ALLEN & OVERY

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

Internal dispute resolution and independent decision-makers

Trustees of occupational pension schemes must have an internal dispute resolution procedure (IDRP) – but a recent determination from the Pensions Ombudsman (TPO) highlights some of the practical issues around ensuring that the IDRP deals properly with complaints (**PO-8663**).

The member and his employer had a long-running dispute about the discretionary early payment of benefits: this was his third TPO complaint. Following the second complaint, TPO had remitted the matter to the employer to reconsider the application, which it again refused (and another two-stage IDRP followed). Part of the latest complaint concerned the independence and impartiality of the decision-makers appointed by the employer, who had been involved in the previous decisions. The employer argued that the decision-makers had received independent legal advice, and the decision was ultimately reviewed by another body (at IDRP stage 2). TPO concluded that it was inappropriate for them to be involved in the decision, even though independent legal advice was received, and that this amounted to maladministration. The matter was remitted to the employer (with directions to ensure that subsequent decision-makers have had no previous involvement in the case) and £500 compensation was awarded.

What does this ruling mean for trustees?

Trustees and administrators should ensure that decision-makers have no previous involvement in a complaint – both as part of the IDRP and if ordered by TPO to reconsider a decision. This may be tricky to manage in the context of a long-running dispute, or if the matter has been considered by the trustees before the IDRP was formally started.

Record-keeping periods

For how long should member records be kept? Records may be required to deal with member queries decades after leaving, but the Data Protection Act states that personal data should not be retained for longer than necessary.

In a recent TPO case (**PO-10036**), a widow contacted Zurich, the provider, in 2014 about survivor benefits – her husband had reached pension age in 1997. Zurich held only a skeleton record confirming the member's details and benefit value (paper files had been destroyed) but other records noted at-retirement contact with the member. Zurich believed this contact (and the low benefit value) meant that it had probably been trivially commuted, but had no proof of payment. The widow complained that Zurich had failed to pay her, or her husband, a pension.

TPO decided that, on the balance of probabilities, the member had trivially commuted his pension in 1997. As the member no longer had any benefits in the scheme, it would not be reasonable for Zurich to hold detailed records indefinitely. It was therefore appropriate, and not maladministration, to have destroyed the paper records.

What does this ruling mean for trustees?

There is a delicate balance: the outcome might have been different if there had been insufficient information to convince TPO that the benefits had been trivially commuted. A key issue when developing a document retention policy is to identify for how long it is necessary to retain the data. Here, TPO felt that it was reasonable that, after 20 years, Zurich only held a skeleton record, but did not indicate, once the benefits were extinguished, either the earliest date at which this would have been acceptable, or the date at which even a skeleton record should be destroyed. To read more about data protection issues, see our recent briefing.

Overpayments – don't get caught out by limitation issues

Recovering overpayments can be a long and complex process, as the recent High Court case of ***Webber*** illustrates. This case is the latest instalment in a long-running dispute (three TPO determinations and three High Court appeals so far), with the latest appeal concentrating on a further limitation issue.

The general rule is that where trustees seek recovery of an overpaid pension using court proceedings, they have six years from the date they discovered (or ought reasonably to have discovered) the mistaken overpayment, and the clock stops running on the limitation period when the trustees issue a claim form. However, what happens where the trustees attempt to resolve the issue with the member and do not file a claim against the member (which is the more common route), but the member subsequently complains to TPO? The court decided that in such cases, the limitation period stopped when the trustees filed their response to the complaint. To read more about the case, see our recent Pensions Talk blog post.

What does this ruling mean for trustees?

The case is unlikely to have much effect on the handling of overpayment claims but is a reminder to trustees and administrators to think strategically, to be aware of limitation periods, and to act swiftly when an overpayment is discovered. A fundamental issue for the scheme related to the fact that the High Court had previously found that the overpayment could have been discovered much earlier (because it held the necessary information but had not 'joined the dots'), meaning that the limitation period started running well before the overpayment was noticed. Trustees and administrators should take heed of this and ensure that there are appropriate procedures and communication channels in place to identify problems and resolve them promptly.

For practical help with recovering overpayments, visit Pensions in Dispute, our new resource base for pensions disputes, at www.allenovery.com/pensionsindispute.

Bankruptcy – dealing with member queries

It is not uncommon for pension scheme administrators and trustees to receive queries about whether a member's pension rights are protected on bankruptcy. When a pension is in payment, a trustee in bankruptcy (TiB) can access the pension income using an income payments order. However, the Court of Appeal decision in ***Horton v Henry*** has reaffirmed that a TiB cannot access the uncrystallised pension benefits of a bankrupt, and cannot compel a bankrupt to put their pension into payment so that it can apply for an income payments order.

What does this ruling mean for trustees?

If trustees and administrators receive a request from a member for information, they should state that payment to a TiB will only be made in accordance with the scheme rules and applicable legislation. At present, a TiB cannot access a pension benefit unless and until it is brought into payment, and then only in accordance with formal insolvency procedures. The court did not address the issue of rights that have been crystallised (eg, if designated for drawdown) but which remain invested. Insolvency Service guidance also indicates that if a member is over 55 and can access a personal pension, this may affect whether they are declared bankrupt.

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