HERBERT SMITH FREEHILLS

PENSIONS DISPUTES QUARTERLY

JULY 2024

The last three months

Recoupment and laches: TPO signals his approach

The Pensions Ombudsman (**TPO**) has determined a complaint against trustees who were seeking to recover overpaid pension. The pension of the relevant member (**Mr E**) had been overpaid from 1996 to 2020. The total overpayment was £90,934.

TPO's determination includes extensive discussion of the law as to recoupment, change of position, estoppel and laches. The determination will be useful when assessing the approach which TPO may take in other overpayment cases.

TPO decided as follows:

- Recoupment (the recovery of overpaid benefits via deduction from future pension payments) is an equitable remedy. The question therefore is whether it is equitable to permit recoupment in the circumstances.
- Whilst change of position and estoppel might not be available as specific, free-standing defences to recoupment, the underlying principles are relevant when determining whether it is equitable to permit recoupment.
- Given that overpaid members will not normally be familiar with the law, it is "good practice" for trustees to explore whether defences to recovery may be available, as part of a scheme's internal dispute resolution process (**IDRP**).
- For change of position purposes, a member can be said to have suffered a detriment if, as a result of an overpayment, he or she has spent more on general living expenses than would otherwise have been the case, and is then required to repay.
- A "poorly-drafted" announcement which the trustees sent in 2013, once they became aware that they might be overpaying benefits, was not sufficient to put Mr E on notice. After sending the announcement the trustees continued to pay benefits at the existing rate. The announcement did not explain that Mr E was still building up benefits which might later have to be repaid.
- For the purpose of estoppel by representation, the provision of payslips amounted to a representation that Mr E was entitled to the benefits which were paid. Indeed payment of the benefits in itself amounted to a representation, given that the trustees had a duty to pay the correct amounts.
- Recognising an estoppel for Mr E would not unduly favour him above other members, because an employer continued to support the scheme. The support of the employer meant that an estoppel for Mr E would have no direct effect on other members' benefits.
- Having regard to the principles as to change of position and estoppel by representation, the trustees were permitted to recoup only the overpayments which were made from August 2019 onwards. That was when Mr E realised that he might have to repay, and reduced his spending accordingly.
- As to laches (a doctrine under which delay can bar a claim to equitable relief), TPO noted that the trustees became aware that they might be overpaying benefits in 2011. Thereafter the trustees progressed matters more slowly than TPO would have expected, with members left "in limbo" while overpayments continued to build up. In the circumstances TPO determined that it would be inequitable to allow the trustees to recover overpayments for periods before the August 2019 date mentioned above.
- Taking account of the August 2019 cut-off, the trustees could recoup only £6,664 of the £90,934 overpayment, at the rate of £200 per month. In order to recoup, the trustees would need to obtain a County Court order (on the basis of the CMG case), though this could be done without a hearing.

SIPP provider's duties and role of the FOS: Court of Appeal judgment

The Court of Appeal has dismissed a claim for judicial review of a ruling of the Financial Ombudsman Service (**FOS**). The underlying facts were similar to those in Adams v Options UK, but the outcome for those involved was very different.

A Mr Fletcher complained to the FOS after losing money through investing in a storage unit scheme (**Store Pods**) via a self-invested personal pension plan (**SIPP**). The SIPP was operated by an FCA-authorised firm, Options UK Personal Pension (**Options**). An unregulated Spanish entity, CLP, introduced members to the SIPP. CLP persuaded Mr Fletcher to transfer his pension pot to the SIPP and invest in Store Pods. Options carried out only limited due diligence as to CLP and Store Pods. Mr Fletcher signed forms acknowledging that Options' role was execution-only, and agreeing to indemnify Options against liability arising from the investment.

The FOS found in Mr Fletcher's favour, saying that, having regard to the FCA's principles and guidance and best practice, Options should have carried out more thorough due diligence. The terms which Mr Fletcher had agreed with Options did not relieve the firm of its obligations in this regard.

Options sought judicial review from the High Court. When the application was refused, Options appealed. The Court of Appeal held that:

- The FOS is not required to determine a complaint in accordance with the common law. Legislation gives the

FOS a much wider jurisdiction, namely to determine what is fair and reasonable in all the circumstances of the case.

- When determining what is fair and reasonable, a breach of the FCA's principles is a relevant factor, even though such a breach is not actionable in itself.
- The FOS had not erred in law in finding that Options had a duty to carry out due diligence as regards introducers and investments, even though the SIPP was execution-only and Options was not authorised to provide advice.
- As to the steps which Options should have taken to discharge its duty, the FOS decision could not be said to be irrational.

Equalisation: TPO upholds adverse change to pre-Barber benefits

TPO has rejected a challenge to the way in which trustees equalised normal retirement dates (**NRDs**) between the sexes following the May 1990 Barber judgment.

The trustees had amended the scheme's rules in November 1992. The amendment had (among other things) changed the complainant's NRD from 60 to 65 for pre-Barber service.

TPO found that:

- The amendment power stated that amendments could have retrospective effect (and the relevant amendment was made before the advent of section 67 of the Pensions Act 1995).
- EU law did not impose any requirements about how benefits earned prior to May 1990 had to be treated.
- Consequently, in November 1992 the trustees had the necessary power to change NRD to 65 for pre-Barber service.

Wrongful trading: Court makes substantial award against former BHS directors

The High Court has found two former BHS directors (the **relevant directors**) liable in connection with the retailer's insolvency. The Court ordered the relevant directors to pay £10.4m and £8.1m by way of recompense.

This was not primarily a pensions case, but BHS's pension schemes were major creditors, and some of the relevant directors' failings related specifically to the schemes.

In a 530-page judgment, the Court held that:

- The relevant directors were liable for wrongful trading; that is, continuing to trade when they knew or should have known that there was no reasonable prospect of avoiding insolvency (section 214 of the Insolvency Act 1986).
- For wrongful trading purposes, the relevant directors were fixed with knowledge from September 2015. By then they had had the opportunity to engage with the pension scheme trustees and The Pensions Regulator, yet no "rational plan" was in place to deal with the deficits. In the circumstances, the relevant directors should have known that BHS would not be able to afford to pay future pension contributions, and accordingly that there was, for the company, "no light at the end of the tunnel".
- The relevant directors had breached various obligations under the Companies Act 2006. Among other things, they had failed to "inform themselves fully" about the pension scheme deficits, and about the implications of expected developments such as the dilution of the employer covenant and fresh valuations. The failure amounted to a breach of the duty to exercise reasonable care, skill and diligence under section 174 of the Act.
- The liability of the relevant directors should not be limited by reference to their insurance cover or ability to pay, because limiting liability would send "the wrong message" to other risk-takers.

Elsewhere in the Courts

Expert evidence: A High Court decision provides a reminder of the tight restrictions on parties and their lawyers having any input into the preparation of an experts' joint statement. It illustrates that any impermissible involvement in the process (even without an intention to change the substance of the views expressed) may result in the relevant expert's independence being tainted and the party needing to seek the court's permission to change experts – usually requiring a waiver of privilege to some extent. Find our summary here.

Disclosure: We reported on a High Court case which explored the circumstances in which a party may be treated as having "practical control" over a third party's documents for disclosure purposes, based on some standing arrangement or understanding (despite having no legally enforceable right of access).

Privilege: A recent case illustrates the application of the collateral waiver principle, or "cherry picking" rule. It serves as a reminder that privilege should not be waived lightly and without thinking through the risks as to how far a waiver might be found to extend. We summarise the High Court judgment here.

Looking forwards

Outcome of Virgin Media appeal (section 37 confirmations)

An appeal in the Virgin Media case was heard in the final week of June. Last year's first instance decision had serious implications for some formerly contracted-out schemes. The High Court held that amendments affecting section 9(2B) rights, made between April 1997 and April 2013, were void unless actuarial confirmation was obtained under section 37 of the Pension Schemes Act 1993. The Court of Appeal was asked to consider whether the High Court had erred in finding that "section 9(2B) rights", for these purposes, included future service benefits, as well as benefits which had already accrued.

The Court of Appeal's judgment is awaited. The judges gave no indication as to the likely issue date.

Outcome of BBC appeal (restriction on amendment power)

An appeal in the BBC case was heard at the same time as the Virgin Media appeal. The case concerns the amendment power in the BBC Pension Scheme, and specifically a restriction which protects the "interests" of active members.

Whilst finalising this quarterly review, the Court of Appeal's judgment was handed down. We summarise the judgment here.

Changes to TPO's operating model

TPO has indicated that, in response to increased caseloads and turnaround times, it will make changes to its operating model:

- Complainants will not be able to use TPO's resolution service until they have exhausted the relevant scheme's IDRP. Volunteer advisers may be able to assist with IDRPs, but they will focus on "vulnerable members and cases". These changes will be implemented by autumn 2024.
- TPO will extend the use of short-form decisions in appropriate cases.
- TPO will explore whether some types of complaint should be dealt with by other organisations, and whether de minimis thresholds should apply.

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