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Pensions in Dispute

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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 Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

No limitation period when recovering overpayments from future pension

The most common and practical method to recover overpaid pensions (and often the least painful for the member) is known as 'equitable recoupment'. This is a self-help remedy under which trustees seek to recover an overpayment made to a member by making deductions from future pension payments. Recoupment can only be used if it is fair to allow the adjustment to be made and if the rate of recoupment is fair (it should be at least as long as the period over which the overpayments were made). Further, if the recoupment amount is disputed then the trustees cannot recoup the overpayment without an order from 'a competent court'.

The stance taken by the Pension Ombudsman (TPO) has generally been that the recovery of overpayments is subject to a six year limitation period unless it could be argued that the overpayment was the result of a mistake which could not, with reasonable diligence, have been discovered any earlier. Members have been able to use the limitation period as a successful defence to repaying the whole overpayment in cases where the trustees could with more care have discovered the mistake earlier.

However, the High Court in Burgess v Bic decided that this rule does not apply to the exercise of equitable recoupment as it is not a claim for payment of the overpayment but rather an adjustment of the money payable in the future. The case concerned a decision in 1991 to use the scheme surplus to fund increases on pensions in excess of GMP. In 2011, the employer challenged the validity of increases in relation to pre-April 1997 service (increases in relation to service in this period are not a statutory requirement). The Court ruled that the increases were properly paid, but went on to consider issues regarding the recovery of overpayments due to their wider interest.

Other defences are available to prevent recoupment – these include the doctrine of laches (essentially based on lapse of time) and estoppel (broadly, detrimental reliance on a representation). The Court noted that the success of either defence would have to be determined on an individual basis – in particular, whether the recipient had relied on the overpaid amounts to the extent that it would be inappropriate to recover the monies.

Where there is a dispute as to the amount of the overpayment, the Court took the view that TPO is not a 'competent court' – which means that if a member objected to the recoupment ordered by TPO, an application to the County Court would have to be made in order to enforce the TPO determination.

What does this decision mean for trustees?

If recoupment is an available remedy (in other words, it is fair, no defence applies and the amount is not in dispute or a court order has been made), trustees will be able to recoup the whole overpayment, without having to consider limitation issues.

The Court's clarification on obtaining a County Court order to enforce a disputed recoupment gives trustees procedural certainty, although the requirement to take such an expensive additional step to recover overpaid pensions will not be welcomed by trustees.

Being mindful of critical pension dates – a reminder for employers

The recent case of Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood reminds employers to keep critical pension dates in mind when making decisions affecting employees' pension rights. In this case, the employer sent a termination notice to Mrs Haywood. It was collected by Mrs Haywood's father-in-law whilst she was on holiday. If the notice took effect when Mrs Haywood read it on her return from holiday, she would be entitled to higher pension benefits (an unreduced early retirement pension) as she would reach a specific age before the notice period expired. If it was effective

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when it arrived at her postal address, then her early retirement benefits would be reduced.

The employment contract did not contain an express term as to when notice was considered to be delivered. The Supreme Court ruled (by a majority) that in such cases, it is implied in the contract that a notice takes effect either when the recipient has read it or had a reasonable opportunity to do so. The 'reasonable opportunity' element will depend on the circumstances – simply ignoring a letter will not delay effective receipt.

What does this decision mean for employers?

This ruling illustrates the need for care in processes affecting pension rights when a critical date is in view. In this case, the employer could have given notice earlier or by a different method.

Employers should also be wary of cutting procedural corners on termination to achieve an intended result. For example, in the earlier Woodcock case, the employee was deprived of the proper redundancy procedure in order to ensure that termination occurred before the critical date. This resulted in a claim of unlawful age discrimination (although the claim was ultimately unsuccessful).

Applying the incapacity test: who makes the decision?

It is not uncommon for a scheme's incapacity rule to state that the employer has to decide whether the relevant member is suffering from incapacity. How does this fit with any role given by the rules to the trustees, and with the requirement under the Finance Act 2004 that the scheme administrator must have 'received evidence from a registered medical practitioner that the individual is suffering from ill-health which makes the individual unlikely to be able (otherwise than to an insignificant extent) to undertake gainful work (in any capacity) before reaching pensionable age'?

In a recent TPO determination, the scheme rule in question provided (a) for the employer to decide whether a member was suffering from incapacity, and (b) that the trustee 'must determine whether the member is suffering from total incapacity or partial incapacity'. Mr G applied for ill-health early retirement. The employer sought its own medical advice and reviewed the medical records before deciding that Mr G was suffering from incapacity. The trustee, having sent the medical information to its own medical panel, disagreed and declined the application. Mr G complained that the trustee's remit was only to determine whether the incapacity (determined by the employer) was partial or total. The trustee argued that each sub-rule was to be read separately and that it also had to determine that a member suffered from incapacity, otherwise the Finance Act requirement might not be met, leading to a potential unauthorised payment.

The member's complaint was upheld and the trustee was ordered to determine within 21 days whether Mr G's incapacity was total or partial, and to pay him an additional £500 for distress and inconvenience.

What does this decision mean for trustees?

TPO's view was that the ill-health early retirement rule was to be read in its entirety to establish whether someone was entitled to an ill-health pension and therefore the trustee's remit under the rules was to determine whether incapacity was partial or total, once the employer had determined incapacity.

The Finance Act requires that evidence of ill-health is received from a registered medical practitioner, not that the scheme administrator has to make the decision on incapacity. TPO suggested that if trustees are concerned that the test may not be met, they should review the employer's process for establishing incapacity or seek to amend the rules.

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