

Sackers



Pensions & Investment Litigation Briefing

December 2016

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



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Abbreviations

- ABI:** Association of British Insurers
CETV: Cash equivalent transfer value
CPI: Consumer Price Index
DB: Defined benefit
DC: Defined contribution
FOS: Financial Ombudsman Service
TPO: Pensions Ombudsman

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Overview

“Now that we are well into the second year of retirement freedoms, it’s perhaps unsurprising that we’re beginning to see some cracks in the system. Complaints to the Financial Ombudsman, whilst relatively small in number compared with the numbers already taking advantage of the flexibilities on offer, are on the rise. The Pensions Ombudsman also expects to see more such complaints arriving in his inbox.

In our final briefing of 2016, we look at some of the stats, and give an example of one individual who didn’t get the smooth ride they were expecting when transferring their benefits in order to access them flexibly.

We also consider the somewhat unsatisfactory conclusion in the long-running saga of the overpayment of benefits to Mr Webber. The limitation date settled upon by the High Court is, to a large extent, outside trustees’ control, as it allows a member to delay making a complaint to the Pensions Ombudsman, potentially reducing trustees’ scope to recover overpayments.

2017 is set to be a busy year for the courts, with a number of big name pensions cases lined up. Among others, we can expect to hear more about *O’Brien v MoJ and Walker v Innospec* (on claiming rights retrospectively where there is a subsequent change in legislation), *British Airways* (on the trustees’ decision to give themselves a unilateral power to award discretionary increases above CPI, currently being heard in the High Court), *Safeway* (on equalisation), and the appeals against the *IBM* “breach” and “remedies” decisions.

With best wishes for Christmas and the New Year.”



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Early days for retirement freedoms

It is still relatively early days in the new world of retirement freedoms, so we have yet to see many complaints in this area. But as TPO notes in its [annual report and accounts](#) for 2015/16, with the retirement freedoms continuing to bed in since their introduction in April 2015, it is unlikely to be long before more start to appear.

Life has also been busy for FOS. In the first year of the retirement freedoms, it dealt with some 1,000 enquiries and around 400 complaints. But this still only represents a small fraction of the total numbers accessing the retirement freedoms.

Retirement freedoms – first year statistics

Statistical analysis from the ABI on customer decisions since April 2015 indicates that for pay-outs:

£4.3bn paid out ▶ 300k lump sum payments ▶ £14.5k average payment

£3.9bn paid out ▶ £1.03m drawdown payments ▶ £3.8k average payment

Whilst at the same time there have been significant funds invested in new products:

£4.2bn invested ▶ 80k annuities ▶ £52.5k average fund

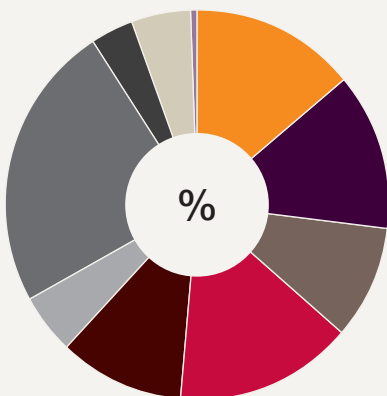
£6.1bn invested ▶ 90.7k drawdown products ▶ £67.5k average fund invested

The Financial Ombudsman's approach

Figures from FOS show that there has been a wide range of queries and complaints relating to the retirement freedoms, from administration and access issues, to financial advice and exit fees.

In an [interview earlier this year](#), senior FOS ombudsman, Phil Miller, says that there has been “a lot of work behind the scenes” with providers “to make sure they’ve got the right resources in the right places [...]. But inevitably – and providers have been upfront about this – delays have been an issue.”

FOS' general approach to delays is to assess whether the provider caused unreasonable delays. If so, their response is to “make sure their customer isn't worse off because of it”. FOS will also consider whether it is fair for the provider to compensate for any upset and inconvenience caused.



14%	administration	5%	exit fees
13%	annuities	24%	delays
9.5%	can't access pension	3.5%	quality of advice
15%	requirement to get financial advice	5%	provider doesn't offer preferred pension option
10.5%	information given about pension	0.5%	other problem

Source: issue 133 [Ombudsman News](#)

Retirement freedoms: transfer request



TPO finds no unfair treatment of active member denied guaranteed CETV

Background



Mrs E, a member of the [Scottish Widows Retirement Benefit Scheme](#) (a DB scheme), wanted to transfer her benefits to a DC scheme and requested a CETV. She was provided with a quotation in June 2015, which showed a transfer value of £686,687. The CETV quotation and covering letter contained three distinct warnings that, because Mrs E had not left the scheme, the CETV was for “illustration purposes only” and “not guaranteed”.

A revised CETV was provided to Mrs E in August 2015 after the scheme’s transfer value basis had been reviewed, and subsequently changed, by a new scheme actuary. The new CETV was around £42,000 lower than the original quote. Mrs E transferred her benefits in any event.

Mrs E complained that she had been treated unfairly compared with a deferred member, whose CETV would have been guaranteed for three months under the preservation legislation. Among other things, she complained that she should have been warned that the CETV value was about to change. She also complained that she had been “forced” to take financial advice and argued that the trustees had not acted “in the spirit of the new pensions freedom legislation”.

Decision



As Mrs E was an active member of the scheme, there was no statutory obligation on the trustees to guarantee the CETV. Mrs E could have opted out of the pension scheme at any point after 6 April 2015 in order to take advantage of the new retirement freedoms legislation and, as a deferred member, secure a CETV that was guaranteed for three months. Had she done so and submitted her transfer request in April or May 2015, the CETV could have been processed before 1 July 2015 when the CETV factors officially changed.

TPO held that the wording in the CETV and covering letter “could not be clearer” in his view – it clearly stated that Mrs E was still a member of the scheme and that the transfer value was not guaranteed.

Sackers’ verdict



This decision illustrates the importance of clarity in member communications and, in particular, ensuring that warnings are prominent and unambiguous.

However, the decision also sheds light on areas of tension that have arisen since the introduction of the retirement freedoms – will we now see a demand for parity between active and deferred members as a result?

It is worth noting that, with a view to increasing the safeguards for members, including those not caught by the appropriate independent advice requirement, the DWP is [currently consulting](#) on the introduction in 2017 of new tailored risk warnings. It is intended that these will be sent to members with safeguarded-flexible benefits (generally, DC benefits with guarantees) who are contemplating either transferring their benefits to a DC arrangement, converting their benefits into DC, or directly accessing their benefits flexibly.

No reasonable reliance on incorrect retirement statement



“Issuance of a retirement benefit statement is not a contractual offer”

Background



Before her retirement in December 2015, Mrs N received a retirement statement (in July 2015) in relation to her deferred benefits in the [University of Edinburgh Staff Benefits Scheme](#), which showed incorrect lump sum and pension amounts. The statement contained a note to “Please be aware that these figures are estimate only and are in no way guaranteed”.

Before her pension was put into payment, a revised retirement statement was issued the following month showing corrected figures. The new statement was accompanied by a letter which noted that the previous statement did not reflect Mrs N’s entitlement from the scheme.

Mrs N, who had reached normal retirement age under the scheme, said that she would not have retired had she known that the tax free lump sum available would only have been around £26,000, compared with the c. £47,000 figure which had erroneously been quoted in 2015. This was because she had a mortgage and other financial liabilities to manage. She asked for the higher tax free lump sum to be honoured.

Decision



The Deputy Pensions Ombudsman (DPO) (reviewing the case adjudicator’s opinion), explained that the starting point is the principle that issuance of a retirement benefit statement is not a contractual offer which can be accepted. Mrs N’s entitlement to benefit remained that provided for by the scheme rules, unless she could prove that there had been reasonable reliance on an incorrect statement which had caused financial loss.

Whilst there had been some discrepancies in benefit statements between 2010-2014, those statements showed that Mrs N’s tax free lump sum was “very substantially lower” than the figure quoted in the July 2015 statement. Subsequent benefit statements received by Mrs N had also shown the correct level for the lump sum. The discrepancy in the July 2015 statement “should have put her on notice” that the figures shown might be wrong.

It was therefore not reasonable for Mrs N to rely on the latest statement.

The trustees had already paid Mrs N £500 by way of compensation because of the fact that she had been provided with an incorrect statement. The DPO found this to be reasonable in the circumstances and no further award was made.

Sackers’ verdict



Whilst trustees and administrators take care to ensure that correct information is given to members, mistakes do happen. This decision illustrates that, where a mistake occurs in isolation, there may be a good defence to a complaint from a member who claims to have “reasonably” relied on an incorrect figure to their detriment. Instead, there is an onus on the individual to query a figure which is very obviously out of kilter with those provided previously.

Overpayments: High Court rules on limitation cut-off date



The High Court found that the cut-off date for limitation purposes was the date which coincided with the trustees' first "unilateral" act to claim recovery – in this case, Teachers' Pensions response to Mr Webber's complaint to TPO.

Limitation periods – the basics



Limitation periods define the time limit within which legal claims must be brought. The timescales for different types of claim are set out in the Limitation Act 1980. For example, ordinary breaches of contract, or actions arising out of negligent acts, are actionable for six years after the cause of action accrues.

Where the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the claimant has discovered the mistake, or could with reasonable diligence have discovered it (subject to a long stop period of 15 years).

A shorter limitation regime applies to claims brought before TPO. In most cases, member complaints must be made in writing to TPO within three years of the occurrence of the act or omission which is the subject of the complaint. However, this time limit may be extended if the complainant was not aware of the act or omission at the time it occurred. In such cases, for the purposes of the three year time limit, time will not begin to run until the complainant knew or ought reasonably to have known that the act or omission had occurred.

A claim that is brought outside the relevant limitation period will, in practice, be time barred. This means that the respondent will have a complete defence to any claim (irrespective of the underlying merits) brought against him or her after that time.

Webber v Department for Education – background



Mr Webber has been involved in a [long running dispute with the Teachers' Pension Scheme](#) ("TPS") regarding overpayments, which involved several referrals to TPO as well as two previous appeals to the High Court.

Having retired early from the TPS, 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, the pension would be reduced. Teachers were relied upon to inform the TPS of increases in their salary. Mr Webber made a notification in his first year of re-employment, but not in subsequent years.

The TPS only discovered the facts and sought recovery of overpayments from Mr Webber in November 2009. Following the final decision under the TPS's IDR, Mr Webber made an application to TPO which was accepted for investigation in November 2011. However, the first overpayment had occurred in the tax year 2002/03.

Overpayments: High Court rules on limitation cut-off date

High Court decision



The Court recognised that there are different regimes for general court claims and complaints to TPO. However, limitation applies in both contexts and the judge sought to apply the principles consistently.

The judge found, as TPO had done previously, that the closest analogy to the issue of a claim form had to be a step in the complaint procedure. However, he did not agree that Teachers' Pensions demand for repayment in 2009 constituted the relevant step.

In the context of this claim, the Court found that the cut-off date for limitation purposes was when Teachers' Pensions first asserted that it was entitled to receive the repayment, in a formal sense, its "unilateral" act – namely its response to Mr Webber's complaint to TPO.

As TPO had commented in its second determination, "if the date of the complaint form were the relevant cut-off date then an overpaid pensioner could simply delay bringing a complaint to [TPO] in order to maximise his limitation defence".

Whilst the judge agreed that it would appear to be contrary to the purpose of TPO (cheap and speedy resolution of disputes) if pension trustees were forced to protect themselves by issuing court proceedings to recover pension overpayments, whatever their value, he nevertheless did not agree that the date on which either Teachers' Pensions first demanded repayment, or Mr Webber complained to TPO about the trustees' actions, could be classed as analogous to the date on which the trustees brought a claim for recovery of the overpayment. The judge held that the relevant step was the trustees' formal response to TPO.

The judge echoed TPO's expectation that the parties would now enter into sensible discussions about how the money should be repaid and, in the circumstances, hoped that "Teachers' Pensions would take a highly charitable view of any modest but sensible repayment programme put forward by Mr Webber".

Sackers' verdict



Whilst it is good to have clarity that both the courts and TPO view limitation as applying in overpayment cases, this decision potentially creates difficulties and uncertainty for trustees. The onus will be on trustees to act quickly.

It now follows that the limitation date settled on by the High Court is, to a large extent, outside trustees' control as a member can delay making a complaint to TPO up to three years after he or she is aware of the overpayment, therefore reducing the extent of the recovery.

Trustees' only protection against such slippage may be to make a formal legal claim against a member, which some trustees may feel uncomfortable in doing. Alternatively, trustees may need to look more closely at seeking recovery from those responsible for the overpayment if recovery from members is restricted in future.

In a public [statement](#) on the case, TPO said: "The judgment is specific on its facts concerning overpayment complaints. However, I welcome that Mr Justice Bartley-Jones QC's judgment recognises that the processes of the Court and The Pensions Ombudsman are different and looked to accommodate that."

TPO is now reviewing its processes and procedures for dealing with overpayment cases, with a view to considering whether any amendments are needed.

Contact

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