



Recoupment of overpaid pension benefits: Lessons from the Pensions Ombudsman

Bic UK Pension Scheme (CAS-55100-G3W9)

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Introduction

On 19 April 2024, the Pensions Ombudsman (the “PO”) issued a determination in relation to the Bic UK Pension Scheme (the “Scheme”), which included a thorough analysis of the principles which the PO will apply when considering the recoupment of overpaid pension benefits. This article sets out eight important lessons for pensions lawyers and their clients which emerge from the determination.

Background

The background to the determination was the decision of the Court of Appeal in *Bic (UK) plc v Burgess* [2019] EWCA Civ 806, which had held that a beneficial change purportedly made to the Scheme rules was invalid¹. The consequence of that decision was that pensioner members of the Scheme (who had been paid on the basis of the more generous rules) had been overpaid.

¹ The change in question was an improvement to the increases that applied to pensions in payment attributable to service prior to April 1997.

The trustees of the Scheme (the “Trustees”) sought to recoup the overpayments from future instalments of pension. The applicant, Mr E, challenged the decision of the Trustees on the basis that it was unfair. The employer Bic UK (the “Company”) was permitted by the PO to make submissions in support of the position of the Trustees.

Lesson 1: Think of all the defences - even if they are not raised by the member.

The PO observed² that most applicants who refer a dispute concerning an overpayment are not lawyers: often they are not represented and complain in general terms that it is ‘unfair’ that the overpayments should be recovered. Consequently, the PO’s view was that it is good practice for trustees to explore whether a defence may be available to an overpaid member during the scheme’s own dispute resolution process.

Where the trustees had failed to explore all possible defences, the PO would make generous allowance for the fact that the member was unrepresented. In this case, Mr E’s complaint was wide enough to capture the following three defences: (i) change of position (ii) estoppel (by representation or convention) and (iii) limitation/laches.

Lesson 2: Change of position and estoppel do not technically apply to recoupment, but in substance they do.

The Company argued³ that the defences of change of position and estoppel did not apply to the right of the Trustees to recoup overpayments from future pension. This argument ran as follows:

- The right of recoupment was a freestanding equitable right arising from the practice of the courts of equity when administering estates and trusts. It was not based on the common law of unjust enrichment.
- Importantly, the exercise of the right of recoupment did not involve any claim being made by the Trustees. Where the right of recoupment was exercised, it was the

² At [88].

³ At [91].

member who would have to make a claim to be paid the full sum of future instalments of pension.

- Since it is the member who would be making the claim to be paid the full sum, any argument based on estoppel or change of position would be being deployed in support of the claim (ie: to argue that the member was entitled to the full sum). This would be impermissible because both estoppel and change of position are defences rather than causes of action - they can only be used as a shield and not a sword.

The PO agreed that neither estoppel nor change of position could apply as specific, free-standing defences to the right of recoupment.

However, he noted that the right of recoupment was itself subject to an exception, such that the right could not be exercised where it would be inequitable to do so. Both the defence of estoppel and the defence of change of position were ultimately based on principles of equity. Consequently, the PO concluded that he was entitled to take into account the underlying equitable principles underpinning each of the defences when deciding whether the right of recoupment could be exercised⁴.

The PO therefore went on to consider in detail how the change of position and estoppel defences would apply on the facts.

Lesson 3: A member can change their position by spending their income based on an expectation of future (unreduced) pension.

It was argued on behalf of the Company that change of position had no relevance on the facts. Change of position would typically apply where a member had, in good faith, spent sums which they were being asked to repay. In this case, recoupment was out of instalments of future pension which, by definition, the member could not yet have spent.

The PO disagreed. Mr E had generally spent up to the level of his monthly income from his pension. He had done so on the assumption that his pension would continue to be

⁴ At [103].

paid without reduction in the future. He would therefore be put in a detrimental position if overpayments were to be recouped out of his future pension.

The PO therefore concluded that change of position was a factor which meant that it would be inequitable to recoup the majority of the overpayments⁵.

Lesson 4: Estoppel by representation may arise in many more circumstances than is commonly thought, including through the mere fact of paying a pension.

Mr E received monthly payslips and annual P60s from the Trustees which set out the value of his pension. The PO noted that these statements did not contain any caveat, such as stating that the sums paid were subject to the Scheme rules. He therefore concluded that they amounted to unambiguous representations as to the level of pension which Mr E was entitled to receive. Mr E relied on those representations, such that it would be detrimental for the Trustees to resile from them. This was a further factor which would make it inequitable for the Trustees to recoup a substantial portion of the overpayments⁶.

Furthermore, and significantly, the PO concluded that, even in the absence of these statements, the payment of the pension amounted to an implied representation that Mr E was entitled to the pension payments⁷.

Whilst the payment of money *per se* would not generally amount to a representation that the sum paid represented the recipient's true entitlement, sometimes such a representation may be implicit in the payment itself in light of the surrounding circumstances. Specifically, if the relationship between the payer and the payee is such that there is a legal obligation on the payer to ascertain the payee's entitlement correctly, the payment may give rise to an implied representation that the money is properly due. The trustees of an occupational scheme have a duty to pay the correct pension benefits and

⁵ The PO found that from 1 August 2019 Mr E had started to build up surplus assets in his bank account, such that the change of position defence would cease to apply from that date.

⁶ The PO held that estoppel by representation would no longer apply after 22 February 2013, when the Trustees announced that there was uncertainty in relation to the validity of the increase provisions. The representations could not be regarded as unambiguous after this point.

⁷ At [180].

deduct PAYE correctly from those pension payments while the member is resident in the UK. Therefore, the payment of the pension by the Trustees amounted to an implied representation that Mr E was entitled to the pension payments.

The PO accepted that this analysis meant that estoppel by representation may arise in many more circumstances than is commonly thought⁸.

Lesson 5: It is very difficult for estoppel by convention to apply in the pensions context.

The PO reviewed the authorities on estoppel by convention⁹ and concluded that it would not apply on the facts.

An estoppel by convention required both parties to have formed an independent view as to a particular state of facts and engaged in a course of mutual dealings on that basis. Here, Mr E had not formed his own independent view on his entitlements under the Scheme rules, nor was there a course of mutual dealings¹⁰. Rather, the dealings were all one way, in the form of actions by and communications from the Trustees.

The PO noted that it is very difficult in the pensions context for the defence of estoppel by convention to apply, except in very specific circumstances¹¹. This is because there would very rarely be mutual dealings based on representation of a member's entitlement.

Lesson 6: A trustee who fails to act promptly upon discovering a potential overpayment may be barred by laches from recouping the overpayment.

The PO also concluded that the Trustees had failed to move promptly after initially identifying the issue that gave rise to the overpayments. Consequently, even if change of

⁸ At [235].

⁹ including, in particular, *Revenue and Customs Commissioners v Benchdollar* [2009] EWHC 1310 at [52].

¹⁰ At [202]-[203].

¹¹ At [207].

position and estoppel had not applied, the right of recoupment would be barred by laches for the period of the delay¹².

Lesson 7: It is necessary to obtain the approval of the County Court before the right of recoupment can be exercised.

The PO concluded that there was a small portion of the total overpayments which the Trustees had a right to recoup. However, he noted that, in accordance with the decision of the Court of Appeal in *CMG Pension Trustees v CGI IT UK*¹³, the PO was not a “competent court” which could authorise the Trustees to commence recovery.

Therefore, it would be necessary for the Trustees to “enforce” the determination of the PO by obtaining an order from the County Court, which could be done by a paper application. Failure to do so would be a breach of the law and could constitute maladministration by the Trustees¹⁴.

Lesson 8: Trustees who fail properly and promptly to explain the overpayments to members may have to pay damages for inconvenience and distress.

Finally, the PO noted that the Trustees had failed to communicate effectively with members in relation to the issues that gave rise to the overpayments, which had caused unnecessary inconvenience and distress. He therefore awarded Mr E £1,000 in respect of the inconvenience and distress he had sustained.

Conclusion

As will be apparent from the above, whilst the determination was in the context of the Scheme, a large number of the points that emerge are of broader application to all cases

¹² At [230].

¹³ [2023] EWCA Civ 1258.

¹⁴ At [249].

involving recoupment of overpaid pension benefits. There is therefore good sense in placing close attention to the lessons which can be learned.

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