Pensions Ombudsman Update – September 2021

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Mrs E (CAS-30002-K6Z8) – Change of position defence partially upheld to avoid repayment of overpaid sums

The Pensions Ombudsman (the Ombudsman) has partially upheld Mrs E's complaint, concluding that she is not required to fully repay sums paid to her due to the miscalculation of her pensionable service record.

Facts

Mrs E was a member of the Teachers' Pension Scheme (**Scheme**) from 1975 to 1980 (**First Service Period**). On leaving the Scheme, Mrs E received a refund of her contributions. Mrs E re-joined the Scheme in 1983 and left in 2008 (**Second Service Period**). Following a review in April 2014, Teachers Pension (**TP**) noted that Mrs E's pensionable service record incorrectly included her First Service Period. However, TP took no further action at this time.

In July 2014 Mrs E applied to receive benefits from the Scheme. She was sent a statement incorrectly showing her pensionable service as including her First Service Period and her Second Service Period. Shortly after this Mrs E elected to receive a lump sum and pension based on the statement.

In 2018, Mrs E's pension was reduced. When she queried why, TP informed her that her pensionable service had been recorded incorrectly, that the reduced pension reflected her correct pensionable service, and that she had to repay an overpayment of £13,506 (**Overpayment**).

Mrs E's complained to the Department for Education, who concluded Mrs E must pay the Overpayment. Mrs E complained to the Ombudsman on the grounds of change of position.

Mrs E explained that she had used the lump sum payment to pay off her mortgage, install a new bathroom, and set-up her business. She had used her overpaid pension to buy expensive wedding gifts and to take trips abroad which she could not otherwise have afforded. Importantly, Mrs E provided a significant level of financial information which evidenced her otherwise low level of disposable income over the period.

Decision

The Ombudsman partially upheld Mrs E's complaint, deciding that TP may only recover £5,667 of the Overpayment, and that Mrs E be awarded £1,000 for the serious distress and inconvenience caused.

The general principle is that money paid in error can be recovered. This applies even when the overpayment was made due to the carelessness of over-payer. However, this principle will not apply where a person has a defence to the recovery, such as a change of position.

The Ombudsman agreed with TP that Mrs E had received enough information to know that her pensionable service record may not have been correct. However, the Ombudsman concluded that it must be established that, on balance, Mrs E noted the error and appreciated or suspected its ramifications. The Ombudsman concluded that there was no evidence of this.

Regarding the change of position defence, the Ombudsman explained the test is a subjective one, and taking into account all the facts, Mrs E satisfied that test and had acted in good faith on receipt of the Overpayment.

Impact

It is relatively uncommon for change of position defences to succeed. Generally the application of the proceeds of the overpayments must be irreversible, which can often not be demonstrated by the recipients. In this case, the Ombudsman was persuaded by the amount of financial evidence provided by Mrs E to support her position and the TP's failure to prove that Mrs E must had had some appreciation that she had been provided with incorrect information.

The decision does not comment on the TP's failure to correct Mrs E's records when they first identified the error; however, it does emphasise the need for schemes to take action as soon as errors are identified.

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Miss Y (PO-23113) – Employer fails in error to automatically enrol eligible jobholder due to misunderstanding on auto-enrolment "Tiers"

The Ombudsman has concluded that an Employer should have automatically enrolled an employee into a qualifying scheme where it had historically used basic pay rather than total earnings when calculating whether the relevant enrolment threshold had been met.

Facts

Miss Y was employed by Ansdell Road Post Office and Fyle News (**Employer**) from 2012 to 2018.

On 1 July 2016, the Employer was required to automatically enrol its eligible jobholders into a pension scheme, and make contributions in respect of those jobholders. Eligible jobholders are employees aged between 22 and the state pension age, who ordinarily work in the UK, who have a contract of employment, and who receive wages in excess of the earnings threshold (assessed at each pay period). This applies unless the jobholder opts-out in writing.

Pursuant to this obligation, the Employer established an auto-enrolment scheme (**Scheme**). When establishing auto-enrolment compliant schemes, employers can certify their scheme is compliant on a Tier 1, 2 or 3 basis. The different tiers reflect different contribution structures based on the nature of the employees' pensionable pay.

The Employer established the Scheme on a Tier 2 basis. Tier 2 requires employers to meet a minimum joint contribution of 8% of pensionable pay (of which the employer must pay at least 3%) provided that pensionable pay constitutes at least 85% of the employees' total earnings. In contrast, employers of a Tier 1 scheme must pay a minimum joint contribution of 9% (of which the employer must pay at least 4%), of the employees' basic pay. The difference between the two is that Tier 2 schemes must include employees' overtime and bonus pay towards their 'total earnings', whereas Tier 1 schemes need only include basic pay.

Miss Y complained to the Employer that she should have been enrolled in the Scheme as she met the earnings threshold on the "Tier 2" basis when her overtime was included in the calculation of her total earnings. She also complained that the Employer should have made contributions into the Scheme on her behalf for the period from 2016 to 2018. Miss Y received no reply from the Employer, and complained to the Ombudsman.

Decision

The Ombudsman upheld Miss Y's complaint. The Ombudsman found that Miss Y met the earnings threshold on the "Tier 2" basis, and that she should therefore have been automatically enrolled into the Scheme. Consequently, the Ombudsman found that the Employer had breached its automatic-enrolment obligations to Miss Y.

The Ombudsman directed the Employer to enrol Miss Y into the Scheme with effect from the date her salary (including overtime) first exceeded the earnings threshold. Upon receipt of contributions from Miss Y, the Employer was directed to pay its contributions into the Scheme in respect of the period of Miss Y's employment. Miss Y was also awarded interest in respect of the missed growth on these contributions, plus £500 for distress and inconvenience.

Impact

Setting up and self-certifying a compliant scheme for the purposes of automatic enrolment can be tricky. Care needs to be taken when selecting a contribution structure as the differences between the three Tiers are significant. We have encountered a few employers who have mistakenly got this wrong.

Employers may wish to audit their scheme to ensure it is compliant and that it is being administered on the correct Tier basis, as failure to comply can be costly. The Pensions Regulator has the power to issue statutory notices (which direct employers to take certain steps to comply with auto-enrolment legislation, including back payment of pension contributions with interest) and issue penalties ranging from a fixed penalty of £400 to escalating penalties of £50–£10,000 per day for non-compliance, depending on the size of the employer.

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Mrs S (CAS-37810-V2L4) – No award for non-financial injustice following a minor delay in providing scheme rules

The Ombudsman has concluded that a nominal delay in providing a member with a copy of the scheme rules did not merit the minimum award of £500 for non-financial injustice, despite this constituting a minor breach of the "Disclosure Regulations".

Facts

Mrs S is a deferred member of the HBOS Final Salary Pension Scheme (**Scheme**), which she joined in June 1986 and left in December 2000.

The rules of the Scheme (**Rules**) state that a member's normal retirement date (**NRD**) is their 62nd birthday, except that if they were a member on 1 July 1987, and so agreed in writing with the employer, their NRD may be their 60th or 65th birthday.

In October 2014, Willis Towers Watson (**WTW**), the administrators of the Scheme, provided Mrs S with a statement showing her benefits if she were to retire early. This listed her NRD as the day before her 62nd birthday. This NRD was repeated in subsequent statements.

In November 2016, Mrs S told WTW that she was considering ill-health early retirement (IHER). WTW informed Mrs S that IHER benefits available to deferred members would be subject to actuarial reduction. Mrs S made repeated requests for more information about IHER, and was repeatedly told that there were no enhancements available.

In August 2018, Mrs S requested a copy of the Rules, which she received in November 2018. She then informed WTW that, on her interpretation of the Rules, her NRD was her 60th birthday, and that the Rules permitted payment of an unreduced IHER pension to a deferred member.

WTW replied that she could not take unreduced benefits until her NRD, which was her 62nd birthday. An NRD of her 60th birthday would have had to have been agreed in writing her employer, and there was no evidence of an agreement.

Mrs S's enquiry was referred to the Lloyds Banking Group Pensions Trustees Limited (**Trustee**), who agreed with WTW's position. After Mrs S's complaint was not upheld by the Scheme's dispute procedure, she complained to the Ombudsman.

Decision

The Ombudsman did not uphold Mrs S's complaint that the Trustee and WTW had used an incorrect NRD to calculate her benefits, nor did he find that the degree of non-financial injustice caused by WTW's delay in providing the Rules was sufficient to merit the minimum award of £500.

This was in agreement with the Adjudicator's prior decision, who noted that the fundamental duty of the Trustee is to act in accordance with the Rules. Whilst the Rules could have been constructed differently so that Mrs S would have been in no doubt of their meaning, the Trustee had construed the Rules correctly.

The Adjudicator also noted that legislation required WTW to issue a copy of the Rules within two months of Mrs S's request, and their failure to do so was maladministration. However, a minimum award of £500 was not merited.

Impact

Under the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (**Regulations**), trustees of occupational pension schemes are required to provide certain information to their members.

Trustees must provide basic information to new joiners of the scheme. As this requirement is usually met by the scheme's member's booklet, trustees should ensure that the booklet contains at least the minimum levels of information required by the Regulations.

Additionally, Trustees must provide certain further information as a matter of course, and other information if requested. When a member requests information about a scheme's constitution, this must ordinarily be provided within two months of the request.

Trustees may disclose information beyond that required by the Regulations, but should consider this carefully. There is no requirement under legislation for trustees to disclose the reasons for their discretionary decisions. However, declining to do so risks that an already unhappy member may escalate their complaint to the Ombudsman. Consequently, this represents a delicate balancing act for trustees; legal advice will often be required in such cases.

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MR N (PO-22137) – Scheme rules take precedence in conflict between provisions in past communications

The Ombudsman has concluded that previous communications stating that a member's deferred pension would be increased at a fixed rate did not create an overriding contract that took precedence over the rules of the scheme that were in force at the relevant time.

Facts

Mr N joined the Iveco Limited Pension Scheme (**Scheme**) in 1979. In 1993, he took redundancy, becoming a deferred member of the Scheme. Mr N stated that on redundancy he was offered a deferred pension increasing by a fixed rate of 5% compound per year. Subsequently, Mr N received a certificate confirming his entitlement (**Certificate**), stating he would receive a pension from age 65 of £19,745.40.

In 2014, Mr N received a benefits statement from Capita stating that his expected pension at his normal retirement date (**NRD**) was £19,742.91, which was an estimate only. Mr N asked Capita if this accounted for inflation, and Capita replied that his pension had been revalued by fixed percentages.

In 2017, Capita told Mr N that his Scheme benefits were not revalued by fixed percentages, but in line with the retail prices index (**RPI**) up to a maximum of 5% per year. In 2018, Capita informed Mr N that his estimated benefits at NRD were £14,481.24, based on his benefits above GMP increasing at 1% a year.

Mr N complained to the Ombudsman in respect of Iveco Pension Trustee Limited (**Trustee**) and Capita on the grounds that he can no longer expect the pension he was told he ought to get, and that he would suffer financial loss in retirement.

The Trustee and Capita submitted that Mr N's benefits were governed by the Scheme's rules as in force when he became a deferred member, which stated that deferred pensions should be increased by reference to RPI up to a maximum of 5% per year. This would have been confirmed in notes accompanying the Certificate. Although Mr N was given incorrect information by Capita in 2014, the correct information was later provided.

The Trustee and Capita further submitted that although the Certificate promised a pension of £19,745.40, Capita's subsequent statements confirmed the figures they provided were estimates only.

Decision

The Ombudsman partially upheld Mr N's complaint, directing the Trustee to pay Mr N £1,000 for the serious distress and inconvenience caused.

The Ombudsman found that Mr N would reasonably have expected to receive a pension of £19,745.40 based on the information he received. Mr N would primarily have referred to the Certificate regarding his benefits, so it should have stated that his projected benefits were estimates which would be increased by reference to RPI capped at 5%.

However, the Ombudsman also held that although Mr N was given incomplete and misleading information, he did not find that a contract overriding the Scheme's rules had been created, nor that Mr N had relied on the information. The Scheme rules therefore took precedence and applied in this case.

Impact

Whilst in this case the provisions of the scheme rules prevailed, trustees should be wary of creating contracts that override the scheme rules, particularly as this may be done by other parties, such as the scheme employer. Trustees should ensure that communications are clear that estimated benefits are estimates only and do not guarantee a specified level of benefit. Pension increases are a common area of dispute between trustees and members and, as here, trustees should be conversant with how the rules of their scheme apply to increases.

This complaint also raises issues around the retention of documents. The complainant and the Trustee both referred to the content of communications sent to members approximately 28 years previously. To comply with data protection legislation, Trustees should not retain member data/documents for longer than is necessary or reasonable in the exercise of their duties. Each case needs to be determined on its own merits and legal advice should be obtained in cases of doubt.

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TLT's Pension Dispute Resolution Team

Pensions disputes have become a key issue for many employers and trustees. TLT's Pensions Dispute Resolution team are first and foremost pensions lawyers.

We understand the issues facing companies and trustees, and provide clear and realistic solutions based on commercial and practical realities to help clients, whether employers or trustees, achieve the right result.

The team is experienced in dealing with complaints to the Pensions Ombudsman, acting on behalf of individuals as well as employers and trustees.

Disputes involving members and disputes between trustees and employers require careful handling and a pro-active approach.

Most disputes the team have been involved in have not become public knowledge as we pride ourselves on pro-active case management to resolve matters at an early stage, avoiding wherever possible the unwelcome cost exposure involved in full blown litigation.

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"They are the best pensions lawyers I have ever dealt with: they are responsive and practical," says an impressed source.

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