PO-20306

Ombudsman's Determination

Applicant	Mrs N
Scheme	Mercury Provident Pension Scheme (**the Scheme**)
Respondent	PTL Pitmans Trustees Limited (**the Trustee**)

Outcome

1. Mrs N's complaint against the Trustee is partly upheld.

2. The Trustee shall pay Mrs N £500 in recognition of:

    - its failure to comply with Section 91 of the Pensions Act 1995; and
    - the significant distress and inconvenience caused to Mrs N.

Complaint summary

3. Mrs N disagrees with the decision of the Trustee to recoup an overpayment of £5,243.53.

Background information, including submissions from the parties

4. Mrs N retired and took her benefits from the Scheme in February 2007.

5. In 2014, as part of a general benefit audit, the Trustee took legal advice in relation to normal retirement age (**NRA**) equalisation. It had originally received legal advice in 2005, that from 1 August 1994 female members had a NRA of 60 and all new joiners after 1 August 1994 had a NRA of 65.

6. As part of the review in 2014, the new legal advice was that the Scheme rules, introduced on 13 August 1996, meant that all members with service after 13 August 1996, had a NRA of 65. This, meant that some members who had retired at age 60 after 13 August 1996, had, in effect, retired early and a reduction for early payment had not been applied to their benefits for service after 13 August 1996.

7. The Trustee wrote to affected members, including Mrs N, on 11 February 2017. It explained that the effective date for equalisation in the Scheme was 13 August 1996, and therefore, Mrs N had been overpaid as she had retired before age 65. As a consequence, the Trustee was seeking recovery of £5,243.53, over a period of 10

years and one month (the same length of time as the overpayment), with a deduction from her future pension payments.

8. Mrs N's incorrect pension in payment was £2,822.28 per annum; her correct pension was £2,205.48 per annum (a difference of £616.80 per annum or £51.40 per month). The Trustee said that from 1 April 2017, her annual benefit would reduce to £1,685.52 per annum in order to recoup the overpayment (a total difference of £1,136.76 per annum).

9. Mrs N objected to the recalculation on 10 February 2017. She said that the letter she received on 5 February 2007, was implicit in that the amount stated, plus increases, would be paid until her death and it was her belief that estoppel prevented the Trustee from recovering the overpayment. She also asked for a breakdown of the Trustee's calculation.

10. On 20 February 2017, the Trustee responded. It stated that it was legally entitled to seek recovery of the overpayment, as it would from other members in the Scheme who were affected. However, it also offered to take account of Mrs N's financial position and any possible hardship that the recoupment may cause. It asked her to return a financial hardship form and said it would consider the matter further.

11. Mrs N made an internal dispute resolution procedure (**IDRP**) request on 25 February 2017, and the Trustee responded under Stage 1 on 22 March 2017. The Trustee did not uphold Mrs N's complaint. It noted that it could not have been aware of the error in the calculation of her benefits until the general audit brought it to light. The Trustee did not believe that it could have reasonably been aware of the error any earlier than the updated legal advice it received in 2014. It again offered to consider any financial hardship claim if Mrs N submitted further information.

12. Mrs N disagreed with the IDRP decision and wrote to the Trustee on 5 May 2017. She said she assumed that the original calculations in 2007 were correct and had no way of knowing it was not. She asked again for a breakdown of the calculations. She then made an IDRP Stage 2 request on 26 June 2017, and explained her distress and anxiety in owing money to the Scheme. She also raised a number of defences against the recoupment, in particular

    - contract; that at the time of her retirement, her employer had formed a contract with her to pay the stated sum, with increases, until her death;
    - change of position/estoppel; that she planned her finances accordingly and, as such she saved for a holiday to visit her sister in New Zealand, including visits to Australia and Singapore. She also provided money to her grandchildren to support them through university and college; and
    - section 91 of the Pensions Act 1995[1] (**the Act**), prevents the Trustee from recouping an overpayment unless it has an order from the Pensions

[1] See Appendix I

Ombudsman and therefore no reduction should be made to her benefits until the end of the appeal process.

13. The Trustee provided its Stage 2 IDRP decision on 21 July 2017, and, again, did not uphold Mrs N's complaint. It did not feel that Mrs N had provided evidence, to date, that estoppel should apply, but said it would consider whether she had changed her position if she could provide evidence to demonstrate this. It also provided Mrs N with a complete breakdown of the current calculation of her pension. In relation to the Act, it said:

"… this prevents a member's pension being assigned, commuted, surrendered, changed or subjected to a lien or set-off unless certain conditions are met. Recoupment of overpayments has similar characteristics to lien and set-off. However, it is the Trustee's view, after taking legal advice, that the best interpretation is that recoupment of overpayments is not caught by s.91. The real purpose of the recoupment is to identify the recipient's true pension entitlement and to adjust future payments accordingly. The purpose of s.91 is to protect members from steps intended to take away a pension entitlement, not to prevent trustees from paying the right amount of pension. Therefore, the Trustee's view is that recoupment is not a remedy that is precluded by Section 91."

14. Mrs N remained dissatisfied and contacted the Pensions Advisory Service (**TPAS**) for advice. She provided TPAS with documents showing her overseas trip, describing it as a "6 week holiday of a lifetime". TPAS noted that the costs relating to her New Zealand trip were in excess of £8,000, while the overpayment from the Scheme was £5,443.53.

15. On 25 January 2018, in its formal response to Mrs N's complaint, the Trustee reiterated the background as to how the error came to be (that the original advice on equalisation was, following updated legal advice, incorrect) and the recovery period would be 10 years, the same length of time as the overpayment period, but it was still open to any financial hardship claim put forward by Mrs N. It agreed that there was a delay between 2014 and 2017, in informing members of the overpayment. It stated that this was because the general audit had raised a number of issues and it wanted to ensure that all of these were dealt with before recouping the overpayments. In relation to Mrs N's claim that the Trustee was estopped from recovering the funds, it said:

"As a general rule, in order to defend an overpayment being reclaimed on the basis of estoppel, Mrs N would need to prove that she has relied on a statement or shared understanding to her financial detriment. This needs to be substantiated with evidence and, to date, the Trustee has seen insufficient evidence from Mrs N which supports her assertions. For example, Mrs N states that she has spent her money on a general lifestyle and saved for a one-off holiday to New Zealand. Mrs N also claims that the holiday was a dream of hers to have. Presumably, therefore, Mrs N would have spent her pension on her lifestyle and saved for the holiday even if the pension had been paid at the correct (reduced) level. The Trustee notes that the total overpayment was £5,243.53 over the course of 10 years. This amounts to around £524.35 per year, or £43 per month. The Trustee does not believe that the amount of the overpayment is substantial enough to show that Mrs N changed her lifestyle based on the pension she was receiving. The Trustee has seen insufficient evidence from Mrs N to conclude that she can successfully present an estoppel claim."

16. In response to this, Mrs N submitted that she did not agree with the recoupment without a direction from the Pensions Ombudsman. In relation to her defence that she changed her position, Mrs N said:

> "I have recorded previously that my position did change. I would never have spent money that would leave me with a debt to pay into my 80s. I did rely on a "statement and shared understanding" that my pension was stated in the original letter at the time of my retirement and was mine to spend.
>
> Since April 2017 when my pension was reduced and repayments began, I have had to make many changes to my life style, so the Trustee is wrong in assuming that I can afford to repay the amount stated.
>
> Furthermore, the Trustees "presumption" regarding my financial position is what it is, purely a presumption. Since the Trustee has no figures regarding my outgoings, it is regrettable and way off the mark."

17. The Adjudicator asked Mrs N to provide further information and evidence of her finances. Mrs N responded and submitted the Trustee's financial hardship form, along with supporting documents, but declined to provide details of any joint income. In relation to her trip to New Zealand, Mrs N said it had always been her plan since her retirement but was subject to cost and available funds. She calculated that in the eight year period between her retirement and the trip she would have received £4,159.68 less pension and without this she would not have made the trip. Mrs N specifically asked that estoppel via representation be considered in relation to her claim against the recoupment of the overpayment. She later provided details of her husband's state and personal pensions on his last annual tax summary and confirmed that he receives a full winter fuel allowance (although she did not specify the amount).

18. Mrs N's financial hardship form and documents were passed to the Trustee to consider whether financial hardship should be taken into account in the recoupment of the overpayment. The Trustee responded and said that it had decided that financial hardship would not be taken into consideration. Based on the information Mrs N had provided, its view was that she could reasonably afford to repay the overpayments over the 10 year period.

Adjudicator's Opinion

19. Mrs N's complaint was considered by one of our Adjudicators who concluded that part of the complaint should be uphold. The Opinion recommended that to put the matter right, the Trustee should pay Mrs N £500 in recognition of the significant distress and inconvenience caused to Mrs N, as well as the maladministration of the Trustee's decision to recoup the overpayment in breach of section 91 of the Act.

20. The Adjudicator's findings are summarised below:-

- In the recent case of Burgess & Ors v BIC UK Limited [2018] EWHC 785 (Ch) (**the Burgess case**) Mr Justice Arnold held that equitable recoupment was not a restitutionary claim for unjust enrichment (unlike the case of Webber v Department for Education [2016] EWHC 2519 (Ch)). Rather it was an equitable self-help remedy which did not involve any claim for repayment of the monies paid in the past by an adjustment of accounts in the future. Equitable recoupment, as in the present case, is not subject to a six-year limitation period under section 5 of the Limitation Act 1980.

- The Trustee agreed that the way in which Mrs N's pension was originally calculated was incorrect and there is no way that she, or it, could have known this. Therefore, there was no dispute that an error had occurred and that the Trustee was entitled to seek recovery of any overpayment. However, as Mrs N raised a number of defences against the recoupment, these needed to be considered.

Change of position

- While it was agreed that Mrs N had relied on the original calculation of her benefits in good faith, she was unable to provide evidence that she had gifted money to her family and therefore this could not be considered as part of her claim of change of position.

- In relation to her holiday, the Adjudicator concluded that, as the amount she spent exceeds the amount of the overpayment and greatly exceeds her annual income from the Scheme, along with Mrs N's description of it as a once in a lifetime holiday, it was more likely than not that she would have continued with her planned holiday. The difference between her incorrect annual pension and her corrected pension is £616.80 per annum, so it is difficult to successfully argue that this would have made a substantial difference in her decision to take her holiday.

Estoppel via representation

- The Adjudicator agreed that there was an unequivocal representation of the pension options available to Mrs N when she chose to retire in 2007. However, there was no information provided at the time of the Opinion to show that Mrs N acted to her detriment, besides the trip to New Zealand, as it does not appear that she made any other material decisions based on the overpayments. While she may have improved her lifestyle over this period, Mrs N had not provided full financial accounts or details of how the overpayment was spent.

- The Adjudicator also considered the information Mrs N had provided on the financial hardship form. The Adjudicator concluded that it would be difficult for Mrs N to argue that a reduction of £43.69 per month would cause her undue hardship when the total excess household income, after expenses, was £426.44 per month[2]. Therefore, Mrs N did not meet the high bar that recoupment would be unconscionable.

Breach of contract

- Mrs N had failed to expand on this argument, or provide supporting evidence, so it could not be found that there had been a breach of contract.

Section 91 of the Act

- As part of the Burgess case, Mr Justice Arnold commented as follows:

  "It is common ground that the equitable right of recoupment is a form of set-off for the purposes of these provisions. The issue is to effect of section 91(6), which prevents exercise of the right in the event of a dispute except under an order of 'a competent court'."

- As Mrs N had challenged the level of recoupment, the Trustee cannot recoup the overpaid amount unless it has an order from a competent court and the Ombudsman acts as such a court.

- In the case of PO-2066, the Deputy Ombudsman found that the trustees' action in commencing recovery of an overpayment without the applicant's agreement contravened Section 91 of the Act and was therefore maladministration. The Deputy Ombudsman also directed that the trustees would be able to recalculate the overpayment according to the Determination, so it was implicit that section 91 did not impose an obstacle to recovery once the member had submitted to the jurisdiction of the Pensions Ombudsman by making a complaint.

21. The Trustee agreed with the Opinion, but Mrs N did not. She provided further information to defend her claim that she changed her position based on the higher amount. She says that:

- Her share of the holiday to New Zealand was only half of the cost (approximately £4,000); and

[2] See Appendix II for a complete breakdown

- If she knew the true position, she would have spent her tax free cash lump sum at retirement differently. Instead of renovating her kitchen, she would have spent less on the renovations and saved more for the holiday to New Zealand.

22. Mrs N did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. However, her further comments do not change the outcome. I agree with the Adjudicator’s Opinion and I will therefore only respond to the main points made by Mrs N for completeness.

Ombudsman’s decision

23. As Mrs N has not argued against the Adjudicator’s view on the other defences against recovery (estoppel or contract), I will only comment on her additional argument that she changed her position based on the higher amount she believed she was entitled to.

24. The Opinion explained that for a successful change of position defence, the applicant must show that, on the balance of probabilities, they detrimentally changed their position on the overpayment received in good faith. The money must have been spent on something the applicant would not have otherwise bought and that the expenditure is irreversible. While it is agreed that Mrs N meets the good faith argument, and that the money spent is irreversible (at least for the holiday, there is always the argument that a new kitchen improves the value of a property and therefore some of the costs can be recouped when the property is sold), she fails on the argument that the money was spent on something that she would not otherwise have purchased. Mrs N has not shown, on the balance of probability, that she would not have renovated her kitchen or taken the trip to New Zealand. These were expenses she had planned for in her retirement. All she is saying is that if she knew the correct position, she would have changed her spending habits, rather than not making those two purchases. For a successful claim of change of position, Mrs N would need to have shown that, if she had known the correct position, she would not have spent the money. Unfortunately, while I empathise with the position Mrs N now finds herself in, she does not satisfy all of the elements for a change of position defence and the Trustee is entitled to recoup the overpayment.

25. While I do not uphold the part of Mrs N’s complaint relating to her defences against the recoupment, I agree with the Adjudicator’s Opinion that the Trustee pay Mrs N £500. This is in recognition of the maladministration causing the length of time of the overpayment and the distress suffered by Mrs N.

Directions

26. Within 28 days of the date of this Determination, the Trustee shall pay Mrs N £500 in respect of the significant distress and inconvenience which she has suffered.

Anthony Arter

Pensions Ombudsman
3 April 2020

Appendix I

Pensions Act 1995

91 Inalienability of occupational pension

(1) Subject to subsection (5), where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme—

(a) the entitlement or right cannot be assigned, commuted or surrendered,

(b) the entitlement or right cannot be charged or a lien exercised in respect of it, and

(c) no set-off can be exercised in respect of it, and an agreement to effect any of those things is unenforceable.

(2) Where by virtue of this section a person's entitlement to a pension under an occupational pension scheme, or right to a future pension under such a scheme, cannot, apart from subsection (5), be assigned, no order can be made by any court the effect of which would be that he would be restrained from receiving that pension.

…

(6) Where a charge, lien or set-off is exercisable by virtue of subsection (5)(d), (e) or (f)—

(a)its amount must not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person in question's entitlement or accrued right, and

(b)the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme,

and where there is a dispute as to its amount, 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.

Appendix II

Based on the information provided by Mrs N in relation to joint income and expenditure on 25 February and 19 March 2019.

Joint income per annum		Joint expenditure per annum[3]	
Mrs M's Scheme pension	£2,205.43	Council tax	£1838
Mrs M's State Pension	£7,072	Insurance	£396
Mr N's annual income	£13,190.22	Utilities	£1,260
Winter fuel payment[4]	£100	Telephone	£153.12
		TV licence/ subscription TV	£684
		Food & sundries	£4,320
		Clothes	£720
		Travel	£540
		Car	£714
		Health insurance	£347.28
		Social	£2,880
		House maintenance	£3,600
Total income	£22,567.65	**Total expenditure**	£17,450.40

Difference between income and expenditure - £22,567.65 - £17,450.40 = £5,117.25 per annum or £426.44 per month (£5,117.25/12 = £426.44)

[3] This is based on doubling the figures provided by Mrs N on the financial hardship claim form

[4] Mrs N submitted that her husband is in receipt of this benefit, but did not say the amount. £100 is the assumed amount, based on the criteria of the person qualifying and living with someone under 80 who also qualifies