

Local authorities - recoveries from abusers' pensions - approach with caution

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10 April 2019

The damages claims social services authorities are facing arising out of alleged abuse by employees is not reducing. For the time being, particularly while the work of the Independent Inquiry into Child Sexual Abuse 'IICSA' and other inquiries is ongoing, we can expect that more victims of abuse will be confident about coming forward to make complaints about their experiences.

Damages claims can now be made by children who were abused by local authority foster carers, and many of them were also local authority employees.

It is only appropriate for proper consideration to be given to the possibility of recovering some public money from the perpetrators themselves where they have a Local Government Pension Scheme (LGPS). In those cases the outlay a local authority would be looking to recover would include:

- damages
- claimant's costs
- its own defence costs.

Different LGPS Regulations have been in force and apply at different times. Almost all of them provide for recovery of monies where the former pension scheme member has a misconduct obligation. At first flush, this would appear to give a local government employer the option of recovering its outlay in terms of child abuse claims from former employees.

However, care needs to be taken. Abuse cases by their very nature often do not emerge until many years or even decades after the events in question and it is not uncommon for alleged perpetrators to have moved on to another employer or have been made redundant. In the past employees who were suspended because of misconduct concerns were often allowed to resign without investigations being completed and without any findings being made against them one way or another. This is important, as a Pensions Ombudsman decision (PO – 7277) on 28 March 2017 illustrates.

Facts

This case concerned regulation 74 of The Local Government Pension Scheme (Administration) Regulations 2008, which read as follows:

“(1) This regulation applies where a person:

(a) has left an employment, in which he was or had at some time been a member, in consequence of a criminal, negligent or fraudulent act or omission on his part in connection with that employment;

(b) has incurred some monetary obligation, arising out of that act or omission, to the body that was his employing authority in that employment; and

(c) is entitled to benefits under the Benefits Regulations.

(2) The former employing authority may recover or retain out of the appropriate fund:

(a) the amount of the monetary obligation; or

(b) the value at the time of the recovery or retention of all rights in respect of the former employee under the Scheme with respect to his previous membership (as determined by an actuary), whichever is less.”

Mr A was Head of Finance for a local authority and in that fraudulently paid himself £448,207.00. At the end of December 2010 Mr A was made redundant after a period of restructuring and left his employment without his fraud becoming known to the council.

A few months later, a police investigation led to the fraud being detected and Mr A was convicted and sentenced to four years imprisonment in July 2012. The council secured a judgment and made him bankrupt. It wrote to Mr A with a proposal to retain £476,300.00 of the value of his pension rights. It relied on the recovery or retention connecting to misconduct laws.

Mr A challenged that decision arguing:

- he had left his employment as a result of a redundancy program, not for any reasons that were connected with this previous criminal conduct
- the Regulation only applied where a person had left an employment in consequence of a criminal, negligent or fraudulent act or omission
- Mr A did not leave his employment in consequence of his criminal act.

Accordingly, as the conditions of the Regulation had not been satisfied he argued that the council did not have the power to retain his pension funds. The Ombudsman found in Mr A's favour concluding that although Mr A was liable to the council for a wrongdoing, since the wrongdoing did not cause his departure the nexus required by the Regulation was not present.

The Ombudsman accepted that Mr A would have been dismissed had his fraud been discovered whilst he was in employment. Had that happened, the Regulation would provide for the council to retain his pension rights. However those facts did not apply to the situation the Ombudsman was presented with.

The Ombudsman directed that the court should reassess the method it wished to apply in its recovery of the debt from Mr A.

The future

In cases of recently disclosed child abuse, local authorities and other employers are now much more careful about investigating allegations. Most organisations adopt policies which specifically address resignations and 'compromise agreements'. Those policies make it clear that every effort should be made to reach a conclusion in all cases where child abuse is alleged, even if:

- the employee refuses to cooperate, having been given a full opportunity to answer the allegation and make representations
- a person's notice period expires before the process is complete.

Most policies also provide that settlement agreements should not be used in cases of refusal to cooperate or resignation before a notice period expires.

If a member of staff faces a serious allegation of sexual abuse then it is incumbent for more local authorities to complete the investigation process whether or not the employee cooperates. If the decision is made to dismiss because of the employee's misconduct then immediate consideration should be given to whether the relevant local government pension scheme recovery or retention clauses apply, either at that point, or when a civil claim for damages comes in.

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