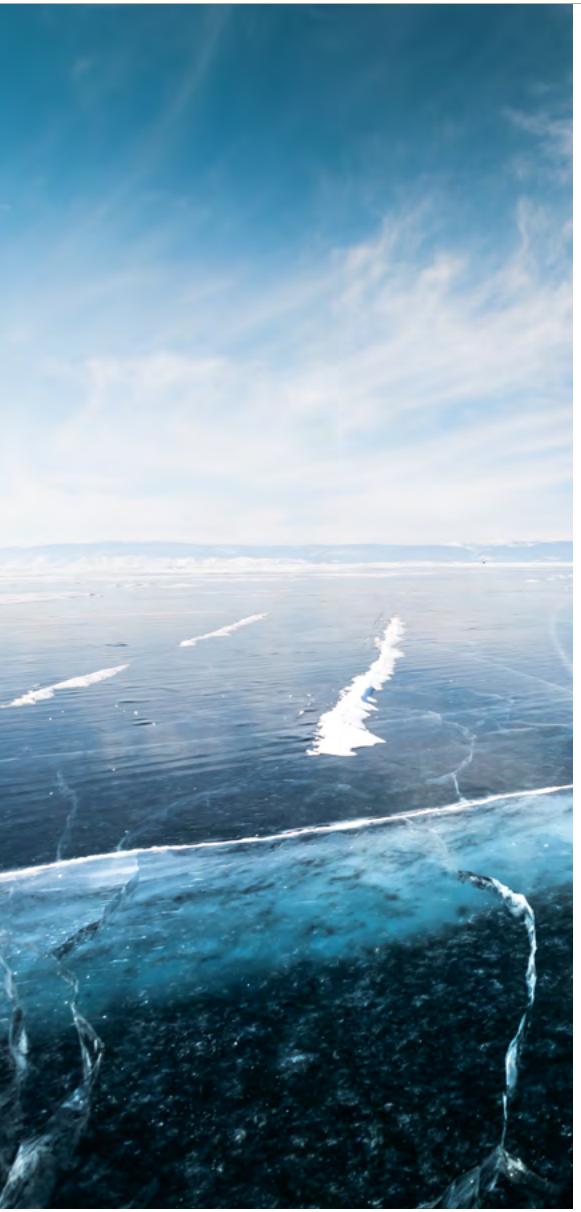
This transfer took place on 1 October 2025, following a data cleanse exercise. Members whose benefits were restricted at PPF levels are also due to receive backpayments with interest.

In its recent report on the settlement, the Regulator said that it will accept a settlement offer when it considers this to be achieving a good outcome for the scheme.

Linklaters acted as legal advisers to ITV in relation to the settlement of the regulatory proceedings.



Chris Biddle



Recoupment of overpayments: an update

Trustees are often faced with the challenge of how to recover overpayments to members, whether caused by administrative error, miscalculation or otherwise. Trustees have several mechanisms at their disposal for recovering overpayments, including recoupment – recovering overpaid benefits by reducing future pension payments. Whilst this offers a practical alternative to repayment demands, trustees may have questions around when and how recoupment may lawfully be applied. The Pensions Ombudsman's jurisdictional limitations have further complicated matters, as a recent Court decision had decided that it could not make the orders necessary to enforce recoupment against members (read more in our Autumn 2024 edition of Pensions Case Law Update). This added another hurdle to trustees' ability to apply recoupment in practice, even when the Ombudsman has determined that recoupment would be appropriate.

The Pension Schemes Bill will change this by designating the Pensions Ombudsman as a "competent court" for certain purposes, including authorising trustee recoupment. This will remove one of the barriers to applying recoupment, though trustees will still need to navigate the various equitable considerations and practical challenges outlined in this article.

This article examines the current legal position on recoupment, analyses practical and legal considerations for trustees recovering overpayments (drawing from several recent Ombudsman determinations in connection with the Bic UK Pension Scheme).

Recoupment: when does it apply?

As recoupment is an equitable remedy, trustees may only apply it where it is fair to do so and in line with general equitable principles. In its recent determination in *Mr E v Trustees of the Bic UK* Pension Scheme the Ombudsman confirmed this means considering whether members have any equitable defences which would make recoupment inequitable, such as:

- "change of position", where the member has altered their financial circumstances in reliance on the overpayment;
- "estoppel by representation", where the member has relied on a representation of fact so it would be unconscionable to apply recoupment; and
- "laches", where trustees have delayed asserting their right to recover the overpayment.

The Ombudsman has also said that the "rule of thumb" is that the period of recovery must be at least as long as the period over which the overpayments arose, and sometimes longer where the recovery period may cause hardship to the member.

In addition, because equitable recoupment is considered a form of "set-off" for the purposes of the Pensions Act 1995, where there is a dispute regarding either the amount of the overpayment or the period of recovery, currently recoupment may only be exercised where the obligation to repay the overpayment has become enforceable under an order of a "competent court". The Courts have previously confirmed that the Ombudsman is not a "competent court" for this purpose.

This means that even where the Ombudsman has determined it is equitable to apply recoupment, if a member disputes the recoupment, trustees must obtain an order from a County Court to enforce this. Although the Court will not seek to re-determine an Ombudsman's decision, this adds further delay to applying recoupment.

The Pension Schemes Bill

The Pension Schemes Bill will change this by designating the Ombudsman as a competent court for this purpose. This means that where an Ombudsman determination is that a trustee may apply recoupment to recover an overpayment, trustees will no longer need an order from the County Court before applying recoupment. This will simplify the recoupment process for trustees.

Further considerations

Before permitting trustees to apply recoupment, the Ombudsman will determine whether a member acquired a contractual right to the overpayment. This requires the necessary elements for a contract to exist: offer, acceptance, consideration, an intention to create legal relations of a contractual nature, and certainty of terms. Whilst these elements are rarely satisfied in overpayment cases, as it will be difficult for the member to show that trustees intended to enter into a legal relationship outside of a scheme's rules, this may be relevant in certain situations.

Furthermore, even where it is established that there has been an overpayment and the various defences noted above do not apply, a member may be able to demonstrate that they:

- have been given inaccurate statements as to their pension entitlement on which it was reasonable for them to rely; and
- have suffered a loss as a result of their reliance on those statements.

In such circumstances, the member may have a claim against the trustee. This does not entitle the member to the promised (overstated) benefit, nor does it prevent recovery of the overpayments, but the member may be entitled to compensation for their loss as a result of the misstatements, which can be set off against the trustee's claim for the overpaid benefits. The measure of damages

seeks to put the member in the position they would have been in had the negligent misstatement not been made.

Additionally, where the Ombudsman determines that maladministration has occurred in making the overpayments, it may make an award to the member for any distress and inconvenience sustained as a consequence of such maladministration.

So, what should trustees be doing?

Notwithstanding that the Bill is expected to simplify trustees' application of recoupment, the recent Ombudsman determinations referred to in this article highlight various additional considerations that trustees must navigate. Whilst robust administrative processes provide the best protection against overpayments, even well-administered schemes may experience such issues. Trustees should ensure that:

- communications to members regarding their benefits are clearly drafted, with any representations about benefit entitlement appropriately caveated;
- communications with members regarding potential overpayment issues are sent promptly and clearly explain the potential consequences for members;
- overpayment issues are addressed swiftly; and
- any potential defences members may have are appropriately investigated.



Oliver Hill



Mr D v BS Pension Fund Trustee Limited

Mr D complained that the trustee failed in its duty of care when processing his transfer request to a self-administered pension scheme (SSAS), which subsequently invested in assets that were unlikely to be recovered, resulting in the likely loss of some or all of his pension. The Ombudsman did not uphold Mr D's complaint, finding that trustees did not owe a duty of care to carry out extensive due diligence in respect of a pre-2021 statutory transfer.

Background

Mr D accrued benefits in the British Steel Pension Scheme (BSPS) from 2004 to 2008. In 2014, First Review Pension Services, an unregulated firm, cold called Mr D and persuaded him to request a transfer of his benefits, to invest in a fractional share of an overseas hotel resort operated by The Resort Group (TRG), a company First Review was connected with. To effect the transfer, Mr D was helped by Bespoke Pension Services Ltd, a pensions administrator also connected with First Review, to set up a small SSAS administered by Bespoke.

On 11 August 2014, Bespoke wrote to the BSPS trustee requesting the transfer and providing (among other things):

- the SSAS's Trust Deed and Rules, and evidence of its registration with HMRC;
- a transfer request signed by Mr D, stating he had received detailed information about the SSAS and the risks involved, and had been offered no incentive to transfer; and
- a copy of the Pensions Regulator's "Scorpion Leaflet", signed and confirmed as read by Mr D.

The trustee checked that the requirements were met for a statutory transfer but did not investigate further. On 1 September 2014, it made the transfer.

Subsequently Mr D discovered the investment was largely inaccessible. He complained that the trustee had caused this loss by failing to carry out due diligence and warn him of the risks. In particular, the trustee had:

- missed obvious scam warning signs, including the unsolicited approach to Mr D, the high-risk proposed investment, the fact that neither First Review or Bespoke were regulated by the Financial Conduct Authority and the links between First Review, TRG and Bespoke;
- missed obvious timing and registration issues, such as the fact the sponsoring employer (a dormant company) had only been incorporated the month before;
- omitted basic checks which would have discovered these, such as searching Companies House or contacting Mr D; and

- made no attempt to check that Mr D understood the receiving scheme and the proposed investment.

Ombudsman's determination

The Ombudsman identified two key questions:

- In August 2014, at the time of the transfer, was there any legislative or regulatory obligation on the trustee to undertake due diligence, beyond checking that the statutory requirements for transfer were met?
- If not, was there any common law or equitable duty of care to do so?

On the first point, the Ombudsman found that, while the Regulator's "action pack" (entitled "Pension liberation fraud: the predators stalking pension transfers") recommended due diligence as best practice, this guidance was not binding and used permissive language such as trustees "may" want to include the Scorpion Leaflet. Indeed, once the trustee was satisfied that the statutory requirements were met, it was obliged to make the transfer and could face civil penalties for not doing so.

On the second point, the Ombudsman reviewed relevant case law and concluded there was no duty of care. The law generally does not impose a duty of care where it could conflict with performance of a statutory obligation. The law also rarely imposes liability for an omission (here, omitting to undertake due diligence), except where a person has voluntarily assumed responsibility for the affairs of another. The trustee had not voluntarily assumed responsibility to conduct due diligence beyond the statutory requirements, nor had it made any representation to Mr D that it would do so. In this case, the trustee met its statutory obligation and obtained the benefit of a statutory discharge. Extending the trustee's duty beyond the statutory requirements would undermine the utility of such discharge.

Comments

Trustees' legislative and regulatory duties in this area are now broader than in August 2014. In particular:

- from April 2015, trustees must check a member has received "appropriate independent advice" regarding a transfer from a DB to a DC scheme exceeding £30,000; and
- from November 2021, trustees are required to undertake extensive due diligence of the kind Mr D argued for.

This determination is nevertheless important for confirming that there is no duty to undertake due diligence beyond that set out in applicable legislation.

The Ombudsman comments that, while each case turns on its facts, this determination will likely inform the Ombudsman's approach to similar pre-2021 transfers.

Mr D argued that the Ombudsman should take account of the Financial Ombudsman Service's views on comparable complaints. However, the Ombudsman emphasised that it is a separate entity and so makes decisions on different bases. This means that consumers may receive different outcomes depending on whether they transferred from personal pensions (regulated by FOS) or occupational pension schemes (regulated by the Ombudsman), even in similar factual circumstances.



Oliver Hill

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