Welcome

Welcome to the 47th edition of the Pensions Ombudsman Focus for the period September to October 2015.

In this edition the principle that an overpayment of pension does not entitle a member to keep the incorrect payments is repeated by the Ombudsman. The Ombudsman also confirms that not asking the right questions, in accordance with the balance of powers set out in the Rules amounts to maladministration. Questions relating to incapacity benefits and giving reasons for decisions are also considered.

Please do not hesitate to get in touch if you would like to discuss any of these issues and how they might affect you or indeed any contentious issues on which the Linklaters Pension Dispute Resolution Group may be able to assist.
Mr Loasby argued that he had retired in reliance on the level of the pension that he had been told he would receive.
Ms B against the Universities Superannuation Scheme (the “USS”) and the University of Cambridge

Ignoring the balance of power in the Rules and not asking the right questions is maladministration

Ms B was employed by Cambridge University from May 2000 and was a member of USS. She suffered ill health from November of that year and was absent from work until May 2001. From then she worked part time until July 2007 and was seen from time to time by Occupational Health at the University who obtained medical reports on her health.

In July 2007 Ms B left the University to start a full-time job as a Specialist Registrar in Public Health but withdrew from training for the new job the next month. Ms B made enquiries of USS in 2008 and was granted early payment of her deferred benefits on grounds of incapacity in May 2009. She then asked USS whether she could retrospectively be considered for ill health retirement from July 2007, when she would have been eligible to apply but had not known it was a possibility.

USS initially told her that backdating was not possible but that it would consider an application from the University. The University made an application, sending medical reports from the period shortly before her resignation, but the application was rejected by USS. Ms B was informed by USS that had she made the early retirement request in July 2007 she would have been recommended to undergo treatments that her doctor had suggested at that time.

The Ombudsman found that the process in reaching the decision was flawed in two respects.

Firstly, the University and the Scheme ignored the balance of powers under the USS rules. It was for the University, not the Scheme, to decide whether Ms B was incapacitated. The University did not make the decision, which was maladministration. The Scheme did not seek confirmation from the University on that point, instead making the decision itself, which was also maladministration.

Secondly, in focusing on untried treatments, USS had taken into account irrelevant factors and ignored relevant factors. It did not ask itself whether the untried treatments would likely improve Ms B’s health to the point where she could resume work. USS had no evidence to suggest that that would be the case.

The Ombudsman ordered the University and the Scheme to exercise their respective discretions within 21 days and also ordered each to compensate Ms B for the distress and inconvenience resulting from the maladministration.
An incapacity pension was not payable under the Rules if the member had not been acting in the exercise of his duty when he received his injury

Mr Murdoch complained to the Ombudsman that the Service incorrectly refused him sick pay and an ill-health pension from the Firefighters’ Compensation Scheme (the “Scheme”).

Mr Murdoch was a retained firefighter based at Wells Fire Station. On the morning of the 8 November 2010 firefighters were called to attend a road traffic collision. Mr Murdoch did not initially go but upon learning that the accident involved his friend and fellow firefighter, Mr Baker, Mr Murdoch decided to attend the fire station. At the same time, the Group Commander in charge of the incident, decided that people who knew the injured firefighter should not attend. Mr Murdoch misread the Group Commander’s instructions and went to the scene of the incident.

At the scene Mr Murdoch learned that Mr Baker had died. Although Mr Murdoch was not involved in the rescue effort and did not cross the cordon, he did see a body being carried into an ambulance. Mr Murdoch volunteered to show the police where Mr Baker’s partner and family lived, and claims that while there he was pressured by the police to deliver the news himself, which he did.

Mr Murdoch went off work sick in or around July 2011 suffering from flashbacks of the scene of the accident. Mr Murdoch’s sick pay entitlement was to six months full pay followed by six months half pay or, if his absence was as a result of an injury sustained on duty, twelve months full pay. Following a referral to an occupational health specialist and a consultant psychiatrist, it was decided in May 2012 that Mr Murdoch was not entitled to twelve months full pay.

The Ombudsman considered whether Mr Murdoch received his injuries without his own default and in the exercise of his duties as a retained firefighter. The complaint was not upheld.
Mrs Stewart against NHS Pensions

Members should be provided with clear reasons for decisions

Mrs Stewart complained that NHS Pensions incorrectly refused to award her Mental Health Officer ("MHO") status for parts of her service preventing her from retiring early without reduction to her pension entitlement.

Under the National Health Service Pension Scheme Regulations 1995 (SI1995/300) (the “Regulations”) members normally retire from the NHS Pension Scheme at 60. Under certain circumstances, where a member has accrued 20 years of MHO status, that member may retire at age 55 without a reduction to their pension entitlement.

Mrs Stewart has been employed by the NHS since 1983. During different periods she has worked as both a Senior Occupational Therapist and a Head Occupational Therapist. Health professionals like Mrs Stewart are granted MHO status under the Regulations if they devote all, or almost all of their time to the treatment or care of patients. The Regulations do not define “all or almost all”.

As Senior Occupational Therapist Mrs Stewart and NHS Pensions agreed that she spent almost all of her time in the treatment of patients. Mrs Stewart argued that she should be awarded MHO status for the entirety of her employment, including the time spent in her role as Head Occupational Therapist. NHS Pension awarded her MHO status for some of her service as an Head Occupational Therapist, but not all of it. Mrs Stewart argued that the rules were applied inconsistently. NHS Pensions’ position was when Mrs Stewart spent 55% of her time in direct contact with patients, this did not represent ‘all’ or ‘almost all’ of her time.

The Ombudsman found that it was ‘understandable’ that Mrs Stewart had come to the conclusion that the rules were being applied unfairly in her case. Mrs Stewart was entitled to know not just the decision on her MHO status, but the full reasons upon which that decision was based. The Ombudsman remitted the matter to NHS Pensions with the instruction that they should within 28 days reconsider Mrs Stewart’s eligibility for MHO status during the contested periods and provide her with reasons for their decision.

"Mrs Stewart argued that she should be awarded MHO status for the entirety of her employment."

"
Contacts

Mark Blyth
Partner, Pensions Dispute Resolution Group
Tel: (+44) 20 7456 4246
mark.blyth@linklaters.com

Madeleine Frost
Managing Associate
Tel: (+44) 20 7456 2423
madeleine.frost@linklaters.com

Geoff Egerton
Associate
Tel: (+44) 20 7456 2802
geoff.egerton@linklaters.com

Sarah Opie
Associate
Tel: (+44) 20 7456 3458
sarah.opie@linklaters.com

Simon Borhan
Associate
Tel: (+44) 20 7456 2415
simon.borhan@linklaters.com