

Pensions in Dispute

February 2024

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 that have practical implications for schemes. For more information, please contact: pensions.team@allenovery.com.

Impact of untaken leave on service dates

The Court of Appeal has upheld earlier rulings that a member who died having ceased to work, but during a period of extended pensionable employment attributable to outstanding annual leave, had died in service rather than after retirement: ***Campbell v NHS Business Services Authority***.

The member in this case had applied for a serious ill-health lump sum, commuting her benefits, but the impact of the decision that she had died in service was that the lump sum payable was approximately half what it would have been, had commuted ill-health benefits been payable. The rules were clear, though, that pensionable employment (and contributions) continued for the extended period of untaken leave.

What does this ruling mean for schemes?

The key takeaway for scheme administrators is to be aware of similar provisions in scheme rules and of member circumstances that could significantly affect the benefits payable.

Serious ill-health lump sum cases are always highly sensitive and awareness of any extension to pensionable service may affect the information provided to members.

Dealing with gaps in scheme records

Two recent High Court decisions have considered historic scheme amendments in detail. In a case relating to the **Newell Rubbermaid UK Pension Scheme**, the High Court upheld the validity of converting member benefits from a DB to a DC basis in 1992. The other case concerned an amendment severing the link to final salary in the **Avon Cosmetics Pension Plan** in 2006. In each case, complex and scheme-specific issues were raised, including consideration of whether the changes made were valid at all, given restrictions under each scheme's amendment power.

Gathering evidence about decades-old decision-making can be challenging, and identifying detriment that may only occur decades into the future also presents problems.

In the Avon case, the court noted that it would not be correct to rely on evidence from a witness, years after the event, about what the trustees might have done in different circumstances – instead, the validity or otherwise of an amendment should be capable of being determined from the factual context and the relevant deed.

In the Newell case there was a question about whether two booklets had been signed and attached to the 1992 Deed. The Court noted that it was 'somewhat extraordinary that it is being disputed over 30 years after the 1992 Deed was executed. The issue only arises because the original 1992 Deed has apparently been lost and the copies that

have survived did not include signed copies of the booklets’.

Issues like these can often lie dormant until there’s a change of administrator, preparation for risk transfer activity such as a buy-in or buy-out, or individual member complaints.

An example of the latter recently came before the Pensions Ombudsman, in a case where a former member was able to produce a benefit statement from 1996 but the scheme had no record of benefits for him. HMRC had recorded the payment of a contributions equivalent premium (CEP) on the former member’s behalf, to ‘buy him back’ into the State Second Pension Scheme and extinguish his benefits under the scheme – but there was a question about whether a CEP should have been paid at all. That question could not be answered because the relevant trust deed and rules could not be found.

While this did not affect TPO’s decision (largely based on HMRC’s evidence) that the member did not have benefits in the scheme, the ‘uncertainty’ caused by a lack of adequate records would, he found, ‘undoubtedly have caused Mr T significant distress and inconvenience for which he should be compensated’. The individual was awarded £500 compensation. **Read the decision here.**

What are the implications for schemes?

We have a lot of experience resolving the issues that complex and sometimes incomplete historical records can create.

If you have a trigger point such as a scheme restructuring or risk transfer in view, it’s generally better to scope out any issues sooner rather than later: get in touch to discuss how we may be able to help.

Contact us



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Jason is a Counsel in the Pensions Litigation group. He specialises in all aspects of pensions disputes, including advising clients in relation to internal disputes and disputes before the Pensions Ombudsman, the Financial Ombudsman Service, the Pensions Regulator, the PPF Ombudsman and the courts. The Chambers & Partners Directory ranks Jason as a ‘Star Associate’ and quotes clients as saying that Jason ‘handles litigation very efficiently. He’s practical, able to relate to what a client needs and wants, and he can explain issues clearly’.

**A date for your diary: Thursday 7 March
9.30-10.30am**

Not just IDR? Trustee involvement in disputes and litigation – Andy Cork and Jason Shaw

Trustees may find themselves involved in various forms of dispute or litigation. As well as the usual scheme dispute resolution procedures and the Pensions Ombudsman, we’re seeing an increase in members bringing complaints outside the normal channels. Andy and Jason will look at some of the common ways trustees might be involved in litigation, including county court litigation with members, and also consider the recent developments in recouping overpaid pensions and how trustees might now handle disputes about recovering overpayments.