Professional negligence

Mistakes happen – it is an inevitable part of life – but when a mistake is made in relation to a pension scheme, it can have significant consequences. It could mean that incorrect benefits have been paid, necessitating a large and potentially costly administrative exercise to assess who has been affected and how, or it could mean that benefits have not been properly funded. The mistake usually needs to be corrected, but the question is whether, if there is a significant loss to the scheme or the employer, the trustees and employer should take action to recover those losses from the negligent adviser.

Some of the most common causes of professional negligence claims against pension scheme advisers include:

A failure to validly amend the scheme
The most common issue here is that the formalities required to amend the scheme’s rules have not been complied with. Typical problems include an attempt to amend the scheme by announcement when the rules require an amendment to be made by deed; or the correct parties have not executed the deed; or the deed has sought to achieve something that it cannot, eg a retrospective amendment. To read more about invalid amendments, visit www.allenovery.com/amendments.

Incorrect amendment
In this situation, the scheme rules have been amended incorrectly, which has resulted in members being entitled to greater benefits than the trustees and employer had intended. In this case the trustees and employer may want to rectify the scheme’s rules so that they are amended to say what the trustees and employer intended them to say (this is known as ‘rectification’). The trustees and employer will, however, want the adviser to cover the cost of seeking rectification from the court and to protect against the risk that the court may not grant rectification. To read more about rectification, visit www.allenovery.com/rectification.

Incorrect benefit statements/early retirement quotations
In this situation, the member will have received an incorrect benefit statement and may have acted in reliance on that statement. If a member has given up employment or taken other significant financial decisions based on the incorrect statement/quotation, the impact on the member and possible loss to the scheme may be significant. The situation may be more serious if the error giving rise to the incorrect statement is a systemic one. To read more about mistakes in benefit statements and quotations, visit www.allenovery.com/estimates.

Overpaid pensions
A frequent problem for pension schemes is the inadvertent overpayment of a pension. When this occurs, the pensioner may well have already spent the overpaid element of his or her pension and thus be unable to repay the overpaid amount. In that case, it is possible that the scheme can recover the loss caused by the overpaid pension from the scheme adviser responsible for the overpayment. To read more about overpaid pensions, visit www.allenovery.com/overpayments.
Managing a claim against scheme advisers

A negligence claim against scheme advisers will usually be brought in the High Court – the Pensions Ombudsman does not have jurisdiction to hear such claims. Before commencing proceedings, the trustees and employer will need to send the adviser a letter of claim setting out the details of their claim and allowing the adviser to respond to the allegations. This is the pre-action stage.

One of the key considerations when managing a claim against an existing adviser is ensuring that the ongoing relationship with the adviser is not damaged by the claim. For this reason, an early resolution of the claim is often in both parties’ interests.

If the claim cannot be resolved at the pre-action stage, then, prior to commencing proceedings, the trustees will want to consider the issue of litigation costs and ensure that they are protected against the risk that they may be unable to recover the costs out of the scheme assets. Thought will therefore have to be given to the methods of protecting the trustees from such costs exposure, such as seeking a Beddoe order from the court (which, if granted, will allow the trustees to take their costs out of the assets of the scheme) or an indemnity from the employer.

It is important to get an idea of the amount of loss at issue, as before commencing proceedings, trustees and employers will need to carefully balance the time and costs involved in bringing proceedings and the amount that might be recovered. Advice on the prospects of success will need to be carefully considered at this point.

Another issue that trustees and employers need to be mindful of when considering whether to bring a professional negligence claim is limitation periods. Given the nature of pension schemes, it is quite possible that the error in question may not come to light for a number of years after the error occurred. As such, it may be that the trustees and employers will need to act quickly in order to preserve their ability to bring a claim against their advisers, as there are time limits for bringing claims.

For more information on avoiding and managing pensions disputes, please visit our Pensions in Dispute site at www.allenovery.com/pensionsindispute

Key contacts

Neil Bowden
Partner
+44 20 3088 3431
neil.bowden@allenovery.com

Jane Higgins
Partner
+44 20 3088 3161
jane.higgins@allenovery.com

Andy Cork
Partner
+44 20 3088 4623
andy.cork@allenovery.com

Jason Shaw
Counsel
+44 20 3088 2241
jason.shaw@allenovery.com

Jessica Kerslake
Counsel
+44 20 3088 4710
jessica.kerslake@allenovery.com