**APL Seminar May 2009**

# Drawing Lines in the Sand: the Application of Limitation Periods to Determinations of the Pensions Ombudsman

## Introduction: The Basics

1. The limitation on the PO's jurisdiction to investigate and determine historical matters is set out in regulation 5 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (SI 2474/1996), which provides as follows:

   *(1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.*

   *(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or reasonably ought to have known of its occurrence.*

   *(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (2) and (3) above, the Pensions Ombudsman may investigate and determine the dispute if it is received by him in writing within such further period as he thinks is reasonable.*

### The Primary Time Limit

2. The primary limitation period which applies to the PO is only three years. As the current PO has pointed out, this is significantly shorter than the limitation period which applies to the Court, the shortest limitation period prescribed by the Limitation Act ("LA") 1980 being six years. It is important to bear in mind that it is therefore often necessary to act quickly on behalf of a complainant, particularly if, as

is common, he or she has been involved in protracted correspondence before coming for advice.

3. It should also be noted that time only stops running under the regulation when a complaint is received by the PO **in writing**: this will almost invariably be when a complaint is received by the PO in the standard form. Time will not cease to run when, for example, a complaint is referred to the Pensions Advisory Service ("TPAS"). This sits rather oddly with the fact that the PO will frequently refuse to investigate cases which have not already been referred to TPAS, although in practice such a situation is likely to be a good reason for the PO to exercise his discretion to extend the primary time limit under regulation 5(3).

When Does Time Start to Run?

4. Regulation 5(2) introduces a "latent damage" principle, so that time does not start to run against a complainant until (in the opinion of the PO) "the earliest date on which [he] knew or ought to have known" of the occurrence of the act or omission in question.

5. It is not uncommon in the pensions field for a complainant to be entirely unaware that he has anything to complain about or any dispute to refer until some time after the act in question. One interesting difference between regulation 5(2) and the latent damage principle contained in s 14A LA 1980 is that, on the face of the regulation, the complainant need only have knowledge of the act in question as opposed to "the knowledge required for bringing an action" under s 14A.

6. On a strict construction of the regulation an individual may thus be barred under regulation 5(2) if he knew of the act complained of over three years before his complaint but did not know the full implications of that act and so did not know that it could form the subject of a complaint.

7. In such a case it seems it would therefore be advisable to ask the PO to exercise his discretion under regulation 5(3) in the alternative to relying on regulation 5(2), although it might well also prove possible on the facts to found the complaint on a later act which alerted the complainant to the implications of the earlier.

No Longstop Date?

8. It is also worth noting that, again unlike under LA 1980, there is no "longstop" date under regulation 5(2): taking the regulation at face value the PO could determine a dispute of enormous antiquity so long as the complainant was unaware of the act until three years beforehand.

9. Whether there is a "de facto" longstop date under regulation 5(2) is a question which was considered by the Deputy PO in his determination in Lever (27178/2) which is referred to in more detail below.

**The PO's Discretion under Regulation 5(3)**

10. Regulation 5(3) gives the PO (again, on its face) an entirely unfettered discretion to extend the three-year time limit so long as it is (in his opinion) "reasonable" for the matter not to have been brought before him earlier, and the matter has been brought within a further reasonable period.

11. This is a provision which is often invoked before the PO, not only in cases of the types referred to above (such as time spent referring a complaint to TPAS) but where a complainant is out of time and has been genuinely unaware of his rights. In his annual report for 1996-97 the then PO, commenting on the (then new) regulation 5(3) said that:

    "*the amended wording is no doubt constructively meant to cover time reasonably spent pursuing internal dispute resolution procedures or seeking the assistance of OPAS. Nevertheless, it would also appear to cover people … who had excusably mistaken their rights*".

How Wide is the PO's Discretion?

12. The issue of the limits on the PO's discretion to investigate and determine cases out of time has come up in three available determinations of the PO:

    (1) Dines (G00325) in 1999;

    (2) Lever (27178/2) in 2008; and

(3) Ralph (27877/1) in 2009.

13. In Dines, the complaint was based on what would, before the Court, have been framed as a breach of trust. The PO was of the opinion (see paragraph 5 of the Determination) that it was reasonable for the complaint to have been brought outside the three-year period. However he also determined that:

"*If the matter were to have been brought in front of a Court, instead of to me, [the Respondent] would have been able to rely … on section 21(3) of the Limitation Act 1980 which provides a six year limitation period in the case of innocent breaches of trust. For this reason, in the circumstances of this particular case, and despite the discretion afforded me by the 1996 Regulations … it would not be right to grant Mr Dines a remedy … where a Court would not grant one*".

14. In Lever, the slightly different question was how far back the PO could extend time under regulation 5(2) where the complainant had been unaware of the basis of his complaint (which, again, had it been brought before the Court would have been framed as a breach of trust) for many years. The question was raised as a preliminary issue and the Deputy PO determined that it was appropriate for him to exercise his discretion to discontinue the investigation on the basis that:

"*… even though I may have the power to investigate a complaint which would be time-barred if brought before a court, it is unlikely that I would decide that it was right for me to do so*".

15. In Ralph the PO took a different view. In that matter the respondent argued that the applicant should have been aware of the basis of his complaint in at least 2004. The PO accepted that if the complaint had been brought before the Court "*the limitations relevant to tort would presumably apply*" (at para 56 of the Determination).

16. However the PO rejected the argument that he should therefore not exercise his discretion under regulation 5(3) saying that (at paragraph 57 onwards):

"*Of course, the Limitation Act is not directly applicable to complaints made to my office. The time limits are now as set out in [regulation 5]. They are quite specifically*

*not the same as the Limitation Act. In one respect they are more restrictive… In another respect, important to Mr Ralph's case, they are less restrictive. There is no 15-year "backstop" (ie a limit outside which action can never be brought) equivalent to that applying under the Limitation Act…*

"*If Parliament had intended precisely the same rules to apply as under the Limitation Act it could have ensured that they did … in fact a discretion was included that is capable of indefinitely extending the time within which a complaint may be brought. It may be that Parliament had in mind that pensions are long term arrangements, with problems potentially only coming to light at retirement or beyond*.

"*…there is no obvious reason in principle that there should be some disputes that cannot be litigated but can be brought to my office*".

17. The PO's determination in Ralph is currently on appeal to the High Court and the outcome will no doubt be received with considerable interest. In the meantime, however, it is possible to give some pre-emptive consideration to the question on the basis of the existing case law.

<u>The Hillsdown Principle</u>

18. The oft-quoted decision in <u>Hillsdown Holdings v Pensions Ombudsman</u> [1997] 1 All ER 862 concerns another area of the PO's discretion: that of the remedies which he can award where he upholds a complaint.

19. The PO's discretion in this respect is perhaps even wider than that under regulation 5(3): by s 151 of the Pension Schemes Act ("PSA") 1993 he is empowered (inter alia) to "*direct the trustees or managers of the scheme concerned to take, or refrain from taking such steps as he may specify*".

20. Despite the apparent width of this discretion Laddie J held that the fact that there is no statutory limitation to the PO's discretion does not mean that his discretion is unlimited. In fact, the Judge held (at 868):

"*That some limits must be placed upon the steps [that the PO may specify] is self-evident but [s 151(1)] is silent on the subject, and unless one is to resort to what*

*would to a lawyer be a counsel of despair and leave the limits to the unfettered discretion of the Pensions Ombudsman, so as to put him under the traditional palm tree, limits must be sought elsewhere*".

21. Following Hillsdown it is therefore clear that rather than allow the PO to recline under his palm tree the Court will (to employ a mixed metaphor) draw a line in the sand and determine the limits of his jurisdiction for him. The question is, of course, where that line should be.

The PO's Jurisdiction

22. In reaching his judgment in Hillsdown Laddie J commenced with a consideration of the PO's general jurisdiction and powers, and such a consideration is instructive. The PO's jurisdiction is established by s 146(1) PSA 1993 which provides that he may investigate and determine any complaint of maladministration or dispute of fact and law.

23. There is no statutory definition of maladministration, but in practice complaints are frequently based on facts that would equate to a cause of action in a claim before the Court. The complaints in Dines, Lever, and Ralph were all of this nature.

24. Consequently, in many if not all of the cases where the PO determines a complaint of maladministration, and in all cases where he determines a dispute of law, the PO will make a decision in the complainant's favour where *ex hypothesi* there has been a breach of the law capable of founding an action before the Court.

25. Put another way, it is explicit in the PO's jurisdiction that, unlike any other ombudsman, he will make determinations on matters of law; and indeed it must be on this basis that a right of appeal (as opposed to the availability of judicial review) lies from the PO to the Court.

26. It was on this basis that Laddie J held in Hillsdown that the PO could not exercise his discretion under PSA 1993 to award a remedy that the Court could not:

"*It is trite law that pension funds must operate within the law and it does not seem to me to be right that there should be a different answer to the question 'are you*

*legally liable to repay this sum' according to the tribunal to which resort is had, so that the answer is: 'if I am sued in court, No, but if a complaint is made to the Pensions Ombudsman, Yes*'".

Drawing the line: does the Hillsdown Principle Apply to Regulation 5(3)?

27. One question that it seems clear that the Court hearing the appeal in Ralph will have to determine is therefore whether the Hillsdown principle applies to the question of time limits. To return to the metaphor of lines in the sand: which side of the PO's determination in Ralph should the line be drawn?

28. Just as it is clear that there must be some limits on the PO's jurisdiction, it is equally clear that in some respects the resolution of issues before the PO and the Courts will necessarily be different: the PO, for example, does not usually hold oral hearings. He is not required to act in accordance with the CPR and nor are the parties who bring complaints before him.

29. Furthermore, it is arguable that there are special factors applicable to pensions disputes that do not apply to the general law and so might not be expected to be taken into account in LA 1980: for example (as the PO pointed out in Ralph), the fact that the implications of actions and advice are frequently not understood for many years, and the fact that the individuals who suffer from maladministration or illegal acts are often unlikely to find redress elsewhere and are often in a position where they are unable to rebuild their pension provision before retirement.

The Flexibility of a Discretion

30. Indeed, given such sensitive considerations it is arguable that the ideal situation would be to leave the PO's discretion unfettered so as to allow him to take such issues into account. The PO's determinations are subject to judicial review, so that the Court will always retain a supervisory role. Determinations can be reviewed on a number of grounds including "Wednesbury unreasonableness" and reliance on irrelevant, or disregard for relevant considerations.

31. The Court is historically reluctant to interfere with the exercise of a discretion, but in Legal & General Insurance Society v Pensions Ombudsman [2000] 2 All ER 577

acceptance of a complaint after a delay of six years was declared "*on the margins of rationality*". Indeed, the PO's final comments in Ralph to the effect that had the question of limitation been raised earlier he might have determined that the evidence available was too slight for a determination seem a fruitful line for arguments in favour of judicial review.

32. It might, indeed, be one option for the Court hearing the appeal from Ralph to hold that, save in exceptional circumstances, it would always be unreasonable for the PO to extend the limitation period by a matter of years, because to do so would necessarily involve disregarding the highly relevant consideration of the deterioration of evidence. Equally, the importance of finality for all parties concerned and the problems that would be caused on appeal might be relevant issues that should always be taken into consideration by the PO.

A Step Back from Hillsdown?

33. However it is suggested that in taking this option the Court would reach a decision inconsistent with Hillsdown. Once the proposition has been accepted (and Hillsdown is authority for it) that there must be a line drawn somewhere around a discretion, the only test of where that line should be must be the test applied in Hillsdown itself: would the dispute be determined to the same effect before the PO as before the Court? The procedure under which the PO determines complaints does not (should not) affect this question; the application of limitation periods clearly and fundamentally does.

34. If the Court in Ralph were to decline to follow Hillsdown and hold that the PO's discretion is subject only to judicial review it is submitted that it would be allowing an inconsistency that would weaken and resile from the limits on the PO's jurisdiction which have already been imposed.

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18th May 2009