



# Pensions Ombudsman Update

June 2016

# Limitation date for recovery of overpayments

The Pensions Ombudsman held that the cut-off date for limitation purposes for the recovery of pension overpayments should be the date when the scheme administrator first sought recovery of the overpayments.

2 February 2016

*Webber (PO-8094)*: The Pensions Ombudsman has given his determination in a complaint by Mr N Webber against the Department for Education acting on behalf of the Teachers' Pensions (the **Administrator**).

Mr Webber took early retirement from his work as a teacher on 1 April 1997 aged 50 and was a member of the Teachers' Pension Scheme. He was re-employed in September 2001 up until August 2010.

Mr Webber submitted a "certificate of re-employment" to the Administrator in 2001 but did not submit any further certificates in the following years.

In November 2009, the Administrator wrote to Mr Webber and informed him that his earnings and pension had exceeded his index-linked salary of reference in each tax year from 2002/3 to 2008/9 and so his pension should have been abated. This had resulted in a net overpayment of £36,282.53.

The Deputy Pensions Ombudsman originally rejected Mr Webber's complaint in June 2012 and Mr Webber appealed to the High Court. The case was remitted back to the Pensions Ombudsman following the High Court judgment in December 2014.

The High Court rejected Mr Webber's change of position defence but accepted that he had a limitation defence against the recovery of any overpayments made more than six years (in accordance with the Limitation Act 1980) before the relevant cut-off date when the limitation period was to be regarded as having stopped.

The court ruled that the scheme administrator could with reasonable diligence have discovered the mistaken overpayments during the 2002/3 tax year.

The Administrator was entitled to claim for overpayments made in the 6 years before the cut-off date but anything after that was statute-barred.

The question of determining the cut-off date was remitted to the Ombudsman but the High Court expressed a provisional view that this should be the date Mr Webber filed his complaint with the Ombudsman.

The Ombudsman decided that the cut-off date was the date the Administrator had notified Mr Webber of the overpayments and sought repayment.

The Ombudsman submitted that the High Court had not heard any submissions on this point and that fixing the cut-off date as the date when the complaint was brought to the Ombudsman could encourage members who have been overpaid to delay resolving the matter in order to reduce the amount they would have to pay back.

## Impact

This decision shows that the Ombudsman is prepared to depart from the High Court's view (although a provisional view) in relation to a point of law that could have wide application. If this decision is appealed, the High Court may reverse the decision on the basis of their initial view.

If the member is effectively using a complaint to the Ombudsman as a pre-emptive measure to prevent formal recovery proceedings, it makes no sense delaying through internal dispute resolution procedures, if this simply allows the member to reduce the amount they have to repay.

However, as the Ombudsman pointed out, the Court did not hear full submissions on this point so we can only place limited emphasis on their provisional view.

# Incorrect pension statements

The Deputy Pensions Ombudsman has upheld a complaint by a member that she was entitled to overstated benefits despite having received a refund of contributions in 1979 because she had relied on incorrect pension statements when planning for her retirement.

16 February 2016

*Mather (PO-5291)*: The Deputy Pensions Ombudsman has given her determination in a complaint by Mrs Mather against Teachers' Pensions (the **Administrator**).

Mrs Mather had been a member of the Teachers' Pensions Scheme between 1974 and 1978. She applied for a refund of these contributions and received the refund in 1979 however her records were never updated.

Mrs Mather returned to work as a teacher in 1986 and resumed her scheme membership. She was sent annual benefit statements from 2005 which overstated her pensionable service and benefits as they incorrectly included the period between 1974 and 1978.

The statements indicated that the quotations were not guaranteed however they stated that "Every effort has been made to ensure accuracy".

Mrs Mather claimed that she had relied on the statements when deciding not to defer taking her scheme pension and moving to a cheaper house in anticipation that her benefits would cover her lower mortgage payments.

She also submitted that she had forgotten about the 1979 refund as she was suffering from post-natal depression at the time and her husband had completed the relevant paperwork on her behalf.

The Deputy Ombudsman accepted Mrs Mather's argument that she had forgotten about the refund and that she had irreversibly relied on the incorrect statements.

The Administrator argued that it did not have the capacity to check all its files and argued that the wording on the statements indicated that the figures were not guaranteed.

The Deputy Ombudsman however held that given the Administrator did not check the accuracy of the statements it should not have included wording to that extent on the statements.

The Deputy Ombudsman directed that the Administrator increase Mrs Mather's pension as if the period of service between 1974 and 1978 were pensionable and to pay arrears plus interest after deducting an amount reflecting the benefit of the refund in 1979.

## Impact

This case highlights the importance of checking the accuracy of pension statements and the impact for administrators on getting this wrong.

The Ombudsman has, in general, upheld claims to overstated benefits where the member can show the necessary detrimental and reasonable reliance on the overstatement. However, this case is distinctive because Mrs Mather had received a refund of contributions so both she and the Administrator had made a mistake.

The Administrator's wording on the statement is likely to have been an important contributory factor in the Deputy Ombudsman's decision as this was additional assurance to Mrs Mather that she could rely on the statement.

## Early retirement terms

A number of failings in an employing authority's consideration of a member's eligibility for ill-health early retirement (**IHER**) constituted maladministration.

18 March 2016

*Mayo (PO-8035)*: The Deputy Pensions Ombudsman has given her determination in a complaint by Mr Mayo against the trustees of the Kodak Pension Plan and the trustees of the Kodak Pension Plan (No.2) (the **Trustees**).

Mr Mayo was employed by Kodak and after its closure to future accrual became an employed deferred member of the Kodak Pension Plan (**KPP**). He obtained an early retirement benefits quotation in August 2012 under KPP's standing policy for early retirement.

In September 2012 he applied to take early retirement commencing on 1 April 2013 after Kodak's US parent company had filed for Chapter 11 protection earlier in the year and after being told by the trustees that less generous early retirement factors would now apply and that the scheme may enter the PPF.

It turned out, however, that Kodak and their parent company came to an agreement and established a new scheme (Kodak Pension Plan (No.2) "**KPP2**") which had more favourable early retirement terms and would have resulted in a £7,185 increase in Mr Mayo's yearly pension.

The Trustees imposed a temporary moratorium at the end of April 2013 for members who had applied to take early retirement but this was too late for Mr Mayo. However this resulted in a windfall for members who had been delayed by the moratorium.

Mr Mayo complained that the Trustees' communications had put him under duress and misled him into taking his pension early.

He also argued that they should have exercised their discretion and ascertained that it was in his financial best interests, once they were aware of the proposed KPP2, to revisit their standing policy of automatically granting early retirement requests.

The Deputy Ombudsman seemed to accept the Trustees' position that they consented to Mr Mayo's application under their standing policy in September 2012 and as such they had no way of knowing at this point what the eventual outcome would be.

At this moment in time the KPP2 was unforeseeable and there had therefore been no maladministration on the part of the Trustees in failing to supply information on this new plan to Mr Mayo.

She held that the Trustees responsibilities were limited to providing Mr Mayo with accurate information about his KPP benefits at the time of his application in September 2012. They had not failed to act in his best interests as they were under no obligation to advise him on whether to take early retirement in respect of his personal finances.

### Impact

A key point to take from this case is the importance of trustees communicating with members and that it is always worth considering the full range of possible outcomes even if they might seem remote at the time.

# AVCs: Incorrect pension statements

The Deputy Pensions Ombudsman has upheld a complaint by a member whose additional voluntary contributions (AVCs) were not collected for 12 years because of a payroll error.

22 March 2016

*Cunningham (PO-86)*: The Deputy Pensions Ombudsman has given her determination in a complaint by Mr Cunningham against Royal Mail Trustees Limited (the **Trustee**) and Royal Mail Group (the **Employer**).

Mr Cunningham was employed by Parcelforce and was a member of the Royal Mail Pension Plan (the **Plan**). He began making AVCs from his salary into the Plan in 1996 in order to buy an additional nine years of pensionable service.

In 2000 Mr Cunningham's employer changed to the Royal Mail Group. There was no break in pensionable service and Mr Cunningham continued to receive annual benefit statements.

In 2012 the Trustee informed Mr Cunningham that no contributions had been deducted since he transferred employer in 2000 and offered him the option of cancelling the additional years of service or paying arrears of almost £17,500.

Mr Cunningham argued that he had not realised the deductions were not being taken from his pay as he did night shifts and overtime so his pay fluctuated.

He had relied on the annual benefit statements which still showed the additional service and had spent the uncollected money on general household expenses. By 2012 he was 55 years old with dependent children and had taken out a new mortgage.

The Trustee and the Employer admitted that the failure to correctly process Mr Cunningham's payroll records when his employer changed in 2000 had amounted to maladministration.

It turned out that the pension administration centre had discovered the contributions had not been taken in 2003 but failed to inform Mr Cunningham or investigate further, this they admitted had also been maladministration. The Trustee maintained however that the Plan rules did not permit the payment of benefits unless the corresponding contributions had been made.

In addition, the Trustees submitted that Mr Cunningham had compromised his complaint by a contractual agreement in 2013 with the Trustee to stop making further contributions and pay the arrears over a ten year period. He had also accepted a voluntary redundancy package on the basis that he pay back the arrears.

The Deputy Ombudsman held that Mr Cunningham had relied on the annual statements and changed his position irrevocably and it was reasonable for him to do so based on his fluctuating income. He was less than ten years away from normal retirement age with dependent children and a new mortgage so it would take him many years to pay the contributions.

She also found that the 2013 agreement and the terms of the redundancy package did not compromise Mr Cunningham's position.

Neither the Trustee nor the Employer had brought this argument until the provisional determination despite the Employer specifically being asked during the investigation whether it wanted to rely on the redundancy agreement.

In addition, Mr Cunningham had already commenced the complaint process with the Ombudsman before the 2013 agreement and had specifically asked if paying arrears would prevent his complaint from being investigated. It was evident therefore that he did not intend to waive his rights to pursue his complaints.

## Impact

This decision again emphasises the importance of checking annual benefit statements are correct and of acting promptly when an error is found. It also highlights the need to raise any arguments you intend to make at the outset of proceedings rather than seeking to rely on them after a provisional determination has been issued.

# Death benefits: tax consequences

The Pensions Ombudsman upheld complaint by a member's personal representative where two-year time limit for making the death grant payment was missed and subject to a 40% tax charge as an unauthorised payment, despite the papers being provided at the last minute.

30 March 2016

*Lettman (PO-3753)*: The Ombudsman has upheld a complaint by a member's personal representative against London Borough of Hammersmith and Fulham (**LBHF**) and to a lesser extent London Pension Fund Authority (**LPFA**).

Mr Lettman was employed by LBHF from August 1997 to June 2008 and was a member of the LBHF Fund (the **Fund**). He passed away on 21 November 2008, aged 44 and his mother, Ms Lettman, acted as his personal representative.

LPFA, who run the day-to-day administration of the Fund, were informed of Mr Lettman's death on 28 November 2008.

They responded to say that a death grant was payable to Mr Lettman's estate and that they would need to see a grant of letters of administration (**Grant of LoA**) before they could give further details.

They did not at any time inform Ms Lettman of the two-year time limit and tax consequences if the death grant was paid after the two years.

There was some delay in Ms Lettman receiving the Grant of LoA however she handed this in to LBHF on 9 November 2010.

The Grant showed the date of death however this was not flagged despite the imminent two-year deadline for making an authorised payment.

The decision was made by LBHF to pay the death grant to Ms Lettman on 23 November 2010 but the LPFA did not write to Ms Lettman until 6 December 2010 informing her that the death grant was payable to her but that it would be subject to a 40% tax charge as it had not been paid within two years of them knowing of Mr Lettman's death.

The Ombudsman held that LBHF and LPFA ought to have been aware of the two-year limit for paying the death grant and Ms Lettman should have been informed of this deadline and the tax consequences of not meeting it.

Despite Ms Lettman providing the Grant of LoA at the last minute, there were still 13 working days for the death grant to be paid which was sufficient time for Ms Lettman to be paid by cheque.

The Ombudsman ordered the balance of the death grant to be paid to Ms Lettman with interest together with £500 as a compensation payment.

## Impact

This case highlights the importance of fund administrators to be aware of the deadline for making death grant payments and to ensure that they act with urgency to ensure these are paid within the time limits. It also stresses that members' personal representatives should be informed of the two year time limit and the tax consequences of missing this deadline.

# 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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