

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.

Change of position – can a member keep an overpayment?

Where a pension has been overpaid the starting point is to try and recover that overpayment. Members are only entitled to receive the benefit set out in the scheme rules unless they can bring a successful defence to a claim by the scheme for recovery. Two recent cases considered the most common defence, known as “change of position”. To succeed, a member must be able to show that (i) the overpayment was received in good faith; (ii) the money was spent on something that would not otherwise have been bought; and (iii) it would be unjust to require repayment of the money.

In the [first case](#), the member seeking to rely on the change of position defence failed to meet limb (i) of the test. The test cannot be met if a reasonable person would have known or ought to have known of the error. The member was overpaid in excess of £21,000 over five years due to administrative error. The Pension Ombudsman (TPO) found that the member had sufficient information that he ought reasonably to have been aware of the mistake or at least made enquiries. The member received an annual pension increase statement showing the correct annual increase and pension entitlement and separately received payslips showing the actual amount received. For example, one pension increase statement showed that he should have been receiving around £1,600 gross per month and his pay slip showed that he was actually receiving around £1,800 net.

In the [second case](#), the member seeking to rely on the defence failed to meet limbs (ii) and (iii) of the test. The scheme administrators made a technical error resulting in a pension overpayment of around £1,800 and a lump sum overpayment of around £52,000. The member

evidenced expenditure he claimed he would not have made but for the overpayment: having a private operation, holidays and home improvements. TPO found that the overpayment was received in good faith - the technical error was not the sort of mistake a reasonable person could be expected to notice or question. However, the member was unable to show that he would not have otherwise incurred the expenditure made. He had spent the remainder of the lump sum on investments and repaying his mortgage. In TPO’s view it was entirely plausible had the member received the correct amount of lump sum that he would have spent less on investments and allowed himself the budget for the other items. TPO also found that it was inequitable for the member to continue enjoying the overpayment in the form of investment returns and the home improvements. In cases where recipients have successfully met limb (ii) of the test, this tends to be because they have gifted some of the overpayment (rendering it irrecoverable) or it has become subsumed into their living costs and the recipient is living according to their means.

What do these decisions mean for trustees?

For members, being notified that their pension has been overpaid and that they need to pay it back is distressing news, which is why we see so many of these cases before TPO. To avoid this, it is important to communicate in a considerate manner and work with the member concerned to put together a fair repayment plan and, if the member so claims, ascertain if there is a valid defence to recovery of the overpayment.

To read more about recovering overpaid pensions, [click here](#).

Moving from RPI to CPI? Seeking appropriate advice

Two recent cases look at the common issue of whether a scheme's basis for calculating pension increases can be changed from RPI to CPI. In the [first case](#), the scheme's trustees went to Counsel to obtain an opinion on the interpretation of the pension increases rule, which referred to both the index used in the legislation (CPI) and RPI. Counsel opined that the rule should be read as requiring the trustees to use the index specified in the legislation as it stands from time to time. The trustees tested Counsel's opinion and satisfied themselves before following his advice. The complainant disagreed with the trustees' decision. However, TPO acknowledged the contradictory nature of the rule and found that the trustees were entitled to question the validity of the payments being made to pensioners and seek legal advice in doing so.

In the second case (*BT v BTPS*) the employer and the trustee went to court to determine whether CPI could be used to calculate pension increases. The scheme rule provided that a different measure was to be used if RPI ceased to be published or became inappropriate. The High Court ruled that in the context of the scheme rule, RPI was not inappropriate for the purposes of uprating pensions and therefore the test was not met. A previous version of the rule referred to 'invalidating' the rule as 'a continuous basis for the purposes of calculating increases'. The trustee asked whether, if this power to amend the index were triggered, the power would lapse if it were not exercised within a reasonable time. The Court ruled that if this power was triggered by a relevant change to the index, but the power was not used before the next date for applying the index, then that specific trigger for using the power could no longer be relied on until another change to the index (preventing a like-for-like comparison between the current and earlier year) triggered the power again. BT has confirmed that it will appeal the High Court's decision.

What do these decisions mean for trustees?

The change from RPI to CPI can result in a considerable liability reduction for employers but as the cases continue to highlight, whether or not the change can be made depends on a careful analysis of the scheme's rules, which may require seeking legal advice or guidance from the courts.

The 'hard-wiring' of RPI in scheme rules continues to be an obstacle to amendment and we wait to see whether the Government's forthcoming White Paper (expected this Spring) will include any proposal to allow schemes with RPI 'hard-wiring' to move to CPI.

To read more about the RPI/CPI case law [click here](#).



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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, the Financial Ombudsman Service, the Pensions Regulator, the PPF Ombudsman and the Courts. Jason is ranked in Chambers & Partners Directory in the field of Pensions Litigation.

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