Sackers

Recent developments in overpayments

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The practice and procedure for dealing with overpayments to members is now well established. Although this issue arises all too frequently, most trustees, pension managers and administrators understand the fundamental principles that apply when approaching members to recover an overpayment and to reduce the pension going forward to the correct level.

However, there has been a recent and important development in the shape of the High Court decision in the case of *Webber*.

In this note we start with a brief summary of the general principles that continue to apply to overpayments. In the second part we highlight the impact of the *Webber* decision which has the potential to restrict a trustee's ability to recover overpayments.

1. General principles

Trustee's duty to recover

The starting point in any case is that a trustee is under a duty to take reasonable steps to recover an overpayment made to a member and to reduce future pension payments to the correct level. There are two reasons for this; a trustee is under a duty to account for the assets of the scheme and cannot simply write off an overpayment that has arisen due to an error. Also, from a member's perspective, they are only entitled to receive the pension set out in the scheme's rules; they are not entitled to a higher level of benefit simply due to an error or mistake.

Trustee to act reasonably

An overriding principle in approaching overpayments is to act reasonably and to remember that it is often not the member's fault this issue has arisen. Always apologise for the mistake, and make it clear that the member will be given time to repay the amount overpaid. A general rule of thumb is to give the member the same period to repay as the period of overpayment. A clear statement of the trustee's duty to recover overpayments should be made, whilst at the same time making it clear that the trustee will not impose conditions which might cause undue financial hardship on the member. A good test is to ask, "*what would the Pensions Ombudsman think if he were to read this letter?*", because later down the line, he just might!

Change of position defence

A member might have a defence to the claim and one such defence is known as the "change of position defence". This defence applies in cases where a member has taken steps e.g. spent large sums of money or changed their position to the extent it would be unfair to require the member to repay the money paid to them in error.

In some cases, a change of position defence can also extend to a claim for continuing the pension at the incorrect, higher level for the future. These cases are complex and very fact dependent.

Trustee's duty to mitigate

It is often the case that a trustee will look to the administrator for compensation. However, the administrator can reasonably expect a trustee to take reasonable steps to recover the overpayment from the member, before looking to the administrator to pay the shortfall. This is called the trustee's "duty to mitigate". This obligation on the trustee can sometimes create controversy in circumstances where the trustee expects the administrator to simply reimburse the loss in full and yet the administrator can reasonably expect the trustee to mitigate. The duty does not extend to the trustee taking every possible step, just simply reasonable steps which are proportionate to the circumstances, including the amount of the overpayment.

Time limit for recovering overpayments

Time limits are set out in the Limitation Act 1980. The trustee's starting point is that the limitation period for bringing a claim to recover overpayments is six years. This time limit will apply in the vast majority of overpayment cases where the error was made by the administrator and ought to have been spotted at the time. In these circumstances, the trustee (acting through the administrator) can only recover overpayments going back over a period of six years. Any overpayments beyond that period would be statute barred.

Recent developments in overpayments cont.

2. Recent developments

As stated above, there is a six year limitation period for bringing a claim against the member.

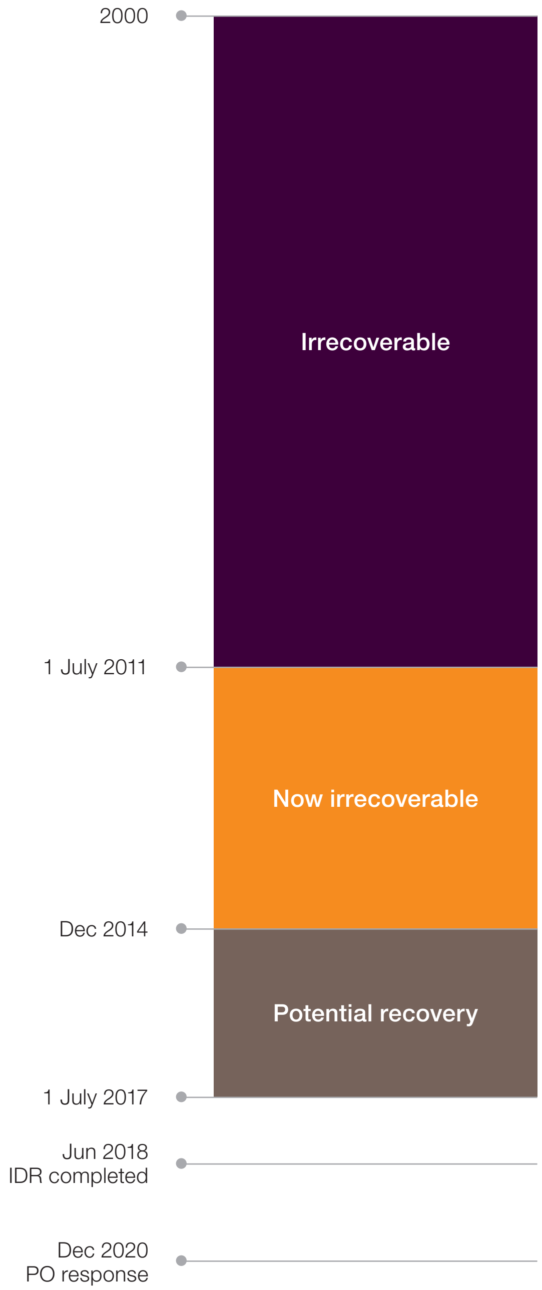
The test of what is meant by "bringing a claim" has not, until now, been tested in the High Court. In practice, most practitioners have viewed the initial demand to the member, stating how much the member should repay, as being the point of "bringing a claim" for this purpose.

In the High Court decision in *Webber*, the Judge concluded that the "bringing of a claim" was the date of receipt by the Pensions Ombudsman of the trustee's response to a formal member complaint. This was a surprising outcome.

Most pension schemes have a two stage IDR process and, once completed, a member has up to three years in which to bring a complaint to the Pension Ombudsman. Even then, there can still be a delay in the Pensions Ombudsman's office serving the complaint on the trustee and then the trustee preparing and serving its response. Only once this response has been received does time stop running. All this time during the complaint process will work against a trustee for the purpose of recovering the overpayment.

Example:

As is apparent from this diagram, the first six year period of overpayments that the trustee initially considered to be recoverable has now been significantly eroded due to the time spent during the IDR process, and the period taken until the trustee's response was received at the Pensions Ombudsman's office. It means that a period of arrears that was originally considered to be recoverable may now be statute barred.



3. Steps to be taken by a trustee – top tips

1 Internal procedures

The consequences of a lengthy dispute with a member are visibly illustrated in the diagram overleaf. The impact of *Webber* on an overpayment case which covers a lengthy period needs to be recognised at an early stage and this type of overpayment case escalated by the administrator. The consequences of *Webber* can have an even more profound effect if a significant overpayment was made at the outset, as the older overpayments are more likely to be statute barred in a *Webber* scenario.

2 IDR process

In the case of overpayments in excess of six years, consider expediting the IDR process rather than waiting for an IDR complaint to be dealt with at the next trustee meeting. It is not uncommon for an IDR complaint to take a year to be completed if it needs to go through both stages of the IDR.

3 Be aware of the clock ticking

If a member has not responded to an IDR stage 2 complaint, be proactive in following this up; find out whether they are contemplating a complaint to the Pensions Ombudsman and consider its implications, bearing in mind a member has up to three years to make a complaint and the consequences of that delay.

4 Action by the Trustee

The significance of the *Webber* case is that any time taken by a trustee or administrator to overcome a member's concerns and reach an agreement with the member has the potential to reduce the amount of overpayment the trustee can recover unless the trustee takes steps to stop time running. The steps which a trustee can take in appropriate circumstances include:

- invite the member to enter into a standstill period which would preserve the limitation period whilst the dispute is being considered via IDR and/or by the Pension Ombudsman. We would advise involving TPAS in such a discussion.
- if the amount is significant, and the member has refused to voluntarily enter into a standstill agreement, then consider issuing a Claim Form in the County Court, which could be stayed whilst the claim is being considered under IDR, but this step would oust the jurisdiction of the Pensions Ombudsman.

These are fairly radical solutions and considerable care needs to be applied in how these steps are taken to ensure that trustees are seen to be acting reasonably at all times. Nevertheless, if a member is aware of the implications of the *Webber* case and, whether intentionally or not, prolongs the IDR/Pensions Ombudsman process, the outcome could significantly reduce the recovery of any overpayment.

Finally, it is important to note that these recent developments do not have any impact on the trustee's ability to reduce pension payments going forward.

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