Sackers

Pensions litigation briefing

June 2023

Sackers' pensions litigation team reviews recent case law and developments, examining the practical lessons for trustees and employers

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Abbreviations

CDC: Collective DC

DB: Defined benefit

DC: Defined contribution

TPO: The Pensions Ombudsman

TPR: The Pensions Regulator

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Overview

“Welcome to the latest edition of our Pensions Litigation briefing.

After the turmoil in markets and ongoing cost of living crisis, we are hopefully turning a corner with expectations a little more upbeat than last year. And following the recent coronation, what could be more timely in putting a pensions-related spin on all things regal than TPR granting the first authorisation for a CDC scheme to the Royal Mail Collective Pension Plan! No doubt there will be more schemes that follow suit, particularly following the recent consultation on expanding the CDC regime to non-connected multi-employer schemes.

In this edition we take a look into a trio of points from a litigation perspective that trustees will encounter from time to time. Firstly, we provide a reminder on the rules on legal time limits and how to bear these in mind when you are pursuing or defending a claim.

We then give some focus on the perennial question of how to recover overpayments and summarise a recent case from TPO’s office.

We also discuss the requirements and considerations that arise when trustees are faced with a breach of law and the question of whether to report it to TPR as part of their ongoing statutory duties. Having appropriate procedures in place now, that are both easy to navigate and understand, should make a big difference for trustees when faced with this question in practice.

Finally, we wish you all a great summer 2023.”

Arshad Khan
Senior Counsel, pensions litigation

arshad.khan@sackers.com

In this issue

Limitation – what is it and why does it matter?

There is a time limit on bringing a claim

What is limitation?

"Limitation" refers to the time limit for bringing a claim in the courts. If court proceedings are not issued within that time limit then the defendant will have an absolute defence, irrespective of the strength of the claim.

If a trustee or employer has a claim relating to their pension scheme, it is important that steps are taken in good time to prevent the limitation period from expiring – otherwise the right to recover compensation may be lost.

Common limitation periods

Different limitation periods apply to different claims:

- **Breach of contract** – six years from the date of the breach (12 years if the contract is made in a deed)
- **Breach of statutory duty** (eg failure to pay a section 75 debt) – six years from the date of the breach
- **Breach of trust** – generally six years from the date of the breach (with some exceptions)
- **Negligence** – "primary" limitation period of six years from the date that loss is suffered or, if later, a "secondary" limitation period where the loss is not discovered until some time later of three years from the date that the claimant acquires knowledge of the claim (see below)
- **Overpayments** – six years from the date of the overpayment. See page 5 for more on overpayments.

"Secondary" limitation period for negligence claims

There is a "secondary" limitation period for negligence claims where the claimant is not immediately aware of the negligent act or the loss it has suffered. This is common in pensions-related negligence claims as mistakes in scheme deeds or in pensions administration are often not spotted for many years.

Three years from date of knowledge

The secondary limitation period runs for three years running from the date the claimant has relevant "knowledge", subject to an overriding "longstop" of 15 years from the date of the negligent act or omission.

To start the clock running for the secondary limitation period, the claimant needs knowledge of:

- the material facts about the loss they have suffered
- the fact that the loss was attributable to a negligent act or omission, and
- the identity of the defendant.

This knowledge can be "imputed" in certain circumstances. For example, a claimant will be deemed to have any knowledge that they ought reasonably to have acquired from reading documents that would have revealed the issue or if they ought reasonably to have taken expert advice sooner (even if they didn't actually read the documents or take any advice). In such cases, the limitation period may start running well before the claimant themselves actually knew they might have a claim.

Limitation – what is it and why does it matter? cont.

Pension Ombudsman complaints

The statutory time limits above equally apply to complaints made to TPO but these complaints also have their own time limits. Broadly, a complaint must be received by TPO within three years of the act or omission which gives rise to it or, if later, three years from the date when the member knew or ought to have known about the issue. After that, the general rule is that TPO should not investigate the complaint, but TPO has discretion to extend this if he considers it reasonable to do so in any particular case.

What steps can be taken to prevent a limitation period from expiring?

You can stop the limitation period from expiring by issuing proceedings at court (by issuing a claim form and paying a court fee).

Standstill agreements can pause the clock

Alternatively, you can enter into a "standstill agreement", in which you agree with the other parties to "pause" the clock on the limitation period for the duration of the agreement. This is known as the "standstill period". When the standstill period comes to an end, the clock usually starts running again from where it left off.

Standstill agreements tend to be used where the parties need further time to investigate a claim. They are also used when parties want to resolve the claim outside of the courts, as court proceedings can be time consuming and costly.

Practical tips

- Consider limitation at the earliest opportunity, whether you a making a claim or defending a complaint. Time has a habit of passing more quickly than you might think!
- Take a cautious approach, as it is an "all or nothing" defence. For example, if a defendant gives incorrect advice orally at a trustee meeting and then follows up a couple of months later with written confirmation of such advice, err on the side of caution and assume the date of the meeting is when the clock may have started running.
- Seek professional advice in relation to any potential claims or issues with your scheme.
- Make a note of limitation dates and set reminders to ensure they are not missed.
- Where multiple potential claims arise from a single event or issue (eg a breach of contract and negligence), consider whether more than one limitation period applies and, if so, work from the earliest limitation date. For example, a negligently drafted deed of amendment may give rise to both a breach of contract claim and a claim in negligence. The time limit for the breach of contract claim runs straightaway from the date of the breach whereas the loss might not arise for some time afterwards, postponing the time period starting in negligence. As each is a separate legal claim with its own criteria, using the earlier limitation date for the breach of contract as your deadline will ensure you can preserve each claim.
- If you wish to use a standstill agreement, leave plenty of time before the limitation period is due to expire, so you can negotiate the terms.
- Allow ample time before a limitation period expires to issue court proceedings, as the work involved in bringing a formal court claim can be significant.

How do you recover overpayments?

General rule is overpayments should be recovered

One of a trustee's key duties is to pay out benefits in line with the scheme rules. Where benefits have been overpaid, trustees are under a duty to take reasonable and proportionate steps to:

- correct the pension going forward, and
- seek recovery of the overpayment.

How can trustees recover an overpayment?

There are two ways for a trustee to recover an overpayment:

- repayment
- recoupment.

Repayment is a legal claim, in which the overpaid beneficiary repays the trustee out of the beneficiary's own funds. In contrast, recoupment works by reducing future payments from the scheme to the beneficiary. Where there are no future payments to a beneficiary (eg where a child is no longer entitled to a pension or the overpaid member had died before the scheme stopped paying them a pension), the only option available to the trustees is asking the beneficiary or member's estate to repay the amount.

What are the time limits for recovering an overpayment?

- **Repayment** – a statutory limitation period of six years, generally preventing trustees from recovering overpayments made more than six years before the claim for repayment
- **Recoupment** – this is not subject to a statutory limitation period, because it is seen as a "self-help remedy" rather than a claim. It can offer a trustee scope to recover overpayments which are older than six years.

How long should you allow someone to repay an overpayment?

In dealing with either method, TPO's rule of thumb is that it would be inappropriate to require repayment or recoupment over a timeframe which is shorter than the timeframe over which the overpayment was made. However, there may be good reasons to take a different approach depending on the circumstances of each case.

What if the beneficiary dies before repaying the overpayment in full?

Overpayments to members cannot be set-off against payments to dependants

It is not possible to "continue" set-off payments in respect of past overpayments to the member from a dependant's pension after the member has died. In these circumstances the starting point would be to try and recover any uncollected overpayments from the member's estate once you have received notice of the death.

How do you recover overpayments? cont.

An overpayment does not always have to be recovered

Do you have to recover an overpayment?

The starting position is that trustees should reasonably seek to recover any overpayments from the beneficiary. However, there are some situations where this is not possible / appropriate, including:

Errors by third parties

If the overpayment stems from an error by a third party (eg the administrator) and that third party agrees to repay the overpaid sum to the scheme, the duty to seek recovery from the member may not arise.

De minimis levels

There may be small amounts where it is disproportionate to seek recovery at all taking into account the time and resource required to do so.

"Change of position" defence

The gist of this defence is that the member has, in good faith, acted differently (by increasing their spending or liabilities irreversibly) as a result of having reasonably relied upon being entitled to the overpayments they received from the scheme.

Overpayments in practice – Mr S (CAS-37581-L1V1)

In one of Anthony Arter's recent decisions as the new Deputy Pensions Ombudsman ("DPO") he didn't uphold Mr S' complaint concerning a request from the trustees that he repay benefits that were paid to him in error.

Mr S had transferred his benefits from the original scheme to the receiving scheme in the 1990s. The original scheme merged after the transfer out but unfortunately Mr S' record remained on the books as a deferred pension even though he had transferred out years before. The administrators of the merged scheme contacted Mr S in November 2011, which was shortly after he had started to draw benefits from the receiving scheme, saying he might be entitled to benefits from the merged scheme.

Mr S claimed the benefits, which were put into payment in 2012. The mistake was discovered in 2018 and the trustees decided to only recover the overpayments made in the previous six years, due to the statutory limitation period applying. Mr S refused to repay the amounts requested and his complaint made it to the DPO.

The DPO considered, among other things, whether Mr S could rely on the "change of position" defence. However, this is only available where an individual has acted in good faith. As he had already begun to draw down his pension from the receiving scheme, it "should have been very clear" to Mr S that something was wrong and that he could not be entitled to both pensions. The need for a recipient to show good faith had, therefore, not been met, so Mr S was required to repay the sums requested.

The ruling is a helpful reminder that both good faith and change of position need to be established by the recipient of an overpayment if they wish to defend a claim for repayment. There was no need in this case, given the absence of good faith, for a heated debate about how the recipient had spent the overpayments claimed over the preceding six years and whether there was sufficient evidence to prove a change of position, which can often be a difficult, time consuming and complex area in these disputes.

Reporting breaches of law

Certain breaches must be reported to TPR

Trustees and sponsoring employers of a pension scheme, as well as advisers and those involved in the administration of the scheme, are under a duty to report certain breaches of law to TPR. This duty is often knowing as “whistleblowing”.

There is a penalty of up to £5,000 for individuals, or £50,000 for corporate bodies, for failing to comply with the requirement to report a breach without “reasonable excuse”.

What needs to be reported?

Report breaches “as soon as practicable”

You must report a breach of the law to TPR “as soon as reasonably practicable” when:

- there is “reasonable cause to believe” that a legal duty, which is relevant to the administration of the scheme has not been complied with, and
- the breach is “likely to be of material significance” to TPR.

TPR’s code of practice on reporting breaches of law identifies four factors which together identify materiality:

Cause of the breach	**Effect of the breach**
Reaction to the breach	**Wider implications of the breach**

Trustees should work through these factors when deciding whether a breach is reportable.

TPR’s traffic light system

A traffic light system to help decide if a breach is reportable is set out in relevant TPR guidance:

RED

Red breaches are always of material significance and need to be reported. Examples include matters indicating dishonesty or misuse of assets or contributions, or breaches which attract a criminal penalty.

AMBER

Amber breaches are the grey areas where the decision whether to report or not requires a balanced judgement. An example would be several green breaches within a short period effectively stemming from a single cause.

GREEN

Green breaches are not materially significant and do not need to be reported. An example would be an occasional administrative lapse which is corrected in an otherwise well run scheme.

Practical points

- ✓ Trustees should have appropriate procedures in place to report breaches
- ✓ Timescales can be tight – the time taken to report should reflect the seriousness of the breach
- ✓ All breaches should be recorded, even if they are not reportable.

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Contact

Our market leading pensions litigation team is highly ranked by both Legal 500 and Chambers UK. Our “first class” team of pension litigators (The Legal 500, 2022) is experienced in handling cases before TPR, the High Court and TPO, and acts for both claimants and respondents in all forms of pensions litigation.

Sackers is the UK’s leading commercial law firm for pension scheme trustees, employers and providers. Over 60 lawyers focus on pensions and its related areas. For more information on any of the articles in this briefing, please get in touch with Peter or any of the team below, or your usual Sackers’ contact.

Peter Murphy
Partner
D +44 20 7615 9568
E peter.murphy@sackers.com

Arshad Khan
Senior Counsel
D +44 20 7615 9563
E arshad.khan@sackers.com

James Bingham
Partner
D +44 20 7615 9597
E james.bingham@sackers.com

Amy Difford
Associate
D +44 20 7615 9039
E amy.difford@sackers.com

Sarah Donnan
Associate
D +44 20 7615 9592
E sarah.donnan@sackers.com

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Sacker & Partners LLP
20 Gresham Street
London EC2V 7JE
T +44 20 7329 6699
E enquiries@sackers.com
www.sackers.com