



Pensions Ombudsman update

Recovery of overpayments

An employer's failure to inform the paying authority of the Principal Civil Service Pension Scheme until 2005 that a pensioner member had, from 2000, exceeded his annual earnings limit used for abatement was maladministration.

2 June 2015

Mayes-Wright (PO-2865): The Pensions Ombudsman has given his determination in a complaint by Mr Ian George Mayes-Wright against the Scheme Management Executive of the Cabinet Office and Capita (the **Administrator**).

Mr Mayes-Wright worked for the Foreign and Commonwealth Office (**FCO**) and was a member of the Principal Civil Service Pension Scheme.

When Mr Mayes-Wright retired, he subsequently continued to work for the FCO periodically under fee-paid contracts. The FCO provided Mr Mayes-Wright with a booklet which explained abatement and stated that if Mr Mayes-Wright earned more than his annual earnings limit, abatement would apply.

Mr Mayes-Wright was not informed when he had exceeded his annual earnings limit, and the FCO and the Administrator failed to take any action in respect of the abatement until five years had passed.

The Administrator's failure to inform Mr Mayes-Wright that he had exceeded his annual earnings limit, which resulted in their failure to prevent further accumulation of pension overpayments, compounded by a failure to act to recover any overpayments until 2010 was also maladministration.

The Pensions Ombudsman upheld the complaint. Mr Mayes-Wright was being asked to repay over £30,000 in overpayments built up between 2000 and 2007. He held that the member had acted in good faith when receiving his unabated pension and could not have known he was being overpaid.

Mr Mayes-Wright had changed his position in reliance on the unabated pension and it would be inequitable for the scheme managers to now seek recovery of the overpayments. The scheme managers should also have considered the risk that hardship would be caused.

The Ombudsman ruled that the scheme managers could not seek to recover any further overpayments and that any payment into the scheme which may have been required should be sought from the employer and the paying authority. Any monies already recovered from Mr Mayes-Wright should be returned with interest.

Impact

Trustees should act quickly to recover any overpayments once they become aware of them. Delays are likely to result in an inability to recover overpayments where it would be inequitable to do so. Trustees should also ensure that information about a pensioner member's annual earnings limit is provided to them at an early stage to ensure that the member is aware of the threshold at which abatement may apply.

This decision also shows that the Ombudsman is willing to make a finding against a party who is not formally named as a respondent, and make appropriate directions.

Unpaid contributions: company director's personal liability

A sole company director who acted as the de facto administrator of an occupational pension scheme was personally liable for loss incurred by a member in relation to £42,798 in unpaid contributions.

19 June 2015

Forrest (PO-1145): The Pensions Ombudsman has given his determination in a complaint by Mr Richard Forrest against Contract Catering Consultants Ltd, (the **Employer**) and Mr Harold Trace.

Mr Forrest was a member of the Contract Catering Consultants Limited Staff Retirement and Death Benefit Scheme (the **Scheme**). In 2011, the Ombudsman upheld a complaint by Mr Forrest against the Employer in relation to £42,798 in unpaid contributions.

When the Employer refused to pay the outstanding money, and other avenues for its recovery had been exhausted, Mr Forrest brought a fresh complaint to the Ombudsman against both the Employer and Mr Trace (the sole director of the Employer) personally.

The Ombudsman upheld a fresh complaint as against the director, who was responsible for the scheme's day-to-day administration and payment of contributions to the scheme provider.

In this case, the Ombudsman held that Mr Trace had acted in a way which had created a personal obligation, as he was personally carrying out acts of administration of the Scheme. The director's decision not to pass scheme contributions on to the provider was maladministration for which he was personally liable as effectively the scheme's administrator.

The Ombudsman directed the director personally to pay £42,798 plus interest into the member's new arrangement (as the original scheme had closed) and to pay him £2,000 for the distress and inconvenience caused by his maladministration.

Impact

This determination shows that where a director has been involved in carrying out acts of administration in relation to a scheme in a personal capacity, the Ombudsman may be willing to pierce the corporate veil and hold that director to account for his maladministration. Directors should be very careful about carrying out acts of administration as it may prove difficult to rely on the proposition that such acts are carried out on behalf of the scheme employer.

However, the facts in this case were unusual and the 'corporate veil' principle protecting company directors from personal liability still has general application for directors of pension scheme corporate trustees, which generally provides a higher level of protection for the individuals concerned as compared with being individual trustees of a scheme.

Trustees entitled to defer equalising GMPs until DWP clarifies legal position

The Pensions Ombudsman has ruled that the trustees of a defined benefit scheme are entitled to defer taking any action to equalise guaranteed minimum pensions (**GMPs**) until required to do so by the government.

10 July 2015

Kenworthy (PO-4579): The Pensions Ombudsman has given his determination in a complaint by Dr Gordon Kenworthy against Campden R A Pension Trust Limited (the **Trustees**) and Trigon Pensions Limited (the **Actuary**).

Dr Kenworthy left service aged 62 in 2010 and asked for details of his deferred pension on leaving service and on reaching normal retirement age (**NRA**). At the time he became a deferred member, the scheme actuary at the time provided Dr Kenworthy with figures for his deferred pension at leaving and at NRA.

The scheme had amended its accrual rate and equalised NRA at 65 for men and women in January 2003, while retaining an underpin for service before that date. When the actuary was replaced, the Actuary advised Dr Kenworthy the figure for his pension at NRA should have been adjusted to allow for a separate Barber underpin.

Dr Kenworthy disputed the calculation method and argued that it did not properly reflect the 2003 underpin, which had been incorporated into the scheme rules. He further argued that male members were unfairly treated by this method of calculation.

Dr Kenworthy argued that there was an obligation for the Trustees to equalise the GMPs between the sexes, following the previous Ombudsman's determination in Williamson.

The Ombudsman rejected the complaint. It was not his role to decide which of the actuaries' calculation methods was preferable. Two actuaries could "quite properly hold different professional opinions about a particular matter" and both actuaries would be bound by the standards of their professional body. The Actuary was, in the circumstances, fully entitled to use her preferred method to calculate the complainant's deferred pension at NRA, which she considered properly took account of both underpins and which she had certified as reasonable. The Trustees were entitled to defer taking action to equalise the GMPs until the government required it of them, and therefore it was acceptable that the GMP calculation distinguished between the sexes (because of the differing GMP pensionable ages applying to men and women).

Impact

This determination will be welcomed by many trustee boards who are uncertain on if and how to equalise GMPs upon a transfer out of the Scheme.

This determination confirms that Trustees are entitled to defer taking action to equalise GMPs until the government legislates in this area. In the meantime, trustees are entitled to rely on calculations of GMPs which apply different GMP pensionable ages to men and women.

Ill-health early retirement

Employer responsible for ensuring decisions not to certify a member as medically eligible for ill-health early retirement are carried out properly and in accordance with scheme rules.

21 July 2015

Staples (PO-6463): The Pensions Ombudsman has given his determination in a complaint by Mrs Danielle Staples against the Ministry of Justice (the **Employer**) and MyCSP (the **Administrator**).

Mrs Staples was employed by the Ministry of Justice and was a member of the Principal Civil Service Pension Scheme (the **Scheme**). She suffered from health problems, causing her to go on long-term sick leave. The scheme rules provided that an IHER pension was payable to a member with two years qualifying service if the Scheme's medical adviser was of the opinion that the member was permanently unfit to return to work and the Minister agreed to the member becoming so entitled.

Whilst the Employer's occupational health advisers concluded that Mrs Staples was permanently unfit to return to work and that further treatment options would not alter this, the Scheme's medical advisers said that there were further treatment options.

The Ombudsman upheld Mrs Staples' complaint. He held the medical adviser and medical appeals board failed to consider the amount of time required to access various treatment options and how quickly they would have any effect as against Mrs Staples' pension age. They also failed to explain why they gave no weight to a medical opinion supporting her eligibility. The Ombudsman therefore upheld the complaint as against the Employer in relation to these failings. He also upheld the complaint as against the Administrator, which failed to identify the same flaws during the later internal dispute resolution procedure.

The Ombudsman remitted the decision on whether to award an IHER pension back to the Ministry of Justice and directed it and MyCSP to pay the member £300 and £200 respectively for the distress and inconvenience caused by their maladministration.

Impact

Trustees should be cautious in considering whether an individual is eligible for ill-health early retirement, and should ensure that all medical evidence is appropriately weighed. When considering possible future treatment options, due consideration should be given to the amount of time remaining before the member reaches pensionable age. When they have reached their decision they should note that if no reasoning is given it is likely the individual in question would then seek a review of the decision through the Ombudsman.

However, Trustees may take comfort from the fact that, in this case, the Scheme rules were binding and, provided all factors are considered in reaching a decision there would be no maladministration.

Transfer values: trustee delay

Trustees of a defined benefit scheme unnecessarily delayed by seeking clarification from HMRC on the request of pensioner member to transfer to an annuity provider, resulting in annuity the member bought being lower than it would have otherwise been.

22 July 2015

Baust (PO-7738): The Pensions Ombudsman has given his determination in a complaint by Mr Julian Baust against the trustees (the **Trustees**) of the Kodak Pension Plan (the **Plan**).

Mr Baust took early retirement from the Plan. The Plan rules gave the Trustees a discretion to transfer members' benefits to another scheme. Mr Baust sought clarification from HMRC as to whether he could transfer his benefits out of the Plan in order to buy an annuity, which HMRC confirmed was possible.

However, the Trustees decided to seek further clarification from HMRC before approving the transfer. Mr Baust complained to the Ombudsman that the delays by the Trustees in transferring his Plan benefits cost him £2,020 in yearly annuity payments.

Secondly he complained that the Trustees would not give him a written assurance that the 30% reduction applied to his transfer value was not higher than the reduction applied to members who transferred to a new Kodak Pension Plan.

The Ombudsman partially upheld Mr Baust's complaint. He had wanted to transfer because the Plan was at risk of entering the PPF, and as a result of his early retirement, his benefits would have been capped.

He held that the transfer could have been completed nearly two months earlier than was the case because of the trustees' inaction. This would have secured the member an annuity that would have been £461.23 a year higher.

However, the Ombudsman held that the Trustees' obligations to Mr Baust ended after the transfer was made, and therefore he dismissed the member's additional complaint that the trustees should now give him written assurance that the 30% reduction applied to his transfer value was not higher than the reduction applied to other members who later transferred to the new Kodak Pension Plan.

The Ombudsman directed the trustees to buy the member an annuity to make up the lost income of £461.23 a year, or an equivalent capital sum if this was not possible.

Impact

Trustees should note that transfers out of a DB scheme are permissible even once pension payments have commenced, provided that the transfer is to a scheme pension which satisfies the "like for like" requirements set out by HMRC. However, members do not have a statutory right to a transfer under these circumstances so the power to transfer must be included in the Scheme's rules. Trustees should deal with such transfer requests as promptly as possible.

However, trustees may take comfort from the fact that in most circumstances their obligations to the member will cease once the member has transferred out of the plan, once the discharge of further liability is received from the member.

Death benefits

It was reasonable for trustees of self-invested personal pension (**SIPP**) to delay making decision on distribution of death benefits, to give deceased member's adult children time to provide further information.

31 July 2015

Barnicoat (PO-5763): The Pensions Ombudsman has given his determination in a complaint by Mrs Jacqueline Barnicoat against Hargreaves Lansdown Asset Management Limited (the **Trustees**), the trustees of the Hargreaves Lansdown Vantage SIPP (the **Scheme**).

Mrs Barnicoat's unmarried partner was a member of the Scheme and had two adult children and several grandchildren from a previous relationship. Six months prior to his death, in March 2012, Mr Bunn completed a death grant nomination form in favour of Mrs Barnicoat.

Mrs Barnicoat was not a beneficiary under Mr Bunn's will, which named his two children as executors. However, the Scheme's rules gave the Trustees discretion to pay death benefits to a wide range of potential beneficiaries, including anyone the member had nominated, his relatives or a beneficiary of his estate.

Mrs Barnicoat gave the Trustees details of her financial position and relationship to Mr Bunn. However, Mr Bunn's children claimed that the relationship between Mrs Barnicoat and Mr Bunn had broken down and that they were seeking evidence pertaining to various alleged financial irregularities and possible fraud.

They requested additional time to obtain this evidence, and further requested that the Trustee maintain confidentiality about their evidence.

Mrs Barnicoat was eventually awarded the member's death benefits nearly a year after his death. She submitted that the delay while the trustees looked into the children's allegations caused her financial loss and considerable distress, a situation she said was exacerbated by the trustees' decision to keep the details of the children's claims confidential.

The Ombudsman found that although the Trustees could have been more proactive in checking the truth of the allegations where possible and keeping the member updated without breaching confidentiality, they had acted fairly and reasonably in the exercise of its discretion. In doing so, it had balanced the need to obtain accurate information against the "legitimate desire to protect people's confidentiality".

Impact

This case is a reminder that interested parties should expect a thorough investigation of the underlying background before trustees exercise their discretion in relation to death benefits. This may cause some delay before payment can be made.

Trustees may take comfort from the fact that where a payment is made before the end of the two year window, any complaints about a trustee's delay in exercising its discretion may be difficult to establish (unless it is clear that the delay has been caused by their inaction or maladministration). However, trustees should ensure that, where possible, they are pro-active in their communications with interested parties.

TLT's Pension Dispute Resolution team

Pensions disputes have become a key issue for many employers and trustees. TLT's Pensions Dispute Resolution team are first and foremost pensions lawyers. We understand the issues facing companies and trustees, and provide clear and realistic solutions based on commercial and practical realities to help clients, whether employers or trustees, achieve the right result.

The team is experienced in dealing with complaints to the Pensions Ombudsman, acting on behalf of individuals as well as employers and trustees. Disputes involving members and disputes between trustees and employers require careful handling and a pro-active approach. Most disputes the team have been involved in have not become public knowledge as we pride ourselves on pro-active case management to resolve matters at an early stage, avoiding wherever possible the unwelcome cost exposure involved in full blown litigation.

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This publication is intended for general guidance and represents our understanding of the relevant law and practice as at 2 October 2015. Specific advice should be sought for specific cases; we cannot be held responsible for any action (or decision not to take action) made in reliance upon the content of this publication.

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