

# Pensions Legal Update

## Legal Update Contents

1. Do one thing this month.
2. Authorised Payments Regulations. The Registered Pension Schemes (Authorised Payments) Regulations 2009 (SI 2009/1171) (the Regulations) have come into force.
3. Rectification. The High Court has granted an employer's motion for summary judgment and rectified a pension scheme's trust deed and rules.
3. Ill-health early retirement. Trustees must correctly apply the test contained in the scheme's rules when determining whether or not a member is incapacitated. They need to show they have considered all relevant factors and no irrelevant ones in order to demonstrate they reached a reasonable decision.

## Do one thing this month

**The Registered Pension Schemes (Authorised Payments) Regulations 2009 (SI 2009/1171) (the Regulations) have come into force. The Finance Act 2004 (2004 Act) sets out the types of authorised member payments a registered pension scheme may make without giving rise to unauthorised payments or scheme sanction charges. Since the 2004 Act came into force, certain gaps and problems have been identified. The Regulations seek to address those gaps by prescribing additional types of authorised member payment.**

**Rule amendments are also likely to be needed before the new trivial lump sums can be made.**

### Authorised Payments Regulations

**Summary.** The Registered Pension Schemes (Authorised Payments) Regulations 2009 (SI 2009/1171) (the Regulations) have come into force.

**Background.** The Finance Act 2004 (2004 Act) sets out the types of authorised member payments a registered pension scheme may make without giving rise to unauthorised payments or scheme sanction charges. Since the 2004 Act came into force, certain gaps and problems have been identified. The Regulations seek to address those gaps by prescribing additional types of authorised member payment.

Under the 2004 Act, scheme trustees have to find out what other pension benefits a member has before being able to pay a trivial commutation lump sum, and overpayments made by mistake are generally unauthorised payments.

*The Regulations broaden the range of authorised member payments*

*These provisions apply to payments made on or after 1 December 2009*

**Facts.** The Regulations broaden the range of authorised member payments to include scheme-specific trivial commutation of up to £2,000 to a member, provided the member is aged between 60 and 75 and the payment extinguishes all entitlement to benefits from that scheme. Other requirements also need to be met. Slightly different rules apply to schemes with fewer than 50 members as benefits in related schemes (that is, schemes relating to the same employment) must be taken into account when determining whether the £2,000 threshold has been exceeded. These provisions apply to payments made on or after 1 December 2009.

Overpayments of pension and related lump sums made by mistake in certain circumstances will be authorised payments. These provisions will apply retrospectively to overpayments made on or after 6 April 2006. Even though, an overpayment made by genuine mistake may not have adverse tax consequences, trustees will still need to consider recovering overpayments.

Pensions paid in error (whether on death or otherwise) will be an authorised payment if the trustees believe that the recipient was entitled to that amount of payment. After discovering that a pension has been paid by mistake, trustees need to take reasonable steps to prevent the payment being made (that is, instruct administrators to stop paying the pension) in order for it to be deemed an authorised payment. However, overpayments made more than six months after a member or other beneficiary has died are not caught by the Regulations and therefore remain unauthorised.

If the trustees have been unable to pay a member's pension (that is, the member has changed bank account details and not informed the trustees) and the member then dies, the payment of the arrears after death will be authorised provided that certain conditions are met.

**Comment.** Although the Regulations are helpful, there are still a number of gaps in the legislation, including overpayments made more than six months after someone has died and trivial commutation in excess of the £2,000. Rule amendments are also likely to be needed before the new trivial lump sums can be made.

*Source: Registered Pension Schemes (Authorised Payments) Regulations 2009, [www.opsi.gov.uk/si/si2009/uksi\\_20091171\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20091171_en_1).*

## Rectification

*Under this remedy, the court will “correct” the deed to reflect the parties’ intention if the moving party can show clear and convincing evidence of what the parties intended at the time the deed was drafted*

**Summary.** The High Court has granted an employer's motion for summary judgment and rectified a pension scheme's trust deed and rules.

**Background.** The ability of an employer or trustee to take away a benefit set out in a scheme's trust deed and rules is limited, even if the benefit is not one that the parties intended (*section 67, Pensions Schemes Act 1995*). The courts have developed the remedy of rectification to deal with this situation. Under this remedy, the court will “correct” the deed to reflect the parties' intention if the moving party can show clear and convincing evidence of what the parties intended at the time the deed was drafted.

**Facts.** The scheme's successor actuary noticed a discrepancy between the basis on which the scheme's revaluation increases (excess over the guaranteed minimum pension) were being administered (the lesser of 5% or the rate of increase in the Retail Price Index, known as “5%/LPI”) and the rate of revaluation set out in one section of the rules (5% per annum compound).

The employer, the moving party, submitted witness statements and evidence of events occurring after the deed was drafted to prove that the parties to the deed intended 5%/LPI to be the basis of revaluation increases.

The witnesses could not recall why the parties would have used the more generous basis of revaluation. Instead, the employer offered evidence of events occurring after the deed was drafted to prove that the parties intended the less generous basis of revaluation. This evidence included actuarial valuations, normal retirement quotations, benefit statements, transfer out member statements, and the scheme's annual reports. All of these were drafted on the less generous basis.

**Decision.** The High Court held that:

- In order for the court to use the remedy of rectification to correct pension scheme documentation, the moving party must offer convincing proof on the balance of probabilities that the employer and the trustees shared the same intention as to the meaning or effect of the (erroneous) deed they executed.
- The requirement that there needs to be convincing proof of “an outward expression of accord” in a case where the trustees have already admitted that the deed as drafted did not reflect their intention is more an “evidential factor” than a strict legal requirement.
- In rectification claims it is permissible to have regard to events after the (erroneous) deed was signed as evidence of the parties' intention at the time the deed was signed.
- On the basis of these principles, this case satisfied the standard for summary judgment (that the defendants have no real prospect of defending the claim and there is no reason the case should be disposed of at trial).

**Comment.** Most rectification cases have been decided after a full evidentiary trial. This decision is interesting because the parties could not offer clear evidence of exactly what they intended at the time of drafting, used post-hoc evidence to prove what they intended, and obtained relief on summary judgment, not a full evidentiary proceeding.

*Case: Colorcon Ltd v Huckell et al. [2009] EWHC 979 (Ch).*

### Ill-health early retirement

**Summary.** The Pensions Ombudsman (the Ombudsman) has held that trustees' reasons must be given for the exercise of an opinion on incapacity, so that the reasonableness of a decision can be tested.

**Background.** Trustees must correctly apply the test contained in the scheme's rules when determining whether or not a member is incapacitated. They need to show they have considered all relevant factors and no irrelevant ones in order to demonstrate they reached a reasonable decision.

**Facts.** The test under the scheme rules for incapacity was whether the member could carry out his own duties or any other duties which were suitable for him. It was a question of opinion for the trustees whether other duties were suitable.

This complaint originated from an earlier complaint in which the trustee decided not to award the member ill-health early retirement benefits. The Ombudsman directed the trustee to reconsider its initial decision as it was not clear that the trustee had reached any conclusion as to the suitability of alternative duties. He concluded that if the trustee decided there were other suitable duties that the member could reasonably perform, then there should be an explanation as to why such duties were considered suitable.

The medical evidence stated that the member suffered from physical incapacity which reduced his mobility and prevented him from continuing in his employment as a train dispatcher. However, he was fit to take an alternative sedentary occupation as his mental capacity was not impaired.

The trustee concluded that as there were other suitable roles available to the member at the time he left employment, he did not satisfy the incapacity definition. The trustee also concluded that it was not its role to suggest what other suitable duties were available.

*The case highlights the importance the Ombudsman places on giving reasons for the exercise of an opinion.*

**Decision.** The Ombudsman held that the test under the rules was not purely about capability; it was also about suitability. The words “suitable for him” meant that the trustee had to consider whether the other roles were suitable for the member. The Ombudsman acknowledged that it was up to the trustee to decide what reasonable factors to take into consideration when assessing suitability (that is, previous earning capability, status, compatibility with previous career experience).

However, the trustee had to demonstrate that it had taken these factors into account when making its decision. The only way the trustee could do this was by giving reasons for its decision as to what is, in its opinion, suitable. As the trustee had not demonstrated that it had considered what duties were suitable for the member, the Ombudsman directed the trustee to reconsider its decision.

**Comment.** The case highlights the importance the Ombudsman places on giving reasons for the exercise of an opinion.

*Case: Mr A Garthley [26029/2].*

## About Mayer Brown

Mayer Brown is a leading global law firm with offices in major cities across the Americas, Asia and Europe. We have approximately 1,000 lawyers in the Americas, 300 in Asia and 500 in Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

### OFFICE LOCATIONS

#### AMERICAS

- Charlotte
- Chicago
- Houston
- Los Angeles
- New York
- Palo Alto
- São Paulo
- Washington

#### ASIA

- Bangkok
- Beijing
- Guangzhou
- Hanoi
- Ho Chi Minh City
- Hong Kong
- Shanghai

#### EUROPE

- Berlin
- Brussels
- Cologne
- Frankfurt
- London
- Paris

#### ALLIANCE LAW FIRMS

- Mexico, Jáuregui, Navarrete y Nader
- Spain, Ramón & Cajal
- Italy and Eastern Europe, Tonucci & Partners

Please visit [www.mayerbrown.com](http://www.mayerbrown.com) for comprehensive contact information for all Mayer Brown offices.

© 2009. Mayer Brown LLP, Mayer Brown International LLP, and/or JSM. All rights reserved.

Mayer Brown is a global legal services organisation comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; and JSM, a Hong Kong partnership, and its associated entities in Asia. The Mayer Brown Practices are known as Mayer Brown JSM in Asia. "Mayer Brown" and the "Mayer Brown" logo are the trademarks of the individual Mayer Brown Practices in their respective jurisdictions.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein.