

## Ombudsman's Determination

Applicant	Dr E
Scheme	QinetiQ Pension Scheme ( <b>the Scheme</b> )
Respondents	Conduent HR Services ( <b>the Administrator</b> ) QinetiQ Pension Trustees Limited ( <b>the Trustee</b> )

## Outcome

1. I do not uphold Dr E's complaint and no further action is required by either the Administrator or by the Trustee.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Dr E is unhappy that the Administrator and Trustee are seeking to recoup an overpayment of pension benefits. They propose to do this by reducing the amount of Dr E's pension in payment.

## Background information, including submissions from the parties

4. Dr E was formerly employed by The Defence Evaluation and Research Agency (**DERA**).
5. On 2 June 2001, DERA was dissolved and split into two organisations; a privatised arm which ultimately became QinetiQ; and, an arm which remained under Government control and became the Defence Science and Technology Laboratory (**Dstl**).
6. On the dissolution of DERA, Dr E's employment transferred to QinetiQ and he became a member of the Scheme.
7. The Scheme was created on 1 July 2001, as the new pension arrangement for former DERA employees who were, as at 30 June 2001, contributing members of either the Principal Civil Service Pension Scheme or the UK Atomic Energy Authority pension.
8. Members of the Scheme transferred their former benefits across on a 'like for like' arrangement as at 1 July 2001.

9. Dr E's former pension arrangement was contracted-out of the then State Earnings Related Pension Scheme (**SERPS**).
10. As a consequence of being contracted-out of SERPS, the Scheme must provide a pension which is broadly equivalent to the SERPS pension being given up. This equivalent amount is known as the Guaranteed Minimum Pension (**GMP**).
11. Section 109 of the Pension Schemes Act 1993, sets out the annual escalation which must be applied to the GMP. For the GMP relating to service accrued before 6 April 1988, the Scheme is not liable for any increases in payment, since the escalation on this portion of the GMP was paid by the State as part of the member's State Pension provision.
12. For GMP relating to service accrued after 6 April 1988, but before 5 April 1997, the GMP, when in payment, must be increased annually in line with the Consumer Prices Index (**CPI**), subject to a maximum of 3%. This increase must be paid by the Scheme.
13. The GMP in relation to service after 5 April 1997, does not increase. However, Section 51 of the Pensions Act 1995 requires the portion of a member's pension in excess of the GMP (**the excess**), which relates to service after 5 April 1997, to be increased in line with CPI up to a maximum of 5%. The cap of 5% was reduced to 2.5% for any excess accrued after 2005.
14. Although, when the Scheme was established, members transferred their former benefits across on a like for like basis, not all members had contracted-out benefits attributed to their transfer.
15. Dr E retired at his normal retirement age of 60 on 14 July 2004. However, as he had not reached state pension age (**SPA**), there was no requirement to split any of the pension elements into different tranches of GMP and non GMP. All of Dr E's pension at that time, increased at the same rate.
16. Dr E attained SPA in July 2009. The Trustee has said that, "normal circumstances when a member attains State Pension Age (14/07/2009 in [Dr E's] case) their pension would be split into the relevant tranches to make sure the GMP and excess pension elements increased at the correct rate."
17. However Dr E's retirement coincided with the time around which the current Administrator took over responsibility of administering the Scheme from Capita Hartshead (**Capita**), the previous administrator, who was replaced on 1 July 2004.
18. The Trustee has said that details of Dr E's GMP entitlement were not provided to the Administrator by Capita. As a consequence, from SPA, Dr E's pension continued to increase fully at the standard scheme increase rate. However, there should have been no increase due on the pre-88 GMP. This, in turn, resulted in an overpayment of benefits amounting to £2,664.84 for the period July 2009 to September 2016.

19. In 2015, the Trustee instructed the Administrator to undertake a GMP reconciliation exercise. As part of this reconciliation, HMRC provided the Administrator with evidence confirming that Dr E had been contracted-out and a GMP liability was incurred from SPA.
20. In August 2016, the Trustee contacted Dr E to advise him of the overpayment. This, in turn, prompted Dr E to complain.
21. The Trustee, when providing its formal response to this Office, has also replied on behalf of the Administrator.

### **Summary of Dr E's position**

22. Dr E disputes that he should have to repay the overpayment saying he made repeated requests for detailed calculations showing how the overpayment had arisen, but received no response.
23. There should be a time limit, beyond which no recovery action should be taken.
24. The compensation offered by the Trustee is inadequate.

### **Summary of the Trustee and the Administrator's position**

25. The Trustee partially upheld Dr E's complaint, but it maintained that the Scheme's rules only allow Dr E to receive his correct level of benefits, and that it was entitled to recoup the overpayment of £2,664.84 at a rate of around £37 per month by reducing his pension income.
26. However, the Trustee accepted that it had not dealt with Dr E's complaint appropriately, nor had it adequately responded to his request for information about how the overpayment had been calculated. In recognition of this, the Trustee awarded Dr E £250 compensation to be offset against the outstanding overpayment to be recovered.
27. In relation to the time limits for recovery, the Trustee said:

“In general trustees are entitled to recover all overpayments provided that the recovery is claimed within six years from the date that they discover the mistaken overpayment. The overpayment of your pension was identified in 2016 and so the Trustee is entitled to reclaim it in full.”

### **Adjudicator's Opinion**

28. Dr E's complaint was considered by one of our Adjudicators who concluded that no further action was required by either the Administrator or by the Trustee. The Adjudicator's findings are summarised below:-
  - The Trustee is seeking to recoup the overpayment from Dr E by making deductions from his future pension payments. Unlike requiring repayment, of a

lump sum recoupment is not a restitutionary claim for unjust enrichment, rather it is an equitable self-help remedy. As such, following the judgment in *Burgess & Ors v BIC UK Limited [2018] EWHC 785 (Ch)* (**the BIC judgment**) equitable recoupment, is not subject to a six-year limitation period under section 5 of the Limitation Act 1980 (**the Limitation Act**).

- Dr E has provided no evidence or comments to suggest that he has any other defence against recovery of the overpayment such as change of position or estoppel. Consequently, the Trustee can recoup the overpayment.
- In the internal dispute resolution procedure (**IDRP**) response dated 20 July 2017, the Trustee acknowledged that Dr E's case, "could have been handled better," and that it:

"...regrets that [Dr E] spent a good deal of [his] time satisfying [himself] as to the correct calculation because (through a misunderstanding of the level of detail [he was] seeking) it was not provided to [him] on request."

- The Adjudicator agreed that Dr E was not initially provided with the level of detail he required. But he considered that the distress and inconvenience Dr E suffered as a consequence was unlikely to have been significant. Consequently, the Adjudicator took the view that the offer of £250 made by the Trustee was reasonable in the circumstances.

29. Dr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr E provided his further comments, summarised below, which do not change the outcome: -

- Dr E is diligent in checking his pension annually. As he had not been informed of the requirements for increases to the GMP, he was not capable of identifying that his pension was being overpaid. Thus, he was acting in good faith when spending the overpayment as he did.
- Dr E's daughter has a complex personality disorder and is reliant on state benefits. Due to the nature of her condition she has great difficulty retaining her entitlement to benefits. So, in 2014, Dr E decided, "it would be prudent to remove her from the benefits system by purchasing her a property, which would provide an independent income when she is eventually discharged from hospital." The commitment to provide financial support to his daughter is a lifetime commitment which will require all of his available income. Dr E says had he known that his pension income would be permanently reduced, he would not have pursued this course of action. Dr E said, "I believe that this constitutes a detrimental and irreversible change in position."
- The Adjudicator has implied that a full calculation was eventually provided. But this is incorrect. Dr E maintains he was not ever supplied with sufficient information to be able to confirm the accuracy of the figures provided by the

Trustee and the Administrator. Further, Dr E disputes that there could have been any misunderstanding about the level of information he requested.

- Dr E maintains that the Administrator has caused significant distress and inconvenience, such that an award greater than £250 is warranted. In particular he said he should have promptly been provided with the calculations and, had the Administrator done so, “this would have significantly reduced the extended period of stress and anxiety caused by this omission.”
- Further, it was only after making a referral to this Office that Dr E learned of the IDR. Dr E has said, “this resulted in an additional few months of delay while the discussion already undertaken was repeated formally.”
- Dr E said the repayment schedule proposed by the Trustee will result in him repaying more than he actually received after tax is taken into account. This is because, “some of the overpayments were taxed at 40%, while the repayments will only attract a 20% rebate”. Consequently, Dr E proposed a revised repayment schedule based on the £1,914.84 net income he received, less the £250 offer of compensation.
- Dr E also said that his complaint was raised well before the BIC judgment. As such he argues that the assessment of whether or not limitation applies should be considered against the interpretation of the law at that time, as opposed to following the new interpretation following the BIC judgment.

30. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Dr E for completeness.

### **Ombudsman’s decision**

31. Dr E has argued that had he known of the true position regarding his benefits, he would not have made the same spending decisions and that it is now unjust to require him to repay the overpayment either in whole or in part. This type of argument is commonly referred to as a ‘change of position’ defence.
32. When assessing whether there has been a change of position, the key question is whether the injustice to the recipient in requiring him to repay the overpayment outweighs the injustice in denying restitution to the party which has made the payment. Thus, for the defence to succeed, certain conditions must be satisfied. Broadly, the recipient must, on the balance of probabilities, be able to show:-
- He received the overpayment in good faith. In other words, he was not or could not, on reasonable enquiry, have been aware of the overpayment. The recipient cannot turn a blind eye if there is anything which suggests an error has occurred.

- Because of the overpayment, he has detrimentally changed his position. The most obvious example of a detrimental change of position is the expenditure of money by the recipient.
  - The money has been spent on something he would not otherwise have bought, and the expenditure is irreversible.
33. In this case, I am satisfied that Dr E was not aware, and could not with reasonable diligence have identified, that he was in receipt of an overpayment. I agree that the information the Trustee and Administrator provided during the period in which the overpayment accrued (prior to it being identified by the Administrator), would not have given Dr E the knowledge that his benefits were incorrect. Thus, I find that Dr E was acting in good faith when spending the money as he did.
34. Dr E claims that but for the overpayment, he would not have purchased a property for his daughter. But I am not convinced by this. The overall value of the overpayment, which equates to additional income of around £380 per year, is relatively minor when compared with the purchase price of even a modest property. Consequently, I cannot say that Dr E was reliant on receiving the overpayment to make the spending decisions he did. It thus follows that the detrimental change Dr E is claiming, buying a property for his daughter, cannot flow directly from receipt of the overpayment.
35. Further, Dr E has described his daughter's circumstances and has explained why he wanted to support her. In view of this I conclude that there were other reasons which influenced Dr E's spending decisions. On balance I find that providing financial assistance to his daughter is a decision Dr E would have taken in any event. On this basis I cannot find that Dr E has a defence against recovery of the overpayment.
36. The Trustee has accepted that information about the calculations and about the IDRP ought to have been provided to Dr E sooner than it was. In recognition of this the Trustee has awarded Dr E £250, however he disputes that this is sufficient.
37. When assessing awards for non-financial injustice I will always take account of the individual circumstances of the case. But similar complaints should result in consistent and broadly comparable awards, so I will also take a wider view and ask would a reasonable person have reacted the same way. Relevant factors that I might consider could include: how obvious the maladministration was; whether this could have been easily avoided or resolved sooner; whether there were any avoidable delays; how many administrative errors there were and how long it took for this to be corrected; and how well the dispute was handled under the IDRP.
38. Having carefully considered the facts of this case, I have decided not to direct the Trustee to pay a higher award. Although the overpayment accrued over a period of time, this could not have been easily identified and, when it was identified, the Trustee dealt with it reasonably quickly; albeit it accepted that some responses could have been more timely. Dr E contested that: "I have not received sufficient detail from the pension administrators to enable me to confirm the accuracy of their

calculations.” However, calculations of this nature are complex, and it would not be usual to expect members to be able to check the calculations in the level of detail Dr E proposed, so it is unsurprising the Trustee’s initial response did not provide the level of detail Dr E hoped for. I have also given consideration to whether the delays exacerbated Dr E’s distress but, since the distress seems to arise from the request that he repay the overpayment, I am not persuaded that the failure to deal with the IDRP dispute more quickly has caused significant distress and inconvenience. Therefore, I find that the £250 offered by the Trustee is reasonable in the circumstances.

39. Dr E has also questioned total amount he is being required to repay suggesting that, taking into account the tax that had been paid on the overpaid monies, he will be required to repay more than the net amount he received.
40. I have considered this point carefully, but I am not persuaded by the argument Dr E makes. The Trustee is seeking to recoup the gross overpayment made to Dr E and any tax that has been deducted, has been paid to HMRC. In situations such as this, it would be for Dr E to contact HMRC for an adjustment of his tax record to reflect his revised taxable income for the relevant period.
41. Dr E has also suggested that the sum the Trustee is seeking to recoup is incorrect on the basis that, “the repayment will only attract relief at 20%.” This suggests to me that Dr E is of the opinion that the repayments he makes will be treated as a contribution to the Scheme. But it is not the case that the money reclaimed by way of recoupment will be paid into the Scheme as a tax relievable contribution, rather recoupment is an adjustment of his future pension payments. Consequently, I do not find that the outstanding overpayment requires amending in the manner Dr E has suggested.
42. Dr E has argued that since he raised his dispute prior to the BIC judgment, that the findings should not apply. But it is not the case that the BIC judgment amended in any way the Limitation Act. So, it is not a case of legislation being applied retrospectively, rather it is a case that the judgment provided clarification as to the interpretation and application of the existing legislation.
43. Section 91(6) Pensions Act 1995, broadly provides that if a member disputes the amount of the recoupment, then the trustees cannot recoup the overpaid pension unless they have an order from a competent court.
44. In the BIC judgment, it was suggested (obiter dictum) by Mr Justice Arnold that a determination by me did not satisfy the requirements of section 91(6) Pensions Act 1995 because the Pensions Ombudsman is not a competent court. The Pensions Ombudsman was not a party to those proceedings and Mr Justice Arnold did not have the benefit of hearing full arguments on the issue. In any event, the comments by Mr Justice Arnold in the BIC appeal were judicial dicta, and I am not bound to follow them.

45. It is my view, for the reasons explained below, that a determination by me, to the effect that trustees may recoup an amount, does satisfy the requirements of section 91(6) Pensions Act 1995, in particular the words:-
- “Where there is a *dispute as to its amount* [my emphasis], the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court.”
46. Because following this determination, there is no “dispute as to its amount”. The dispute is brought to an end further to section 151(3) Pension Schemes Act 1993 (subject to any appeal on a point of law).
47. Additionally, schedule 1, part 1, paragraph 35(e) of the Tribunals and Inquiries Act 1992 confirms that the Pensions Ombudsman is a tribunal in respect of its functions. *Peach Grey & Co. v Sommers [1995] I.C.R. 549* confirms that a tribunal is an inferior court. Rule 52.1(c) of the Civil Procedure Rules states that a lower court includes the person from whose decision an appeal is brought (to the High Court), which includes the Pensions Ombudsman. Section 91(6) Pensions Act 1995 also includes arbitration awards. Tribunals, including the Pensions Ombudsman, therefore clearly fall within the definition of a competent court.
48. A distinction needs to be drawn between the recognition and enforcement of my determinations, as with judgments more generally.
49. I have decided that Trustee is entitled to exercise its right of recoupment against Dr E. I exercise my powers under section 151(2) Pension Schemes Act 1993 to direct the Trustee to take such steps as specified in this determination. So, subject to any appeal, my determination and directions will be final and binding on the parties. This is made clear by section 151(3) Pension Schemes Act 1993.
50. My determination must then be recognised by (amongst other things) the County Court. Although obiter dictum, Mr Justice Arnold suggested that the County Court would have power to make a declaration duplicating the direction already made by me; section 151(3) Pension Schemes Act 1993, is not referred by the judge. In my opinion the County Court would not have power to entertain the substance of a claim which was in essence *res judicata*.
51. By contrast, a determination by me, may be enforced as if it were a judgment or order of the County Court: section 151(5)(a) Pension Schemes Act 1993. What this means is that enforcement orders such as charging orders, attachment of earnings orders and injunctions can be obtained following the determination in the same way as they can be following a judgment of the County Court. In the case of the right to recoupment, it is difficult to see why enforcement measures would be necessary or relevant, given that recoupment is in essence a self-help remedy for trustees.



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52. Therefore, I do not uphold Dr E's complaint.

**Anthony Arter**

Pensions Ombudsman  
25 October 2018