Sackers FIFTY YEARS OF PARTNERSHIP 50

Pensions & Investment Litigation Briefing

April 2016

Sackers' Pensions & Investment Litigation team reviews recent case law and examines the practical lessons for trustees and employers

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Abbreviations

CETV: Cash equivalent transfer value

PO: Pensions Ombudsman

SSAS: Small self-administered scheme

TPR: The Pensions Regulator

Seminar: Trustee protections

In May 2016, we will be running an interactive workshop for trustees and pension managers on the different protections available to trustees.

There is a choice of two dates – a lunchtime seminar (12:30-2:00pm) on 17 May and a breakfast seminar (09:00-10:30am) on 19 May.

You can register through the events page on our website or by contacting our marketing team at marketing@sackers.com.

Electronic format

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The perils of trusteeship

"Pension scheme trusteeship can be a complicated business. So whether you are taking on the role for the first time, dealing with day-to-day business or the odd complaint, or winding-up a scheme, it is good to know that there are a variety of protections available in case things go wrong.

In May 2016, we will be running an interactive workshop on the different types of protection available to trustees, such as insurance, indemnities, exoneration clauses and statutory protections.

Ahead of this, we set out on page 3 some top tips for dealing with member complaints.

Also in this edition, we look at a trio of recent cases, including the case of *Hughes v Royal London*, in which the High Court, disagreeing with the Pensions Ombudsman, found that Mrs Hughes should have been allowed to transfer her benefits."

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In this issue

Top tips for trustees: defending member complaints

Exoneration: to rely or not to rely?

In practice, trustees can be reluctant to rely on the exoneration clause in their scheme rules. This is perhaps unsurprising, as generally members and trustees focus on the underlying merits (or otherwise) of a dispute or complaint. But it is a legal question that we often get asked. While they vary from scheme to scheme, an exoneration clause will typically enable trustees to avoid liability for breach of trust or negligent mistake, unless that breach or mistake was committed in bad faith, fraudulently or in wilful default.

Exoneration clauses can also differentiate between professional trustees and lay trustees, for example, by providing a higher level of protection for lay trustees.

In itself, exoneration is a broad topic and worthy of consideration by trustees as part of their overall strategy for protection from potential liability. We will discuss this and other forms of trustee protection at our forthcoming workshop for trustees and pension managers, further details of which can be found at the front of this briefing.

Transfers: the decision in *Hughes v Royal London*

In February 2016, the High Court overturned a decision of the PO which had upheld the scheme's decision to decline a transfer request due to concerns over a possible pension scam. The court disagreed with the PO's interpretation of the relevant legislation.

Background

Is there a statutory right to a transfer?

The starting point for trustees dealing with a transfer request is that they have a duty to pay a CETV where the relevant legislative requirements are met.

To satisfy the statutory requirements for a CETV, the transfer must be to a registered occupational or personal pension scheme. Broadly, under case law, to be an occupational pension scheme, a scheme must have been established:

- "for the purpose of providing benefits to people with service in employments of a description or for that purpose and also for the purpose of providing benefits to other people" (the "purpose issue") and
- by a person to whom section 1(2) of the Pension Schemes Act 1993 applied when the scheme was established (broadly, where there is an employment relationship) (the "founder issue").

Will the CETV be used to secure transfer credits in the receiving scheme?

The individual's CETV must be used for acquiring "transfer credits" in an occupational pension scheme or "rights" under a personal pension scheme. The term "transfer credits" is in turn defined by reference to "earnings", which includes "any remuneration or profit derived from an employment".

Facts

Ms Hughes, a member of a personal pension scheme administered by the Royal London Mutual Assurance Society (Royal London), requested a transfer to the Babbacombe Road 1973 SSAS, an occupational pension scheme. Royal London refused to make the transfer and, in particular, questioned whether she had a statutory right to a transfer because she was not an "earner" in relation to the SSAS.

The PO's decision

In June 2015, the PO dismissed Ms Hughes' complaint. While he was satisfied that the SSAS was an "occupational pension scheme", he held that for Ms Hughes to be "an earner" within the definition of "transfer credits", she had to be an earner in relation to a scheme employer under the SSAS. Although Ms Hughes was "apparently employed" by the principal employer of the SSAS, she did not receive remuneration from that employer. In the PO's view, this meant she was not an earner in relation to a scheme employer and therefore did not have a statutory right to a transfer.

Ms Hughes appealed, arguing that the PO had wrongly construed the definition of "transfer credits" and that she was an "earner" within that definition, even though her earnings did not come from a scheme employer.

Transfers: the decision in *Hughes v Royal London* cont.

High Court decision

The judge noted that "it is sometimes possible for a court to supply missing words in a statutory provision" but was not satisfied that, in the circumstances, it was open for him to read words into the definition of "transfer credits" (as the PO had done). "Earner" therefore had to be given its general meaning.

As it was agreed that Ms Hughes was "an earner by reason of her earnings from another source or sources", the judge found that she was entitled to require Royal London to transfer her benefits to the SSAS.

Sackers' verdict

This decision clarifies the position for trustees and administrators on the parameters for paying a CETV and for that reason has been welcomed by the PO.

The PO notes that "it seems likely that most transferring members will meet [the earnings] requirement so, beyond verification of earnings and the provision of risk warnings, trustees and administrators will be conscious that under current legislation they cannot refuse such a transfer – even if they have significant concerns that it may be for the purposes of pension liberation".

The PO does not go so far as to require trustees to go back over past refusals of transfer requests which may have been based on his (now over-ruled) decision. But depending on the circumstances and how the decision was communicated to the member, a cautious approach for trustees might be to notify affected members of the court's ruling.

Additionally, other legal questions remain relevant in this area including:

- did the member cease accrual more than one year before normal pension age?
- has the member crystallised their benefits?
- does the receiving scheme satisfy the founder and purpose tests?

These should not be overlooked by trustees when assessing whether the member has a statutory right to transfer.

For more information on the considerations for trustees and administrators, as well as other sources of guidance (including TPR and Action Fraud), please see our Alerts on recent PO transfer request rulings and the Pension Liberation Industry Group's Code of Good Practice on Combating Pension Scams.

Early retirement terms: Readman – employer decision "perverse"

The PO in this case found an employer's refusal to authorise the payment of unreduced early retirement benefits to be perverse.

Background

Mrs Readman, a hospital nurse since November 1976, transferred to district nursing in 1985 as she did not enjoy working in the hospital environment. She enjoyed a successful career, reaching the position of "Community Modern Matron" in 2006.

However, in 2007 she faced possible redundancy. As part of the redundancy exercise, Mrs Readman was offered (and turned down) two alternative roles – community nurse team manager (effectively a demotion) and Modern Matron in a hospital. Her employment terminated in November 2008.

In 2014, following an appeal, the Employment Tribunal decided she was entitled to statutory redundancy as she had not unreasonably refused suitable alternative employment.

Mrs Readman also applied for early payment of her pension benefits on grounds of redundancy. The Secretary of State, on behalf of her primary care trust (her former employer), refused to provide the necessary confirmation that the reason for retirement was redundancy. In the Secretary of State's view, Mrs Readman's refusal to accept an alternative role meant that she had failed to show "some flexibility" – a contractual test in a document outlining NHS terms and conditions of service.

Decision

The PO found that while the Secretary of State was right to assess whether Mrs Readman had shown "sufficient flexibility" in considering the job offers, he found that she had not unreasonably refused either one. He therefore found the Secretary of State's refusal to confirm that the reason for her retirement was redundancy was perverse and directed NHS pensions to pay an unreduced pension from the date of her redundancy in 2008, plus interest.

Sackers' verdict

Claims for enhanced pension benefits on termination of employment are common. This case serves as a useful reminder that employers (and trustees, if they are making the relevant decision under the scheme rules) cannot simply reject such claims where alternative employment has been offered.

This is also a rare instance in which the PO considered not only that the employer's decision to refuse enhanced pension benefits was unjustified, but also that it was perverse. He considered it unlikely that a fair decision would be made if he sent the case back to the employer for a fresh decision and instead made his own direction regarding the pension payments.

Overpayments: Webber – how far back can a scheme look for recovery?

Where an overpayment is based on a mistake, time for recovery starts to run when the mistake is discovered, or could have been discovered with reasonable diligence.

Background

Mr Webber had been involved in a long-running dispute with the Teachers' Pension Scheme (TPS) regarding overpayments, including several referrals to the PO and two appeals to the High Court.

Having retired early from the TPS in 1997, Mr Webber started teaching again in 2001. The TPS provided that if a retired teacher started working again and their salary exceeded a certain threshold, their pension would be reduced. Although Mr Webber submitted a "certificate of re-employment" to the TPS administrator in 2001, he did not do so in subsequent years. TPS only became aware of his situation in 2009 and sought recovery of the overpaid pension at that stage. Mr Webber first complained to the PO in April 2011 and the complaint was accepted for investigation in November 2011.

In his latest appeal to the High Court, the judge held that the TPS ought reasonably to have discovered the overpayment from information available during the tax year 2002/03. As the Scheme had not claimed repayment within six years of that date, it was only entitled to recover overpayments going back six years from the "cut-off date". The case was referred back to the PO to decide on the cut-off date.

Decision

The PO was faced with deciding between two arguments.

Mr Webber argued that the cut-off point was the date his complaint was accepted for investigation by the PO, akin to the start of court proceedings for the purposes of limitation (ie 26 November 2011).

The TPS meanwhile argued it was the date when it demanded recovery, given that legally it was not entitled to bring a complaint to the PO (only a member can do this). On this basis, the cut-off date was 24 November 2009 which meant it should be able to recover overpayments from 25 November 2003.

The PO agreed with the TPS. To decide otherwise would mean that a member could delay bringing a complaint in order to limit a scheme's ability to recover overpayments.

Sackers' verdict

The basic rule is that the time limit for recovery of overpayments is six years. Where the overpayment is based on a mistake, time does not start to run until the mistake was discovered or could with reasonable diligence have been discovered.

Trustees should look out for and act promptly on information which might suggest that an overpayment is being paid, whether that information comes from a member or from a scheme audit. Members affected by attempts to recover past overpayments may scrutinise closely when the trustees could reasonably have discovered the overpayment to resist a demand for repayment at least in part.

Contact

Sackers' market leading Pensions & Investment Litigation team is consistently ranked in the top tier by both Chambers UK and the Legal 500. Sackers is experienced in handling cases before the Pensions Regulator, High Court and Pensions Ombudsman, with Chambers UK commenting that it is the "go to firm in this area of law".

Sackers is the UK's leading commercial law firm for pension scheme trustees, employers and providers. Over 50 lawyers focus on pensions and its related areas. For more information on any of the articles in this briefing, please get in touch with Katherine or any of the team below, or your usual Sackers' contact.

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Recent publications

For more practical guidance on dealing with pensions disputes, see our "Top Tips" on:

- Managing Complaints - IDRP and the Pensions Ombudsman
- Death benefits and incapacity cases
- Recovery of overpayments

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