

## Redress for non-financial injustice

This factsheet is revised guidance from the current Pensions Ombudsman, Anthony Arter, about redress for applicants for non-financial injustice caused by maladministration. It replaces our previous guidance on this topic.

Where the Ombudsman makes a determination “he may direct any person responsible for the management of the scheme to which the complaint or reference relates to take, or refrain from taking, such steps as he may specify” – section 151(2) Pension Schemes Act 1993.

### What's new?

The Ombudsman has decided, following consultation with various stakeholders, to introduce fixed amounts for non-financial injustice awards (commonly referred to as ‘distress and inconvenience’ awards). This enhances transparency, creates consistency and manages expectations for all parties to the complaint.

An award for non-financial injustice will now usually fall into one of the following five categories of awards; **nominal**, **significant**, **serious**, **severe** and **exceptional**, as detailed in the table overleaf.

Additionally, the award for non-financial injustice falling short of exceptional, has increased to £2,000 (see **severe** category).

### What is non-financial injustice?

- ‘Inconvenience’ or ‘time and trouble’ suffered by an applicant. That is the time and effort spent by an applicant in relation to the maladministration and in having to pursue their complaint. This includes needing to go through a complaints process where the maladministration was both avoidable and identifiable at an earlier stage.
- ‘Distress’ suffered by an applicant. It could, for example, be concern, anxiety, anger, disappointment, embarrassment or loss of expectation that an applicant may experience. Distress can vary from mild irritation to (exceptionally) anxiety that requires medical treatment.

The non-financial injustice suffered must be caused directly by the maladministration.

Non-financial injustice is distinct from financial injustice/loss. This is financial loss arising directly or indirectly from the maladministration (including legal or professional expenses incurred in pursuing the complaint because of that maladministration). See, for example, *Mr N (PO-12763)* where the scheme was directed to reinstate Mr N's accrued benefits in the scheme or provide equivalent benefits (in addition to £1,000 for non-financial injustice).

## How much might an award be?

We will always take account of the individual circumstances of the case. Similar complaints should, however, result in consistent and broadly comparable awards. Not all maladministration inevitably leads to an award for non-financial injustice.

nominal	significant	serious	severe	exceptional
No award	£500	£1,000	£2,000	More than £2,000

### Nominal

If the non-financial injustice is **nominal** (that is not **significant**) then it is unlikely that any award will be made. It might be that we will simply make a recommendation that the respondent offers the applicant a formal apology. The applicant may be looking for vindication or a public acknowledgement that something has gone wrong for which the respondent should be sorry.

### Monetary – case law background

In 1999, in the case of *City and County of Swansea v Johnson [1999] 1 All ER 863*, the judge said that an award for non-financial injustice *over* £1,000 should only be given in exceptional circumstances. Recently, the High Court case of *Bagniet v Capita Employee Benefits Ltd [2017] EWHC 501 (Ch)* reconsidered the upper limit of awards for non-financial injustice *falling short of being* exceptional. The judge suggested an increase from £1,000 to £1,600 as being broadly in line with inflation.

In *Smith v Sheffield Teaching Hospitals NHS Foundation Trust [2017] EWHC 2545 (Ch)*, the judge made similar comments in relation to the effect of inflation, adopting £1,600 as the upper limit and going on to increase the award we had made of £500 to £2,750. The judge highlighted several instances of maladministration, occurring over a long period, which was material to the likely level of distress.

## Significant

If the non-financial injustice is **significant**, then in line with industry practice, our usual starting point will be £500. We will not look to increase this lower limit, because it was reviewed and increased to £500 in July 2015, which took account of inflation and other factors.

## Serious and severe

Following the recent caselaw referred to above and a review of our current policy more generally, we have decided to increase the upper limit for non-exceptional awards (that is **severe**) to £2,000 (so satisfactorily demarcating between **serious** and **severe** awards).

## Exceptional

Complaints do come to us, albeit rarely, where **exceptional** distress or inconvenience has been suffered by the applicant. See, for example, *Lambden (74315/3)* and *Foster (82418/1)* where awards of £5,000 and £4,000 respectively were made for non-financial injustice, or more recently, *Ms R (PO-18157)* where £3,000 was awarded.

## Our approach

If a sufficient offer of redress has been made before or during the investigation we will not normally add to it. An offer by a respondent should not result in an applicant gaining an advantage. Awards are made based on the facts and circumstances of the individual case.

Our awards for non-financial injustice are intended as an acknowledgement to the applicant of the inconvenience and/or distress that they have suffered. In other words, to remedy the injustice genuinely suffered – not to penalise or punish the respondent for bad behaviour.

However, if a respondent persists in behaviour making it difficult for members to achieve redress and causing more anxiety, this is likely to result in a higher award.

Additionally, we will not look to ‘rob Peter to pay Paul’. For example, where the award comes out of limited scheme resources and the scheme is underfunded, in wind-up, or is in the process of being transferred to the Pension Protection Fund.

Non-financial injustice awards are usually treated as a ‘scheme administration member payment’ and assessed to tax under the tax rules generally, rather than the registered pension schemes’ tax rules. For more information, see HM Revenue & Customs’ website.

## How do we assess non-financial injustice?

We will look to take into account the particular circumstances of the individual, such as the person’s individual characteristics. But we will also take a wider view and ask would a reasonable person (with those characteristics) have reacted the same way. It is a matter of

judgment. If an applicant claims, for example, a high level of distress, it does not necessarily follow that they will receive an award if the distress was not justified, foreseeable or credible. For example, the applicant might be angry by nature. If, however, the applicant is vulnerable, for example due to their mental health, then it might be reasonable that they would be more likely to suffer distress.

Each case is assessed on its own facts and merits, but relevant factors that we might take into account could include:

- If it was obvious that there was maladministration and whether the complaint could have been easily avoided or resolved at an early stage.
- How well did the respondent handle the applicant’s complaint and the internal dispute resolution procedure (IDRP), for example, thoroughly, dismissively?
- Were there excessive delays that were extensive or readily avoidable by those responsible for handling the complaint?
- Whether any maladministration (and distress or inconvenience arising from it) took place on a single or over many occasions; and how long did it take for the respondent to correct this?
- What level of distress or inconvenience was suffered?

## Guidelines for awards for non-financial injustice

Where we consider that an award for non-financial injustice may be appropriate, the award is likely to fall into one of the following categories shown below. Given that no two complaints are the same, we will always consider all the submissions and evidence of the parties when determining what the appropriate award should be and we will provide an explanation for the decision that we reach.

Award	Category	Description (one or more factors to apply – depends on facts of the case)
No award	<b>Nominal</b>	<ul style="list-style-type: none"> <li>• minimal, or no, distress and/or inconvenience established</li> <li>• very limited distress and duration</li> <li>• single occasion</li> <li>• an apology would be adequate redress.</li> </ul>
£500	<b>Significant</b>	<ul style="list-style-type: none"> <li>• starting point – where some significant distress and/or inconvenience has been caused to the applicant</li> <li>• one or more occasions</li> <li>• effect was short-term</li> <li>• respondent took reasonable steps to put matters right.</li> </ul>

£1,000	<b>Serious</b>	<ul style="list-style-type: none"> <li>• a <b>serious</b> level of distress and/or inconvenience that has materially affected the applicant</li> <li>• several occasions</li> <li>• lasting effect over a prolonged period</li> <li>• respondent was slow to put matters right.</li> </ul>
£2,000	<b>Severe</b>	<ul style="list-style-type: none"> <li>• a <b>severe</b> and adverse, but not quite exceptional, level of distress and/or inconvenience caused to the applicant</li> <li>• chronic situations</li> <li>• numerous and/or repeated or compounded errors over a prolonged period but opportunities to notice and remedy those mistakes were missed (more so if ease of true position could have been ascertained)</li> <li>• lasting effect over a prolonged period</li> <li>• applicant's wellbeing affected, for example, serious detriment to health</li> <li>• applicant prevented from making informed life decisions at critical times, for example, a decision to retire early or resigning from employment that might not have otherwise been taken</li> <li>• respondent failed to respond to the applicant</li> <li>• respondent failed to take steps to put the matter right</li> <li>• respondent failed to understand the applicant's distress and/or inconvenience.</li> </ul>
Higher than £2,000	<b>Exceptional</b>	<ul style="list-style-type: none"> <li>• one or more <b>severe</b> factors above apply</li> </ul> <p><b>plus</b></p> <ul style="list-style-type: none"> <li>• an aggravating factor, as listed below for example, could push a <b>severe</b> award of £2,000 up to <b>exceptional</b> level: <ul style="list-style-type: none"> <li>○ applicant was persistent in explaining to respondent their distress and/or inconvenience</li> <li>○ respondent wilful or reckless</li> <li>○ repeated failure by respondent to engage with TPO on one or more complaints</li> <li>○ widespread failure by respondent to address complaints</li> <li>○ grave adverse health consequences for the applicant</li> <li>○ disregarding IDRPs recommendations.</li> </ul> </li> </ul>