

## Ombudsman's Determination

<b>Applicant</b>	Mr N Webber ( <b>Mr Webber</b> )
<b>Scheme</b>	Teachers' Pension Scheme ( <b>TP</b> )
<b>Respondent</b>	Department for Education ( <b>DfE</b> )

### Complaint Summary

Mr Webber previously complained about the recovery of an overpayment of his pension from TP. This matter has been determined and remitted on appeal. The remaining issue before me is the applicable date for recovery of the overpayment and the quantum of the overpayment.

### Summary of the Ombudsman's Determination and reasons

The provisions of the Limitation Act 1980 apply because with reasonable diligence the mistake should have been discovered in the 2002/2003 tax year. The six year time period would run from this date.

The applicable date for recovery of the overpayment is 24 November 2009. This means that the Respondent is able to recover overpayments which were made up to six years prior to this date. As such, the quantum of the overpayment is £18,008.05.

## Detailed Determination

### Material Facts

1. Mr Webber first complained to my office about the recovery of an overpayment of his pension from the Scheme.
2. On 26 June 2012, the Deputy Pensions Ombudsman in post at the time, Jane Irvine (the **DPO**), issued a determination not upholding Mr Webber's complaint (84498/1). Mr Webber subsequently appealed and, following a decision in the High Court on 22 November 2012, the matter was remitted to the DPO for reconsideration with reference to the following questions:
  - whether Mr Webber was aware that he had been overpaid and if so on what grounds;
  - whether Mr Webber ought to have been aware that he had been overpaid in the sense that he was guilty of sharp practice and if so, on what grounds; and
  - in respect of each element of alleged expenditure to his detriment, whether it would have been incurred in any event and/or was a detriment and in each case giving reasons.
3. The DPO reconsidered the complaint and issued a further determination on 24 January 2014 (PO-2080). Again, Mr Webber's complaint was not upheld.
4. The DPO rejected two defences relied on by Mr Webber. First, Mr Webber had argued that TP's claim for recovery of the overpayment was statute-barred based on section 32 of the Limitation Act 1980. Mr Webber had argued that TP could have discovered the overpayment with reasonable diligence and so could not recover in respect of overpayments received more than six years ago. The DPO rejected this defence, holding that TP had acted reasonably and could not have discovered the mistake earlier than it did. The DPO noted that "reasonable diligence means just that and does not require that exceptional or excessive measures be taken."
5. Secondly, Mr Webber relied on a change of position defence. The DPO also rejected this, ruling that there was no causal link between his personal circumstances and expenditure and the maladministration. In the case of much of the expenditure, she ruled that because he was aware or ought to have been aware of the overpayment, he could not rely on any change of position.
6. Mr Webber then made a second appeal to the High Court in relation to his complaint and judgment was handed down on 19 December 2015 (the **Judgment**).
7. The appeal was upheld, in part, by Mr Justice Nugee in relation to whether TP's attempt to recover the overpayments should have been statute barred.

8. It is not necessary for me to set out all of the material facts relating to Mr Webber's complaint as these are contained in previous determinations (84498/1 and PO-2080) and in the Judgment. Mr Justice Nugee ordered that two questions be remitted to the DPO. The Appeal Order states:

"(3) The following questions be remitted to the Deputy Pensions Ombudsman for determination (if not agreed) as soon as reasonably practicable:

the date which determines the limitation period for the recovery of overpayments by the Respondent

the quantum of any overpayments remaining payable by Mr Webber to the Respondent".

9. The following facts are particularly relevant to my consideration of those issues remitted by Mr Justice Nugee (the **Remitted Matter**).
10. Mr Webber argued that TP had the same information from his employer in 2008/9 as they would have had in 2002/03, so they should have discovered the overpayment earlier, with due diligence. Mr Justice Nugee found that although it would be possible for TP to set up systems to better marry up the information they held on teachers to whom they were paying pensions and on teachers who were in employment and accruing further pension; it was not a question for him as to what they could have done, but whether the DPO's finding that reasonable diligence was used was open to her. Relying on teachers to notify TP each year was considered by the DPO to be reasonable diligence and that was a value judgment for her to make and was not an error of law.
11. However, Mr Justice Nugee held that it should have been clear to TP when they wrote to Mr Webber in 2001 that he would exceed his earnings limit that year and, since no exceptional or excessive measures needed to be taken to establish that fact, they should have alerted him to the overpayment then. With reasonable diligence, the overpayment would have been discovered in the tax year 2002/03. Mr Justice Nugee concluded that in this respect the DPO's conclusion on limitation could not be upheld and that the limitation period started running as soon as TP started making overpayments, which would have been sometime in the 2002/03 tax year. It was not necessary for Mr Justice Nugee to identify the precise date (and he did not have the information to do so anyway) but the effect was that TP could not recover overpayments made more than six years before the relevant date when the limitation period is to be regarded as having stopped (the cut-off date).
12. Mr Justice Nugee went on to conclude that Mr Webber did have a limitation defence for the recovery of any overpayments made more than six years before the relevant cut-off date. Mr Justice Nugee did not formally rule on the cut-off date but considered, in the absence of any submissions from the parties, that it ought to be the date that the complaint was formally brought to the Ombudsman. He gave the parties the

opportunity to agree the date or refer the matter back to the DPO for a ruling on this alone.

13. The parties were unable to agree on this point and so the matter has been referred to me (as the then DPO Jane Irvine is no longer in post) to consider.
14. In the Judgment Mr Justice Nugee explained his reasons as follows:

“74. I do find it very surprising that when TP wrote the letter of 22 October 2001 it did not do more to highlight the position. As explained in paragraph 55 above, the letter itself gave Mr Webber’s earnings limit at £20,837.10, and although it calculated his salary for the tax year 2001/2002 at £14,491.00, this was only for the period starting in September 2001. Whoever calculated the £14,491.00 must have known that this was not a full year’s salary but only for some 7 months. It does not take a moment to realise that this is the equivalent of some £24,000 a year – indeed one suspects the calculation may very well have started from the yearly salary.

75. But this means that it was inevitable that if Mr Webber continued in the same employment throughout the next tax year, his salary would exceed his earnings limit. This has nothing to do with the effect of salary increases: even if there had been no annual increase Mr Webber’s income would go over the limit. I do not see that sending a new certificate in April would have added anything to TP’s knowledge on this point – they already had at the time of writing the letter all the information they needed to see that this would happen. TP did not need to have any complex system in place, or cross-refer from their records of pensioners to their records of employees; or rely on information from Mr Webber or from Durham or anyone else; all that was needed was to identify at the time of doing the calculations that if Mr Webber’s employment continued unchanged into next year, there would be a need for an abatement. I think they had enough information to be aware of this as matters stood, but another sentence in the letter saying “you should note that although there is no abatement this year, if you continue to be employed at the same rate next year your salary will exceed the earnings limit; please will you confirm in April whether your employment is continuing” would have been sufficient to lead to TP having all the information it needed to be aware that an abatement would be triggered in the course of the year unless Mr Webber stopped work. In order to calculate the precise amount TP would then need either from Mr Webber or Durham a statement of his salary, but there is no reason to think that if they had asked him what it was he would have refused to tell them.

76. I have looked carefully at the Second Determination to see if the DPO dealt with this particular point. I cannot find that she did. What she said about this is at [45]:

“Given that I have found that Mr Webber ought reasonably have known what his obligations were, it follows that I consider that TP acted reasonably in relying on the provisions of the Regulations and could not reasonably have discovered the mistake earlier than it did. “Reasonable diligence” means just that and does not require that exceptional or excessive measures be taken.”

But no exceptional or excessive measures were required to identify that unless Mr Webber stopped working he would go over the earnings limit. And as I have already said this has nothing to do with the obligation in the regulations to notify TP of salary increases (and it is to be noted that nowhere in the regulations is there a specific obligation on the teacher to notify TP each year that they continue to be employed – the obligation is only to notify on taking up employment or on a change in salary, not on remaining in employment in a new tax year). Even without any salary increase TP had all the information in their own letter to enable them to know that an abatement would be triggered in the course of the next year unless Mr Webber gave up his job.

77. I have come to the conclusion that on this narrow but significant point the DPO’s conclusion cannot be upheld. I do not think that either reliance on the regulations or the fact that reasonable diligence does not require exceptional or excessive measures is an answer to the point that TP already had all the information it needed to see that an abatement would, other things being equal, be triggered.

78. I have considered whether it is necessary to send the matter back to the DPO for a third time, but I am most reluctant to put the parties (or the DPO) to the trouble, expense and delay that this would cause, and I have decided that I should myself resolve the point now. In my judgment the only reasonable conclusion is that TP could with reasonable diligence have discovered the fact of overpayment during the tax year 2002/3. TP knew, or had all the information necessary to know, that an abatement would be triggered in the tax year unless Mr Webber gave up his job. It would not have been difficult or cost TP anything to tell Mr Webber that in the letter and require him specifically to confirm the position after April. Indeed I do not think they even needed to go that far: if TP knows that an abatement will be triggered if Mr Webber continues in employment, it does not seem to me unreasonable, or require any particular diligence, for them to proceed on the assumption that his employment will continue unless they hear to the contrary. It is not as if the end of the tax year

coincides with the end of a school year, and it would seem perverse to think that someone in Mr Webber's position would not continue working into the next tax year. If a person knows (or has the information to enable him to know) that unless circumstances change he will inevitably be making an overpayment I do not think he can escape a finding that he could have discovered the mistaken overpayment with reasonable diligence by saying he did not know, and did not trouble to inquire, whether circumstances had indeed remained the same.

79. It follows from this conclusion that the limitation period started running as soon as TP started making overpayments which would have been some time in the 2002/3 tax year. It is not necessary (and I am not in a position) to identify the precise date: the effect is that Mr Webber has a limitation defence for the recovery of any overpayments made more than 6 years before the relevant date when the limitation period is to be regarded as having stopped (the cut-off date). To this extent I will allow the appeal.

80. I have had no submissions on when the cut-off date is. In court proceedings the cut-off date is when the claim form is issued. The proceedings before the Ombudsman do not start with a claim form and do not technically stop the limitation period, but in practice the Ombudsman will decide cases that turn on legal rights (as opposed to pure maladministration) by analogy to how a court would have decided the same dispute: see the explanation by the DPO at [41]:

"As I am obliged to decide cases in accordance with legal principles (except in cases of "pure maladministration and consequential injustice" which is not the case here) it would not be right for me, by not upholding Mr Webber's complaint to, effectively, grant a remedy to TP (by implying that it was entitled to recovery of the full amount) if it would not have been entitled to such a remedy had the matter been before the court."

It was not suggested to me by either party that this approach was wrong.

81. Since I have not heard any argument on the point, I will not formally decide what the cut-off date is but I will say, in the hope that this may assist the parties, that I am presently firmly of the view that the closest analogy to the issue of a claim form is the formal bringing of the complaint by Mr Webber to the Ombudsman because at that point the question of the recovery of the overpayments was in issue between the parties before the Ombudsman. I do not I think have any information as to what that date was but it is presumably easy to identify. I also have no information which would enable me, even if the cut-off date were identified, to ascertain what overpayments were made in the 6 years before that date, but again I would hope that would not be a difficult or

controversial exercise. I will formally give the parties the opportunity to have both the question of the cut-off date and the quantum of overpayments that were made in the 6 years previous to that date referred back to the DPO in case they are unable to identify or agree those matters, but I hope that they will be able to agree what should be straightforward matters and that it will be unnecessary to actually trouble the DPO again.”

### Relevant legislation

15. The Limitation Act 1980 provides timescales by which an action must have commenced where a breach of the law has occurred. Ordinary breaches of contract are actionable for six years after the cause of action accrued as are actions to recover sums recoverable by statute (sections 5 and 9 of the Limitation Act 1980).
16. Section 32(1) of the Limitation Act 1980, entitled “Postponement of limitation period in case of fraud, concealment or mistake” states that:

“(1) ..., where in the case of any action for which a period of limitation is prescribed by this Act, either—

  - (a)...
  - (b)...or
  - (c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.”

### Summary of Mr Webber’s position

#### Relevant date for limitation purposes in respect of recovery of overpayments (the first part of the Remitted Matter)

17. That the case of *David Clift v Coal Pension Trustees Services Limited* (PO-2066) (**Clift**), as cited by the DfE, is not comparable to this case. It is not comparable because there is a specific guide that Local Authorities use in relation to recovery of overpayments. The decision in *Clift* refers to a decision about whether to claim from the landlord or tenant.
18. *Clift* cannot be used as a precedent because it has not been tested on appeal.
19. The case of *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198 demonstrates that the Pensions Ombudsman is analogous to a court. The courts have held that the Pensions Ombudsman does not have power to make an order that the court could not make.

20. The Pensions Ombudsman must decide disputes in accordance with established legal principles rather than by reference to what he considers to be fair and reasonable (*Henderson v Stephenson Harwood* [2005] Pens. L.R. 209).
21. The Pensions Ombudsman is unable to investigate a complaint if before the complaint is made proceedings have begun in court in respect of the matters which would be the subject of the investigation. The two are intended to be mutually exclusive alternatives and it would be strange if it was contemplated that the alternatives would or might produce different results as to the substance of the dispute (*Hillsdown Holdings plc v Pensions Ombudsman* [1996] Pens. L.R. 427).
22. The power to refer a question of law to the High Court and the right of appeal on a point of law both recognise that the general legislative purpose does not in itself empower the Ombudsman to act otherwise than in accordance with legal principles (*Wakelin v Read* [2000] Pens. L.R. 319).
23. As such, there should not be a difference between a decision of the Pensions Ombudsman or the court except where it is specifically provided for. There is no such reference for Teachers' Pensions other than that in Managing Public Money.
24. The idea of the first invoice being the applicable date for the cut-off date (29 November 2009) does not work as there has to be limits on recovery. If there were not such limits then a very late first invoice issued ten years later and then nothing issued for fifty years could mean that the debt was still able to be collected sixty years later. This is why the Limitations Act 1980 became law. It was also needed to define when the claim finished if the debt, say ground rent, was on a thousand year lease. The limit was further defined in relation to when it would have been reasonably diligent to have first discovered the debt. There are certain exceptions to the rule and this case is not one of them.
25. The expectation of Mr Justice Nugee was that the date for the purposes of the Limitation Act 1980 would be "when the Pensions Ombudsman became involved, but not knowing the process...he could not suggest when".
26. The acceptance of the case by the Pensions Ombudsman should be the correct date as that is the date most equivalent in a court of law.
27. When an application is made to court, acceptance of the claim is when it receives an official stamp. This is when the claim form is issued and prior to the defendant receiving notification of the claim. Mere arrival does not mean that time should begin or end on that date. It only begins when the court stamps its approval and dates its response. It is no different for the Pensions Ombudsman.
28. It follows that acceptance in Mr Webber's case should be the 26 November 2011. It should be the 26 November 2011 because although Mr Webber made his application to the Pension Ombudsman Service on 18 April 2011, it was not until the 26 November 2011 that it was formally accepted. This is because the Pensions



Ombudsman Service had a backlog of complaints and this was the date that formal notification of acceptance of the complaint was made to Mr Webber.

29. The 26 November 2011 was also the date which Mr Webber states was “supplied in court on request to Mr Justice Nugee by Mr Davey, Counsel for the DfE” in relation to the date which Mr Webber made his application to the Pensions Ombudsman Service. He goes on to state that this “may now have been seen by the DfE to be an error, but I hope learned counsel would not suggest a date if he was unsure, even if it was supplied to him at the time in court by a Treasury solicitor after consulting the files they had with them.”
30. In the alternative, Mr Webber states that the applicable date should be the 26 June 2012. This is on the basis that he made an application to appeal the previous DPO decision on this date. Mr Webber states that “the DfE seems to be ruling out the Ombudsman as equivalent to a court of law” and goes on to conclude that “this means that the cut-off date would be the first time that the matter was taken up in a court of law”.
31. Another argument Mr Webber puts forward is that the date should be the first time that the Limitation Act 1980 was appealed in the High Court and stamped as being accepted. In this respect Mr Webber refers to his appeal of the DPO’s second determination. That date, he states, is the 19 February 2014.

Quantum of overpayments payable by Mr Webber (the second part of the Remitted Matter)

32. Based on Mr Webber’s suggested date of 26 November 2011 he calculates the overpayments to total £7,935.15.
33. Alternatively, Mr Webber calculates that if the 26 June 2012 was taken as the applicable date then the outstanding overpayment would amount to £4,853.07.
34. Lastly, based on the date of 19 February 2014, Mr Webber calculates that the DfE would owe him £3,927.16.

Issues raised by Mr Webber other than the Remitted Matter

35. Mr Webber’s further submissions relate to issues of maladministration which he states that the DPO has ignored in her first determination. He refers to a conversation with TP on 29 May 2001, a meeting with TP in 2010 and inaccurate information which he states that he was given by TP which all amount to maladministration. He refers to the various different options which he could have taken to avoid the situation which he faced in 2009, had he of been given the correct information by TP.
36. Mr Webber states that TP should have had procedures and measures in place and that this is simply good governance. With such procedures and measures in place Mr Webber would not be in the position that he now finds himself in. He goes on to state that the DPO knew this before she took her decision regarding maladministration.

37. Mr Webber highlights that TP had the option of coming to an agreement with him in 2010 and that despite Mr Webber pointing out that they had not taken account of his change of position defence, he was ignored. Mr Webber states that TP should have taken notice at this time and agreed to his repayment proposal.
38. Mr Webber refers to previous evidence and statements which he has made throughout the investigation of his complaint by this office, including his complaint of 31 January 2011.
39. He also relies on comments made by Mr Justice Nugee in the Judgment regarding the start date for the purposes of the Limitation Act 1980.
40. Mr Webber argues that only where there is “a specific guide” can the start date be altered. He states that this is Managing Public Money produced by the Treasury. In this guide it states that where the Limitation Act 1980 is a relevant consideration then TP should take various steps. Mr Webber states that TP has not complied with this because they did not seek advice from a solicitor in accordance with the guide.
41. Mr Webber also complains that the DfE submissions raise a new argument in relation to the limitation date.

### **Summary of Department for Education’s position**

#### Relevant date for limitation purposes in respect of recovery of overpayments (the first part of the Remitted Matter)

42. The relevant date for limitation purposes is 24 November 2009. It says this on the basis that:
  - 24 November 2009 is the date of the letter sent by the Scheme to Mr Webber informing him that overpayments had been made, and providing a detailed breakdown in respect of the same.
  - This is in line with the approach adopted by the DPO in the case of Clift.
43. The DfE states that Mr Webber’s case is comparable to that of Clift. It says that in the case of Clift, the relevant date was the date that the trustees wrote to Mr Clift stating that his overtime earnings whilst a member of the British Coal Staff Superannuation Scheme had been mistakenly taken into account in the calculation of his pension benefits in the Industry-Wide Coal Staff Superannuation Scheme. The DfE references paragraph 35 of the determination where the DPO concluded:

“In my judgment the Trustees are only able to attempt recovery of payments made, at the earliest, in the six years before they notified Mr Clift in August 2011.”
44. It does not agree with Mr Justice Nugee’s provisional view (as indicated at paragraph 81 of the Judgment) that the relevant date for limitation purposes was the date that Mr Webber made his complaint to the Pensions Ombudsman Service. That is, Mr

Justice Nugee's view that Mr Webber's bringing of his complaint to the Pensions Ombudsman was closely analogous to the issuing of a claim form (which would stop time running for limitation purposes in a case where the provisions of the Limitation Act 1980 directly applied).

45. It asserts that:

"The making of a complaint to the Pensions Ombudsman is a step which is taken by the pension scheme member (resisting repayment) rather than the pension scheme itself (seeking repayment). This contrasts with the position in respect of the issuing of a claim form where it is a procedural step taken by the person seeking repayment which is the trigger".

46. It goes on to state that:

"Where an overpayment dispute arises it is, in practice, rare for a member to bring a complaint before the Pensions Ombudsman. Thus, there is a danger that taking the bringing of a complaint as the touchstone for the purposes of limitation might lead to inconsistencies as between different cases, i.e. the period of limitation being determined simply by whether a member decides to bring a complaint, with such decision itself being contingent upon that member's own particular circumstances and/or knowledge and/or inclination."

47. If the date that a member issues a complaint form is taken as the relevant date, it could lead to an incentive for pension scheme members who have received overpayments to bring complaints before the Pensions Ombudsman. They would do this in order to take advantage of the effect on limitation, being that it would reduce the extent of overpayments which would be due.

Quantum of overpayments payable by Mr Webber (the second part of the Remitted Matter)

48. On the basis that the relevant date for limitation purposes is taken to be 24 November 2009, the quantum of overpayments payable by Mr Webber is £18,487.42.

49. If the DPO finds that the relevant date for limitation purposes is the date that Mr Webber made his complaint to the Pensions Ombudsman, namely 18 April 2011, the quantum of overpayments payable by Mr Webber is £11,185.74.

**Conclusions**

Issues raised by Mr Webber other than those Remitted Matters

50. Since the parties were provided with my preliminary decision, Mr Webber has complained that his submissions have been summarised and not included in full. He feels that because of this they are an inaccurate reflection of the points which he has made.

51. It is worth noting Mr Justice Hart's comments in *Save & Prosper Group Ltd & Anor v Scoot Ltd & Anor* [2001] All ER (D) 349 "that the procedure of issuing preliminary determinations is itself not one that is mandated by the relevant regulations and it is a matter for judgment by the Ombudsman in the final analysis as to the extent to which parties are given an opportunity to come back with further submissions in relation to his provisional conclusions."
52. The case of *Seifert v Pensions Ombudsman* [1997] 4 All ER 947 CA established that the Ombudsman has a duty to allow those concerned an opportunity to comment. In the High Court decision ([1996] EWHC Admin 13) Mr Justice Lightman commented that the Ombudsman should comply with the statutory procedure contained in section 149 of the Pension Schemes Act 1993. He went on to say that the Ombudsman should disclose to the respondents to the complaint all potentially relevant information obtained by him in exercise of the power conferred by section 149(4) Pension Schemes Act 1993, and most particularly all evidence and representations received by him from the complainant.
53. In Mr Webber's case I am satisfied that I have complied with the requirements under section 149 Pension Schemes Act 1993 and, having done so, I have summarised the substance of the allegations when communicating my preliminary decision to the parties. I do not accept Mr Webber's assertion that it is necessary to include verbatim his full submissions since, what is included is merely a summary of the substance of the allegations which have been made before me. The full submissions of the parties have been provided to Mr Webber and to the Respondent to his complaint. Both parties have had the opportunity to comment on those materials being considered by me and to contradict them. It is therefore accurate to say that all of the evidence submitted has been considered fully when reaching my decision and I am satisfied that the summary of the circumstances which I have provided is accurate and appropriate in light of the procedures which have been adopted throughout the investigation.
54. Mr Webber has made various submissions relating to the maladministration of TP and his change of position defence. However it is only the Remitted Matter before me, identified in paragraphs 77 to 81 of the Judgment and paragraph 8 of this determination that I am addressing. That is, the date which determines the limitation period for the recovery of overpayments by the Respondent and the quantum of any overpayments remaining payable by Mr Webber to the Respondent.
55. Mr Webber quite rightly states in paragraph 21 of his submissions (when referring to submissions made by him titled "Maladministration following references supplied by the respondent") that "everything above was known to the DPO before she took her decision regarding maladministration". As Mr Webber is aware, this determination is confined to the Remitted Matter so these issues are not relevant to my determination. These matters have already been dealt with by the DPO and heard before the court – as acknowledged by Mr Webber. I refer to paragraphs 49 to 63 of the Judgment

which specifically deals with Mr Webber's change of position defence. I do not consider it proper that I consider these submissions again now.

56. Mr Webber also refers to Managing Public Money produced by the Treasury. Mr Webber states that TP has not complied with this because they did not seek advice from a solicitor in accordance with the guide. Again, this is not relevant to those issues remitted to me by the court and has no bearing on the question of the Limitation Act 1980. I reference it here only for completeness. I would also reiterate that although Mr Webber refers to the Judgment in making these other submissions, these are not remitted issues.
57. It follows that these are the only two issues which I have considered.
58. Finally, Mr Webber argues that the DfE has raised a new argument in relation to the Limitation Act 1980. However, as this issue has been remitted to me, both parties have been asked to provide submissions on this point, which I have taken into account when reaching my decision.

Relevant date for limitation purposes in respect of recovery of overpayments (the first part of the Remitted Matter )

59. Mr Justice Nugee held that, while Mr Webber is liable to make repayment to the Scheme, such liability is limited by virtue of his partial defence based upon limitation. In such regard, Mr Justice Nugee stated (paragraph 79 of the Judgment):
- “Mr Webber has a limitation defence for the recovery of any overpayments made more than 6 years before the relevant date when the limitation period is to be regarded as having stopped (the cut-off date).”
60. The Limitation Act 1980 governs time limits for bringing different types of claims in the courts and the basic time limit is six years from the date when the cause of action accrued (for example, the date the overpayment is made). However, under section 32(1)(c) of the Limitation Act 1980, the limitation period is extended in the case of an action arising as a result of a mistake. In circumstances such as described the primary six year limitation period does not begin to run until the claimant has discovered the mistake, or could with reasonable diligence have discovered it.
61. In paragraph 75 and 79 of the Judgment Mr Justice Nugee held that:
- “the only reasonable conclusion is that TP could with reasonable diligence have discovered the fact of overpayment during the tax year 2002/3. TP knew, or had all the information necessary to know, that an abatement would be triggered in the tax year unless Mr Webber gave up his job.....It follows from this conclusion that the limitation period started running as soon as TP started making overpayments which would have been some time in the 2002/3 tax year”.

62. In addition to section 32 referred to above, during a current limitation period, sections 29 to 31 of the Limitation Act 1980 extend the limitation period in cases where the defendant makes some acknowledgment or payment in respect of the claimant's right of action. This is the situation here but I have not needed to go on to consider this point further, because of what follows below. But I would say, if the limitation period is extended, then the cut of date in respect of recovery will also change which is relevant to what follows below.
63. Accordingly dealing with the first part of the Remitted Matter (the date which determines the limitation period for the recovery of overpayments by the Respondent). TP sought to recover the overpayment on 29 November 2009 and so claim any defence to an overpayment claim applies six years before that. Whereas Mr Webber asserts that the defence to the recovery of overpayments applies six years before 2011; 2011 being the date Mr Webber made his complaint to our office.
64. Mr Webber refers to Mr Justice Nugee's provisional view that Mr Webber's bringing of his complaint to my office was closely analogous to the issuing of a claim form. Mr Justice Nugee suggested that the cut-off date, and so the quantum of overpayments that were made in the six years previous to that date, is the date when Mr Webber brought his complaint to the Pensions Ombudsman.
65. However, it is clear from the Judgment that Mr Justice Nugee's view was simply a provisional one. It is evident that this issue was remitted to my office for consideration and that Mr Justice Nugee had not fully considered it, nor had he heard submissions from the parties on the issue. Mr Justice Nugee acknowledged that proceedings before the Pension Ombudsman do not start with a claim form and do not technically stop the limitation period.
66. The Civil Procedure Rules which outline when proceedings are brought before the court for the purposes of the Limitation Act 1980 do not apply to complaints made to this office. The date of the claim form is not analogous to the date of the complaint form. Regulations made by Parliament impose time limits on complaints which may be investigated by the Pensions Ombudsman. The date of the complaint which Mr Webber made to my office is relevant for the purposes of Regulation 5 of The Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (the **1996 Regulations**) in so far as determining whether his complaint was made within the time limits pertaining to my jurisdiction and therefore as to whether it can be heard at all. The Limitation Act 1980 does not preclude my jurisdiction to investigate and determine a complaint it precludes the remedy, because that is what is statute barred by virtue of the Act.
67. By way of example, a lack of knowledge will always postpone the running of time under the 1996 Regulations; yet it is still possible that a complaint may be made or a dispute referred to my office which is wholly or partly based on breach of trust, or on some other cause of action which is statute barred by virtue of the Limitation Act 1980. That is because of a lack of knowledge does not automatically postpone the

running of time under the Limitation Act 1980 (except in claims for the tort of negligence within section 14A).

68. The provisions of the Limitation Act 1980 are not analogous to the 1996 Regulations. For example section 21(4) of the Limitation Act 1980 provides that the statute-barred beneficiary may not derive a benefit from a judgment obtained by the other beneficiary than he could have done if he had made the claim and the Act had been raised as a defence. There is no equivalent provision to section 21(4) in the 1996 Regulations. A beneficiary who is precluded from going to the Pension Ombudsman because he is out of time under regulation 5 of the 1996 Regulations would not be precluded from benefiting under a determination made in favour another beneficiary where the remedy amounted to constitution of the trust fund.
69. The matter of limitation periods was considered in the case of *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198 (Ch). In this case, the High Court made it clear that the Pensions Ombudsman did have jurisdiction to investigate and determine statute barred complaints. It was common ground that the Pensions Ombudsman does not decide “actions” as defined by the Limitation Act 1980. But the Court held that the Pensions Ombudsman must give effect to a valid defence based on limitation.
70. The limitation defence for the Court is merely a “procedural safeguard” because it turns on the cut-off date of when the claim form was issued. But as can be seen above and below, for the Pensions Ombudsman, the limitation period turns on “the substance of the dispute”.
71. It is trite law that the Limitation Act 1980 bars the remedy and not the right. That is the right to the monies is not extinguished and can still be claimed (but not a claim in court if that is statute barred). This is reflected in section 91 of the Pensions Act 1995 which does enable the recoupment of overpayments by offsetting pension payments where the amount is not in dispute. This occurred in Mr Webber’s case but the amount was in dispute because of a change of position defence raised by Mr Webber, which has since been heard and dismissed by Mr Justice Nugee.
72. There is an obvious distinction between recoupment made by a party who seeks to recover overpaid funds and the party who received those overpaid funds looking to resist such a claim. A claim by TP is a restitutionary one seeking to reverse the overpayments, as opposed to what can be described as an action to halt a claim for restitution by Mr Webber. Seeking a restitutionary remedy would rest on TP and I find that it is this that would be the most analogous to the issuing of a claim form. Mr Webber’s complaint merely rests upon TP’s attempt to recover the overpayment.
73. The Respondent makes a compelling assertion that the complaint form date cannot be correct, given the factual matrix and variants on such a complaint being made by a member. The member could simply delay bringing a complaint to my office in order to limit the Respondent’s ability to recover overpayment.

74. As such, it is logical that the applicable date would be that date closest to when TP demanded payment from Mr Webber because that is when TP made its claim - not the date that Mr Webber brought his complaint to my office about that claim.
75. Accordingly, I find that the date TP sought to formally recover the overpayment would be the date most analogous to court action – that date being the 24 November 2009. The result of this being that the 24 November 2009 would stop time running for limitation purposes.
76. Mr Webber asserts that the idea of the first invoice being the applicable date for the cut-off date (29 November 2009) does not work as there has to be limits on recovery. If there were not such limits then a very late first invoice issued ten years later and then nothing issued for fifty years could mean that the debt was still able to be collected sixty years later. I agree. But adopting Mr Justice Nugee's finding that time is taken as running from 2002/2003 and providing a defence as the court would of six years, means that I have applied a limit.
77. Mr Webber invoked the internal dispute resolution procedure (IDRP) shortly after the issue of the letter dated 24 November 2009, which set out the overpayment. He invoked the IDRP in relation to TP's attempt to recover the overpayment and he raised various defences to recovery. TP was engaged in the IDRP until it made its stage two decision on 8 December 2010, following which Mr Webber brought his complaint to my office (having also gone to the Pensions Advisory Service).
78. TP was obliged to engage in the statutory IDRP and the Pensions Ombudsman Service is unable to accept a complaint for investigation which has not triggered IDRP. It cannot be right that by TP engaging in the statutory procedure, laid down to attempt to resolve complaints and avoid costly and time consuming court action, that the relevant cut-off date is delayed to the bringing of the Mr Webber's complaint to my office. That period would then be entirely dependent on the number of stages of IDRP and the speed with which a member brings a complaint to my office; the wider implications of that cannot be correct.
79. In *Myers and another v Nottingham City Council ET/2601136/15 and ET/2601137/15*, an employment tribunal considered how to calculate an extension of time, where ACAS' early conciliation was commenced prior to dismissal. It concluded that submission of early conciliation with ACAS would "stop the clock" on the time period in which to submit a claim and that the entire early conciliation period should be taken into account when determining the length of the extension.
80. Finally, the UK government has now published the principal legislation implementing the Alternative Dispute Resolution (ADR) Directive and the Online Dispute Resolution Regulations, both of which are designed to encourage the use of ADR in order to resolve disputes. Pursuant to this, the Limitation Act 1980 has extended the standard six year limitation period in cases where ADR is ongoing at the expiry of the limitation period.



81. To conclude. The usual time limit for such a claim is six years from the date of payment, if the claim is for relief from the consequences of a mistake, time does not start to run until the mistake was discovered or could with reasonable diligence have been discovered. That date has been established as being the 2002/2003 tax year running until the 2008/2009 tax year. I find that the relevant date for limitation purposes in respect of recovery of overpayments is 24 November 2009 and as such TP are able to recover six years of overpayments from Mr Webber prior to 24 November 2009.

Quantum of the overpayment (the second part of the Remitted Matter)

82. On the basis that the relevant date for limitation purposes is taken to be 24 November 2009, the quantum of overpayments payable by Mr Webber is £18,008.05.

83. The figure of £18,008.05 is broken down as follows:

Up to and including 24 November 2009

2003/04	£1,479.58
2004/05	£5,404.82
2005/06	£5,488.60
2006/07	£5,390.97
2007/08	£5,246.86
2008/09	£4,745.38
2009	£2,271.55

84. From 25 November 2009 onwards

2009/10	£2,427.74
2010/11	£0

*I have noted the DfE's comments that as Mr Webber left service in 2010 his pension in 2010/2011 was "unaffected by his re-employment earnings".*

Subtotal	£32,455.50
Less payments received and offset	
	(£3,775.00)
	(£10,672.45)
TOTAL	£18,008.05

**Directions**

85. My expectation is that TP and Mr Webber will now enter into sensible discussions about how the money should be repaid.

**Anthony Arter**

Pensions Ombudsman  
2 February 2016