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Pensions in dispute

Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent court and Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

Provision of incorrect information to members: using estoppel

One of the common causes of complaints to the Pensions Ombudsman is the provision of incorrect benefit statement or retirement quotations which set out pension entitlements which are greater than those the member is properly entitled to receive under the scheme. These cases often concern members seeking to claim a right to the higher incorrect pension. The way a member can obtain a right to the higher pension is by arguing that the scheme is prevented from going back on the earlier quote – it is estopped from resiling from its representation as to the member's pension entitlements.

The recent case of *McClean* for example concerned a complainant who was informed by his scheme administrators that his normal retirement age (NRA) was 62, and who retired on that basis. He was subsequently informed that his benefits had been incorrectly calculated and his NRA was in fact 65 – and his pension would be actuarially reduced. The complainant argued the defence of estoppel by representation and that he had acted to his own detriment by retiring at 62 as he would have otherwise delayed taking his pension until 65 and been in a better financial position.

The Deputy Pensions Ombudsman (DPO) held that in order to succeed in a defence of estoppel by representation, a person needed to establish an unambiguous representation on which he had relied in good faith to his own detriment. The complainant had established a clear representation and, even though he had enjoyed some benefit from having received his pension and lump sum early, viewed against the higher pension he would have received had he delayed taking his pension until 2013 when he had expected to retire, he had acted to his own detriment. The DPO said it would be 'unconscionable' for the trustee now to go back on its representation.

Direction: Complaint upheld. The trustee was ordered to pay the complainant on the basis of an NRA of 62, together with appropriate increases and a payment of a lump sum representing the shortfall between the date his pension was adjusted downwards and the date of the reinstatement of his pension, and the pension he should have received during this period, together with interest. Costs of GBP150 for distress and inconvenience were also awarded.

Comment: The DPO considered both negligent misrepresentation and estoppel and decided that the more 'practical and proportionate' approach in this particular case was to provide Mr McClean with the benefit of the defence of estoppel. In considering estoppel, the determination helpfully cited the test for estoppel by representation as set out by Neuberger LJ in the *case of Steria v Hutchinson* [2006]. Broadly, three requirements must be satisfied to establish estoppel by representation:

- a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act;
- an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise; and
- after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise.

For more detail on this case, see our **Pensions talk** blog post.

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Changing from RPI to CPI

The recent decision in ***Arcadia Group Ltd v Arcadia Group Pension Trust Ltd*** held that a switch from RPI to CPI was permissible for increases to pensions in payment and the revaluation of deferred pensions.

The case concerned two Arcadia pension schemes in which the scheme rules broadly provided for increases or revaluation by reference to 'the Index of Retail Prices…(or any replacement of that Index).' 'Retail Prices Index' in turn was defined as 'the Government's Index of Retail Prices or any similar index satisfactory for the purposes of the Inland Revenue'. In neither scheme did the rules express which party had the power to select a 'similar' index if the power were used.

In light of the change to CPI-based statutory minimum revaluation and indexation, the question arose as to whether the Arcadia pension schemes were obliged to retain RPI-based calculations given the wording of the schemes' rules.

The case focused on four issues but the most important concerned section 67 of the Pensions Act 1995 (which protects modifications to a scheme that would adversely affect a member's 'subsisting rights'). The trustees argued that the case of ***Danks v QinetiQ*** (in which we successfully acted for QinetiQ) was wrongly decided because it was inconsistent with the Court of Appeal's decision in *Aon Trust Corpn v KPMG*. The crux of the trustees' argument in Arcadia was that the rules gave members a default right to increases by reference to RPI and that such a default right was a subsisting right and protected by section 67. The court was not persuaded by the trustees' arguments and confirmed that the analysis in *Danks v QinetiQ* was correct.

The court was also asked to determine who had the power to select an alternative index as the rules were silent on this point. In the absence of any express provision, the court held that the power was exercisable jointly by the trustee and employer.

Comment: The decision will be welcomed by the many schemes that have already made the move from RPI to CPI in light of the *Danks v QinetiQ* decision. Had the trustees of the Arcadia schemes been successful in their case, those schemes would have been faced with the unenviable prospect of having to re-examine the validity of their purported switch from RPI to CPI.

Jason Shaw, Senior Associate

Jason is a Senior Associate in the Litigation group. He specialises in all aspects of pensions disputes, including advising clients in relation to internal disputes and disputes before the Pensions Ombudsman, Financial Ombudsman Service, the Pensions Regulator, PPF Ombudsman and the Courts. Jason is ranked in Chambers & Partners Directory in the field of Pensions Litigation.

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Allen & Overy LLP

Your contact office for this proposal is London: One Bishops Square, London E1 6AD, United Kingdom | Tel +44 (0)20 3088 0000 | Fax +44 (0)20 3088 0088 | www.allenovery.com.

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