

### Recovery of overpayments – a complex area which has just got more complicated

Overpayments arise in a multitude of different ways and can occur over any length of time. A common response from members who receive a request for repayment of an overpayment is “it’s not my fault, you made an error and should have spotted it from the outset”.

One could now add to this refrain a second common response – namely “you are out of time to recover the whole overpayment.” This is due to the Court’s most recent judgment in the case of *Webber and the Department of Education (the DoE)*. Trustees and administrators should take note of the case, as it raises issues pertinent to the ability to recover overpayments from members.

#### Key ruling in the Court decision

Mr Webber had received overpayments from the Teachers Pension Scheme (the Scheme) since the tax year 2002-03. This was not discovered until much later and it was only on 24 November 2009 that the Scheme wrote to Mr Webber explaining that overpayments had been made since 2002-03 and requesting repayment of around £36,000. This was followed by an internal dispute resolution procedure (IDRP) during 2010 and then a complaint filed with the Pensions Ombudsman dated 2 April 2011.

The DoE responded to the complaint on 19 December 2011.

The Court decided that, while the DoE had a right to claim for recovery of overpayments, that right would be limited to recovery of overpayments made in the six year period prior to 19 December 2011 (i.e. the date of its formal response to the Ombudsman).

This meant that even though it had informed Mr Webber of the overpayment on 24 November 2009 (over two years before), the overpayments made between 24 November 2003 and 19 December 2005 were not recoverable simply due to the procedure that ensued following the initial demand for repayment. The Court felt that the DoE could have preserved its right to recover more by issuing a protective court claim at any time between 2009 and 2011 but chose not to.

#### Issues arising

While the case gives rise to a range of potential issues for trustees, a few in particular are worth considering:

1. There is a dilemma for trustees, especially in cases involving significant sums and historic overpayments, in how to balance:

- a. adopting a more formal approach with members to avoid the risk of losing periods of recoverable overpayments due to passage of time<sup>1</sup>; against
- b. a need to be sensitive towards members and to give them fair opportunity to ask questions, take advice and consider their position in light of an unwelcome and potentially overwhelming demand for repayment from their own trustees

2. Members (and TPAS) will be keen to raise a limitation defence to resist some or all of any attempt to recover an overpayment. Trustees ought properly to consider putting those responsible for the error (e.g. the administrators or employer) on notice of the potential limits on what might be recoverable from the member, in order to support any claim for the balance against those responsible

3. A third area of greater focus should be for trustees to identify when the error arose and whether it was reasonable to have spotted it sooner. If by its nature it was not reasonable to have spotted the error earlier, the time for bringing a claim for recovery of the whole of the overpayment would start from the date of discovery, which might allow the IDRP to run its course before the need to start formal steps arises

#### Practical tips

- don’t delay – prompt action will avoid losing potential claims to recover past overpayments
- standard wording may be appropriate for certain situations in order to include reference to potential court proceedings and/or a standstill request in early-stage communications with members
- review your policy on overpayments to take account of the impact of the case
- expedite the IDRP process – be prepared for any attempt by members to prolong the IDRP process deliberately with the aim of reducing the scope for recovery ■



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<sup>1</sup> Formal steps might include starting a court claim for recovery of overpayments or agreeing with the member contractually that any recovery by the scheme would be able to look back to a particular date (i.e. a form of standstill agreement)