Pensions Ombudsman Update

Happy New Year and welcome to our first Pensions Ombudsman Update of 2017. These quarterly Updates are designed to help you get to grips with the Ombudsman's thinking, to keep track of decisions on individual topics and to identify underlying trends. In this edition we look at new High Court judgments made on appeal from the Ombudsman, and two determinations that may have wider application.

Overpayment claims and limitation – the High Court's verdict

Our last Update mentioned the pending High Court decision in the Webber case, in which the Ombudsman participated in the court process because of the significance to his jurisdiction. By way of reminder, a member was overpaid pension for several years after failing to declare income from re-employment. The Ombudsman had held in PO-8094 Webber (2 February 2016) that the "cut-off date" (on which the limitation period should be regarded as ending) was November 2009, when the member learned of the overpayments and not November 2011, when the Ombudsman accepted his complaint. Teachers' Pensions (TP) were obliged to engage in statutory IDRP before that complaint could be brought, and such engagement should not delay the cut-off date. TP could therefore claim back overpayments made within the six years leading up to November 2009. The member appealed.

The High Court has now handed down its decision in Webber v Department for Education [2016] EWHC 2519 (Ch). The judge's approach (following Arjo Wiggins v Ralph [2009] EWHC 3198 (Ch), which ruled that the Ombudsman could not provide a remedy if an action in the courts would have been time-barred), was to find an analogous time under Ombudsman procedure to the date that a claim form would be issued in court proceedings. On this basis, the correct cut-off date was in fact December 2011 (when TP formally responded, under the Ombudsman's Procedure Rules, to the Ombudsman's letter notifying them of Mr Webber's complaint). The Ombudsman reacted by confirming a review of his office's processes in overpayment cases, together with existing legislative provisions, *"with a view to considering whether any possible amendments are necessary".*

> *Comment:* The ruling reduces the scope of overpayments that may be reclaimed by trustees and administrators, and opens up the prospect of 'astute pensioners' delaying formal complaints in order to move back the cut-off date. Trustees and administrators should therefore progress IDRP in a timely manner in overpayments cases where an Ombudsman complaint is likely.

Ombudsman determination reached "illegitimate outcome"

Butterworth v Police and Crime Commissioner for Greater Manchester (Appeal Ref CH/2016/000122, 10 November 2016) concerned a member whose compromise agreement had provided that, *"to the extent that it is and remains lawful… to do so",* her employer (the Commissioner) would allow her to access an unreduced pension from the Local Government Pension Scheme at age 55. On reaching that age three years later, she discovered that the relevant regulations only permitted her to take the pension if the employer could be satisfied there were compassionate grounds for doing so (and in this case it could not).

Last April the Ombudsman found that the offending clause, by promising a benefit which was not actually available, was void as a matter of public law. However, the Commissioner had committed to allow access to a pension from age 55 and should be held to this: an employer could not simply deny the existence of an agreement reached and recorded in the compromise agreement. The Ombudsman directed the Commissioner to pay the member a 'bridging' pension from his own office's funds until her scheme pension came into payment, together with £2,000 for distress and inconvenience.

The Commissioner appealed to the High Court. Despite the Ombudsman's active participation in the appeal, the judge found in favour of the employer, holding that the Ombudsman was wrong in his starting premise that the employer was contractually bound to provide the member with an unreduced pension from age 55. The wording in the compromise agreement meant what it said, i.e. that the pension would only be paid if it was lawful to pay it. The Ombudsman's finding of maladministration could not therefore stand. In the court's view, the Ombudsman's direction to pay a bridging pension was unlawful, as the Commissioner had no legal power to make such payments. The determination also reached an illegitimate outcome by directing a result which was different from the contractual commitment that had been made.

Again, the Ombudsman released a statement on his participation in the case. He explained that he had hoped to clarify whether a public authority could avoid the effect of a contractual commitment to a member on the ground that making the commitment lay beyond its powers (the judge, not needing to decide the point, observed that this was a *"vexed question on which the law remains uncertain"*). The Ombudsman's concern stems from the inequality this could create between public and private sector pension schemes. Although accepting the judgment the Ombudsman describes it as *"largely disappointing"*, adding that it was *"disheartening"* that it did not remedy the underlying injustice to Mrs Butterworth arising from the fact - accepted by the court - that she probably had been encouraged to think she would receive the unreduced early pension.

> *Comment:* The Ombudsman not only intervened, but sought to make new arguments on behalf of the member (who was not represented). In the event, he made no headway.

Court "re-hears" Ombudsman decision

Wise v Sun Life Insurance Company of Canada [2016] EWHC 2814 (Ch) was another appeal to the High Court, this time from a decision of the Deputy Pensions Ombudsman. On this occasion, the Ombudsman's office declined to be involved in the appeal.

The member complained about having lost his guaranteed annuity right when Sun Life policies held by a pension scheme were terminated in 1990. The Deputy Ombudsman accepted that the policies would have been terminated at

the trustees' instruction and that Sun Life were not responsible for the loss.

The member appealed, producing new witness statements and other documents which had not been before the Deputy Ombudsman. The parties agreed that the appeal should proceed by way of re-hearing rather than merely reviewing the Ombudsman's decision, and that - although appeal from the Ombudsman lies only on a point of law - the Court would reconsider the real issue between the parties, which was essentially one of primary fact, on the new evidence. After doing so, the judge dismissed the appeal. It was *"overwhelmingly probable"* that the scheme employer or trustees, not Sun Life, were responsible for cancelling the policies: and doing so would have seemed reasonable in 1990, when market annuity rates were consistently high.

Although awarding Sun Life its costs in the main dispute, the judge refused to do so in respect of a respondent's notice which it had also served, raising a separate issue about the Ombudsman's jurisdiction. It was not reasonable for Sun Life to recover those costs, given that it already had a strong defence to the claim. The notice, which raised an unnecessary legal complexity, had been issued at its own risk.

Comment: Whilst the Court's approach to re-hearing the Ombudsman determination is novel, the real lesson is for parties to ensure that all relevant evidence is put before the Ombudsman. In addition, respondents should think carefully before raising new points on appeal.

Good faith and the 'change of position' defence

A member who has been overpaid benefits may have a defence to recovery of some or all of the overpayments if, acting in good faith, they entered into irreversible commitments as a result of receiving the overpayments.

In PO-3633 Mr R (31 October 2016) the member received benefit statements between 2010 and 2012 that referred to a total tax-free lump sum from his two schemes of around £25,000. However, a revised quotation produced a few months later gave a combined figure of £85,000 which the member, after taking financial advice, applied for and received. The member was then told there had been an error: the correct lump sum entitlement was under £30,000. When the administrator sought repayment of the balance, the member claimed to have spent the money, much of it on settling credit card debts. However, he later disclosed bank statements which showed over £40,000 in his account when he found out about the overpayment. The administrator said this cast doubt on the member's defence, although as a goodwill gesture offered to reduce the sum owing by £5,000.

The Ombudsman's Adjudicator found that it was not unreasonable for the member not to have queried the higher quotation: he was not a pension scheme expert and entitled to rely on his IFA, who did not question the amounts quoted and recommended that he take them. However, it was settled case law that repayment of a debt did not count towards a change of position defence; the rest of the expenditure might have been incurred even without the overpayment; and on the evidence of the bank statements the member had *"not shown equitable grounds for him to avoid making repayment".*

The Ombudsman upheld the Adjudicator's decision, noting that the £5,000 offset offered to the member was ten times the Ombudsman's minimum distress award.

Comment: This is a good example of how a member's claim to a change of position defence can crumble when challenged. That said, the Adjudicator's view that the member was entitled not to question the higher quotation might be viewed as generous. Only weeks earlier, in PO-12613 Mrs N (3 October 2016) the Deputy Ombudsman found that a member could not rely on a benefit statement quoting a lump sum of £47,000 when previous statements consistently showed a figure around half of that. Moreover, in determination 28034/5 Kenny (24 February 2010), a previous case in which the Ombudsman described a member as no "pensions expert", the discrepancy between the amount of pension quoted, and that received, was still so great that the member *"should have been aware that something was amiss".*

How to use an occupational health adviser

In PO-13059 Mr Y (21 September 2016), the Ombudsman criticised aspects of an employer's handling of a member's application for total incapacity benefit. These included the failure of it and its medical advisers to apply and interpret the relevant rules definition consistently, which is a common problem. However, the Ombudsman also cast doubt on the employer's reliance on those advisers' views as to the member's ability to work going forwards, citing a British Medical Association publication which states: *"Occupational physicians should not be asked to assess patients' ability to obtain work in the future."*

Comment: In our experience trustees and employers will often seek the occupational health adviser's medical opinion as to a member's longer-term prognosis and ability to work, as part of ensuring that incapacity criteria in scheme rules are properly tested. The determination warns that they must now take particular care in this area.

CMS and the Pensions Ombudsman

CMS has had a market-leading Pensions Ombudsman Unit for many years, led by Mark Grant. Mark wrote the only text book on the Ombudsman's role and established and chairs the Pensions Ombudsman Liaison Group, an industry body that meets with the Ombudsman and seeks to improve understanding, relationships and communications between his office and key stakeholders.