IN FOCUS

ONE LUMP OR TWO? FLEXIBILITY IN THE IDRP

By James Walmsley

Unsurprisingly, there is much to take from the fascinating discussion with Anthony Arter in Episode 1 of Talking Pensions. One particular topic that is covered, and which I focus on in this short note, is IDRP. When asked what struck him as the defects in the existing system of pensions dispute resolution, Mr Arter said this:

> *One was the two stage IDRP process. When I was in practice, I found it was quite rare for a decision at the first stage to be changed by the second stage. Now that's not always true. But nine times out of ten it will be exactly the same decision, that would waste at least six months. And the problem for a complainant is they become very stuck in their position. You know, they've argued it, they spent hours and hours arguing the points and going over papers and everything else, and for them to suddenly accept that there's nothing in it or whatever the offer might be from the respondents is more difficult. And so the faster and quicker one that deals with the complaint, the better. And so I argued certainly from 2015 onwards, that trusts should change to a one stage process, unless it was a really complicated issue, and they could perhaps fall back on a two stage process. But the legislation allows a one stage process. Why not take it? Why not do that? And actually, it saves them resource as well and time as well. So I've been very keen on that and argued - and many schemes have changed, the armed forces scheme from in the public sector has changed, for example. But there were other schemes as well.*

When the Pensions Ombudsman makes the observation that in disputes he has seen the use of two IDRP stages (rather than one) has often been a waste of resource, cause of delay, and invitation to entrench positions, anyone involved in the governance of a pension

scheme should stop, listen and think. And that got me wondering: should all those schemes that currently have a two stage process (and who knows how many of those there are?) simply abandon that in favour of a one stage system? I am not so sure. I think there are a few things for trustees to consider.

First, whilst the Pensions Ombudsman is obviously extremely well placed to form an impression about the role/impact of IDRPs in the context of those disputes that get as far as the Ombudsman, it is to be hoped that there are disputes out there which do not get that far. Where a swift and relatively light touch first stage procedure has resolved matters satisfactorily and with relatively little use of resource, and no further complaint is taken forward, the Pensions Ombudsman might never know. So before switching away from a two stage procedure, trustees for a given scheme will want to consider those cases where their procedure has operated successfully, with disputes being resolved early, and not judge its operation only by reference to the quality of its impact in those complaints that have ended up involving the Ombudsman, or by reference to how often a complaint taken to a second stage receives a different response to that which it received on the first.

Secondly, whilst the rigidity of the original two stage statutory framework for IDRPs introduced by section 50 of the Pensions Act 1995 and The Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996 (SI 1996/1270) was quite soon regarded as problematical, and was in the end replaced with effect from 6 April 2008 by section 273 of the Pensions Act 2004 as amended by section 16 of the Pensions Act 2007, there was a specific rationale behind the original two stage idea, and the fact that the two stage process was expressly maintained as a non-mandatory option is suggestive of a perspective that for some schemes a two stage procedure may still be best. A brief review of the relevant statutory and parliamentary history illustrates the point.

The first statutory intervention in this area, through section 50 of the Pensions Act 1995, had been prompted by analysis in the Goode Report, published in 1993. (See the

discussion of the corresponding clause of the Pensions Bill in Standing Committee D – 23 May 1995 (am).) There had been a substantial chapter (Chapter 4.13) in the Goode Report on dispute resolution, and this included a recommendation that there be a requirement for internal dispute resolution procedures communicated to members. The analysis included the following comments:

> *Whatever the form of the dispute resolution machinery [and in context the machinery referred to was both internal and external], it will not be fully effective unless it commands the confidence of those who resort to it. For this to be achieved the procedures should be, and be seen to be, fair to all parties, and should, if possible, be readily accessible, expeditious, inexpensive and easily understood. When these criteria are applied to the current facilities for dispute settlement, various inadequacies quickly become apparent… (Paragraph 4.13.10)*

> *Disputes can in many cases be avoided by proper communication between scheme administrators and members. Very often the problem is not that the member has been unfairly treated but that misunderstandings have arisen through failures in communication…. The first route to dispute resolution should be the internal dispute machinery provided by the employer or the scheme. There are some schemes which already provide mechanisms for internal resolution of disputes, and it is clearly desirable that wherever possible disputes should be settled without either side feeling the need for external adjudication… (Paragraph 4.13.11)*

> *A satisfactory procedure for settling individual disputes needs to be easily accessible to everyone concerned, to allow a preliminary stage of explanation/conciliation so that simple misunderstandings can be cleared up without bureaucracy, and to include powers for individuals to have access to their records…. There is at present no duty on schemes to provide an internal procedure for the resolution of disputes, nor to give information to members as to any procedure that does exist. We consider that all schemes other than small schemes should be required to establish a formal internal disputes procedure… (Paragraphs 4.13.37-38).*

In view of those comments it is not surprising that the initial legislation in 1995 provided for two stages, with a first stage that was clearly intended to be lighter touch in nature, with a single person dealing with the matter potentially without any trustee board involvement at all.

By the time of the Pickering Report published in July 2002 the detailed provisions of the IDRP system do not seem to have been generally regarded as working well – that report said (Paras 6.11-6.12):

> *It is right that members should have access to an effective mechanism where disputes arise, but we do not think the existing system works to their best advantage… We would, therefore, recommend the abolition of the current prescriptive approach to internal dispute resolution… The general principle should be that schemes need more flexibility with the option of retaining current arrangements where they are working well, or changing them where that would be advantageous….*

That review led to a proposal to change the statutory requirements in the Bill that survived unscathed in the Pensions Act 2004. In discussion of the relevant clause in the House of Lords on 13 October 2004, Baroness Turner, in support of an amendment (the details of which I need not go into and which was not pursued), made a number of comments that are worth noting:

> *As I understand it, the Bill simplifies the existing requirements for IDR procedures, principally by removing the requirement for a two-stage process. The change is driven by simplification and a view that the present process is too complex and time-consuming.*

Her union, based on its experience of representing members, had told Baroness Turner that:

> *…the nature of many complaints is that the member, while dissatisfied, may have very little conception as to the full facts and rules that are relevant to his case. In the era before IDRs were required companies often fobbed off complainants summarily. The key advantage to the two-stage procedure was that it allowed the complainant to make what might be called an*

uninformed complaint and guaranteed him or her a reasoned response; that is, an explanation, reference to the rules, and so on. He or she could then bring an informed complaint at a second stage if not satisfied. Often, the second stage was not so much an appeal as an elaboration of the original complaint, which might well include information not previously known.

Baroness Hollis' response on behalf of the Government includes the following:

Currently, all occupational pension schemes are required to have formal arrangements in place for dealing with complaints and disputes. Normally, that is a two-stage process. We have had representations made to us that, while that is obviously satisfactory for public-sector or large schemes, it is often unwieldy, cumbersome and inappropriate for small schemes. Clause 261 [which became section 273] removes the detail. We hope that it provides an effective framework for the resolution of disputes while allowing trustees to adopt procedures best suited to their scheme.

The guide to the Pensions Act 2004 published by the Government in November 2004 said this:

Existing legislation on the requirement for schemes to provide a procedure for dealing with disputes has been criticised for being too rigid and prescriptive. The Act replaces this with new requirements that are much simpler, require only a one-stage process, and will allow schemes to adopt procedures that are best suited to the way they operate.

Unfortunately, section 273 was not regarded as fit for purpose and itself required amendment before being brought into force. That was dealt with by section 16 of the Pensions Act 2007. The background was set out by the then Parliamentary Under-Secretary of State for Work and Pensions (Mr James Plaskitt) in the session on 1 February 2007 (pm):

The clause amends the provisions relating to the resolution of disputes. Occupational pensions schemes are currently required to operate a formal two-stage process for dealing with disputes between individuals and trustees. However, the process is rather prescriptive and is

bound by rigid time limits. Although the process works well in many larger schemes, we wanted to give schemes the opportunity to adopt something simpler and more flexible. The change that we propose also follows recommendations that came from the Pickering Report…. We legislated in the Pensions Act 2004 to enable schemes to simplify their dispute resolution arrangements, by allowing them to adopt a one or a two stage-procedure. However, the measure was not commenced, because doubts were raised by pension schemes and their advisers about the extent to which the provisions would allow trustees to delegate decisions on disputes… We… decided that it would be sensible to put the matter beyond doubt [and that] is the main purpose of the clause… As I have said, the main purposes of the changes set out in the clause is to make things simpler and easier for schemes to implement, and to make the legislation less prescriptive…

As can be seen from the above, a theme of this history has been an acknowledgment that there may well be schemes in the context of which the two stage approach works well, not just for reasons of efficiency and management, but also as a means of promoting swift dealing with misunderstandings and ensuring that members have the opportunity to make, if they wish, a properly informed and formal, but still internal, complaint.

Thirdly, if on review of the operation of a two stage IDRP within a particular scheme it is seen as giving rise to problems of waste, delay and entrenchment, it might be asked whether flexibilities might be deployed to address the issues while retaining a two stage system – for instance by committing to a shorter timescale for the first stage.

Fourthly, the overall procedure has to be examined not just from the perspective of efficiency and individual dispute outcome, but also from the perspective of member experience more broadly. There may well (and in some schemes more than others) be members out there who welcome the opportunity to raise a matter as a "complaint" but in a more contained and low-key way, that falls short of an embarking on a more full-blooded

dispute that requires consideration by a full trustee board (or body delegated to consider such matters). In the context of some schemes, a two stage procedure might be seen from the member perspective as a humane way to strike the necessary balance.

To sum up, even where trustees consider that experience with their particular scheme justifies a switch to a single stage procedure, it would be sensible to consider measures that avoid changes throwing the baby out with the bathwater – measures such as, for example, specifically including in the IDRP the promotion of communication and discussion before any formal complaint is actually initiated. That should help to ensure that significant and ultimately wasted efforts are not put into preparing a complaint in relation to something where there has been a simple misunderstanding or easily addressed error. This all comes back, unsurprisingly, to communication with members – a theme of the Goode Report that kicked all this off, but also of the discussion with Mr Arter. The excellent first podcast is well worth another listen.

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