

Ombudsman's Determination

Applicant	Dr S
Scheme	USS Pension Scheme (the USS)
Respondent	Universities Superannuation Scheme Ltd (USS Ltd)

Outcome

1. I do not uphold Dr S' complaint and no further action is required by USS Ltd.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Dr S disagrees with USS Ltd's decision to recoup an overpayment of pension and tax free cash lump sum from his current pension payments.

Background information, including submissions from the parties

4. Dr S joined the USS on 1 September 1976 and in February 1983 he transferred in six years and 244 days service from another pension scheme. As such, Dr S reached maximum pensionable service in the USS (40 years) on 30 December 2009. Despite reaching the maximum 40 years' service, employer and employee contributions continued to be made into the USS. USS Ltd have said that in 2009 this could only have happened if Dr S and his employer, the University of Bath, had both agreed to pay Extra Service Contributions (**ESC**).
5. On 27 July 2010, the University of Bath contacted Dr S in relation to the contributions paid from 31 December 2009:

"It has come to our attention that you obtained 40 years service at the end of December 2009 at which time both you and the University should have ceased paying contributions to USS; although you do have the option to pay 'extra service contributions' into USS to accrue further service; although the accrual of pensionable service will be at the rate of 25%."
6. Following a telephone conversation on 29 July 2010, Dr S emailed the University of Bath confirming that he wished the additional contributions to be refunded into his Prudential Additional Voluntary Contribution (**AVC**) fund.

7. On 31 August 2011, Dr S left employment and became a deferred member of the USS. He was sent a pension statement for a deferred member on 6 September 2011 which gave a deferred pension to age 65 of £29,121.99 per annum and a tax free cash lump sum of £87,365.97. The statement also said that he had accrued 40 years' service.
8. However, Dr S returned to employment on 19 September 2011 and therefore was eligible to re-join the USS and his membership became active again. He also completed and signed a form called an "Election by member and institution to pay extra service contributions". Part of the form stated:

"CONTRIBUTION START DATE

Enter the date that extra service contributions started. In other words the day after 40 years' service is actually achieved (no earlier than 6 April 2006).

19/09/2011"

9. In 2012, Dr S decided to take flexible retirement. On 14 May 2012, USS Ltd sent him a retirement calculation which showed he had 42 years and 164 days service. Dr S took flexible retirement (80% of his benefits) from 30 June 2012 (but he did not take his AVC at this time). He was provided with a tax free cash lump sum of £150,010.56 and an annual pension of £22,501.68. According to USS Ltd, this is when the overpayment occurred. The calculation included additional service between 31 December 2009 and 31 August 2011, when Dr S was not paying contributions to the USS.
10. Dr S decided to take full retirement in 2015. Full retirement quotes were provided in March 2015, but USS Ltd did not pick up on the error until it did the final calculations in June 2015. It wrote to Dr S on 25 June 2015 with details of the additional benefits to be paid after his full retirement on 30 June 2015. It also explained there had been an error when he took flexible retirement in 2012 and that it had included service between 31 December 2009 and 31 August 2011, but he had ceased paying contributions to the USS between these dates (contributions had only recommenced from 19 September 2011). It stated the overpayment of pension amounted to £2,680.96 and lump sum of £5,812.94. It offered to recoup the pension overpayment from Dr S' pension and the additional amount to be repaid via a lump sum.
11. USS Ltd wrote again to Dr S on 8 July 2015 regarding the overpayment. Dr S responded via email on 20 July 2015 to complain about the overpayment and that he had made financial decisions based on the higher amounts originally paid in 2012.
12. USS Ltd replied the next day. It explained again the background and that the error came to be because the forms when Dr S took flexible retirement indicated that he and his employer had been paying ESC from the time he achieved the maximum 40 years service, rather than just from 19 September 2011.

13. Dr S did not respond and USS Ltd wrote to him on 15 September 2015 about the overpayment and setting up a repayment plan for the outstanding amounts. It chased again on 2 November 2015 and Dr S replied on 5 November 2015 to say that he was seeking further professional advice. Dr S did not respond further and he later lodged a complaint under the USS' internal dispute resolution procedure (**IDRP**) on 6 January 2016.
14. In his IDRP request, Dr S raised a number of points as to why he did not believe he should have to repay the overpayment, including (in summary): -
- it should not have been his responsibility to analyse the calculations he was provided by USS Ltd;
 - USS Ltd should have known that the 2012 amounts were incorrect;
 - the 2012 statement did not make specific reference to contributions between 2009 and 2011;
 - the calculation of benefits did not provide a breakdown between his AVCs and USS benefits; and
 - he claimed to have spent the money in good faith and therefore he had changed his position based on the higher amounts. He says that he gave money to his daughter and renovated his house (to the amount of £74,000).
15. USS Ltd provided an IDRP Stage 1 response on 7 October 2016 and apologised for the delay. It recognised the original error in paying incorrect benefits to Dr S and offered £750 to recognise the distress and inconvenience caused because of this (to be offset against the overpayment of the lump sum). In addition, it offered to recoup the pension and lump sum from future pension payments over a period of three years. However, it also argued that Dr S ought to have noticed the error and therefore could not have relied on it to his detriment:

"In your case, you state that you had no reasonable grounds for doubting that your benefits had been calculated correctly. However:

- the provisional quotation issued in 2012 showed that your benefits were calculated based on a total pensionable service of 42 years and 164 days;
- you had been advised by USS in September 2011 that, at that time, you had accrued 40 years pensionable service;
- when you rejoined USS on 19 September 2011 you completed a form requesting to pay ESC which stated that, at that date, you had accrued 40 years' service; and
- the provisional quotation issued in 2012 showed how the pensionable service had been calculated up to 30 June 2012. In particular, this stated that your pensionable service included:

- pre-October 2011 ESCs of “01 years and 113 days”; and
- pre-October 2011 CCs [Continuation Contributions] of “00 years and 142 days”.

Whilst I accept that USS Ltd should have calculated the pensionable service correctly, there is nonetheless a duty on members to check quotations issued to them, particularly where there was known complications and individual arrangements had been applied to a member's circumstances, as was the case with you.

Taking all of the above into account, in my view, it should have been apparent to you that the quote contained an overstatement of pensionable service and it is reasonable for there to be a responsibility on you to have checked the calculation of your benefits and to have queried this with USS Ltd or the University.”

16. Dr S disagreed with the outcome and asked for the decision to be reconsidered under Stage 2 of the IDRP on 7 April 2017. He disagreed that the statement he received in 2012 should have made him aware of the error and said that it “does not distinguish between these converted contributions and extra service payments”. Therefore, the information supplied in 2012 was not sufficiently clear or informative enough to make him aware of the error. Dr S reiterated his early claims that he had changed his position based on the higher amount and that without the additional amount he would not have been able to afford to gift money to his daughter or renovate his kitchen. Dr S also raised the issue that deductions were already being made in respect of the overpayment from his pension, without his consent, and that USS Ltd should discontinue any claims for recovery of the overpayment.
17. USS Ltd replied under Stage 2 of the IDRP on 6 June 2017 and upheld the decision of the Stage 1 IDRP decision maker. It noted that recovery of the money via Dr S' pension in payment was allowed under USS Ltd's trust law powers and therefore it had not committed any maladministration by making deductions from his pension. It also offered to consider an alternative recoupment plan, if Dr S contacted it to arrange.
18. Dr S remained dissatisfied and made a complaint to this service.

Adjudicator's Opinion

19. Dr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by USS Ltd. The Adjudicator's findings are summarised briefly below:-
 - The Adjudicator explained that Dr S is only entitled to his correct benefits from the USS and, in general, any money paid in error can be recovered. But, there are defences against the recoupment, and, based on the information provided by Dr S, she considered whether Dr S had changed his position (i.e.

that he had changed his position in such a way that it would be unjust to require him to repay the money).

- In doing so, the Adjudicator considered whether Dr S had relied on the information provided by USS Ltd in good faith. In her opinion, Dr S ought to have remembered that he had received a statement and signed a document stating that he had 40 years pensionable service. However, nine months later, he received a retirement statement with an additional 2 years and 164 days, of which he had only paid an additional nine months service (at a rate of 25%, as set out in the email he received in 2010). The discrepancy over a short time span should have been enough for Dr S to have queried this with USS Ltd.
- USS Ltd are seeking to recover the overpayment from future pension payments. In the recent case of *Burgess & Ors v BIC UK Limited* [2018] EWHC 785 (Ch), Mr Justice Arnold held that equitable recoupment was not a restitutionary claim for unjust enrichment. Rather it was an equitable self-help remedy which did not involve a claim for repayment of the monies paid in the past but an adjustment to accounts in the future. As such, equitable recoupment, as in this case, is not subject to a six year limitation period under section 5 of the Limitation Act 1980 (**the 1980 Act**).

20. Dr S did not accept the Adjudicator's Opinion. He submitted:

- "Under, section 91 of the Pensions Act 1995 the trustees cannot recoup overpayments in circumstances where the member has disputed the legitimacy of the recoupment unless they have an order from a competent court. I disputed the recoupment on 20th July 2015. However, USS did not obtain a court order. At paragraph 28, the Adjudicator compares the 'equitable recoupment' in the recent case of *Burgess and Ors* with the action taken by USS to recover the overpayment made to me. She considers that both cases 'did not involve any claim for repayment of the monies paid in the past by an adjustment of accounts in the future'. Even if that is correct, the case of *Burgess* has not been correctly applied by the Adjudicator for the following reasons:
 - a) In its letter to me dated 2nd November 2015, USS asked for either a lump-sum or repayment plan of the overpaid £5,812.94 pension lump sum. Thus, at least as far as this part of the overpayment is concerned, USS's case does involve a claim for repayment and not recoupment.
 - b) In *Burgess et al* the 'adjustment of accounts' involved a policy decision by the scheme to recoup monies because of regulations governing the amounts by which funds should be in surplus or deficit. Repayment was sought from pensioner-members in order to make an adjustment of the fund as a whole and not an individual overpayment. As the judgement

said: 'The present proceedings are not concerned with issues affecting individual pensioners and members of the scheme' para 4.

- c) Burgess contradicts the previous position established in other cases, notably Webber and the PO has not affirmed Burgess, on recoupment, over Weber and others. Burgess is in any event subject to appeal. Further the PO is not obligated to apply strictly any court decision.
- d) The judge's comments in Burgess on recoupment were made 'obiter', i.e. they were not intended to set a precedent and they are not binding on future courts decisions.

For these reasons I contend that recoupment is subject to the six-year limitation period set out in the Pensions Act and therefore that USS is not entitled to recoup the overpayment because it is out of time to do so."

- He also submitted, in summary, that the Adjudicator had not adequately assessed the strength of the point as to whether the information he received in the statement in 2012 was sufficient to identify the error. In particular that:
 - The terminology used on the 2012 statement was different to the terminology used by the Adjudicator;
 - He made additional contributions during the disputed period and therefore it was reasonable for him to believe that these were represented in the 2012 statement;
 - He would not have renovated his kitchen or gifted money to his daughter if he had been aware that the amounts involved were lower;
 - The error on the statements is only around three percent and therefore it is not reasonable for him to have noticed it; and
 - A previous Ombudsman case found that if the overpayment was not significant, it was not reasonable to ask the member to question it.

21. USS Ltd made no further submissions on the points raised above by Dr S. However, DLA Piper, acting on behalf of USS Ltd, confirmed that USS Ltd would be seeking both the lump sum and pension overpayment via recoupment. The overpaid pension has already been recouped to date and therefore it is still looking to recoup the remaining overpaid lump sum of £5,812.94 (although no recoupment for this has happened to date). DLA Piper also said:

"USS L[td] has offered £750 in respect of distress and inconvenience under the IDRP process, and that this should be deducted from the monies owed. The proposal of recovery of the outstanding lump sum over 3 years would, therefore, be at the rate of £140.61 per month. USS L[td] would be willing to recover this over a longer period if this rate would cause the member undue hardship."

22. As Dr S did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. Dr S' further comments do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Dr S for completeness.

Ombudsman's decision

23. The general legal position is that trustees (or managers) of a pension scheme can only pay benefits in accordance with the scheme rules and money paid in error is recoverable from the recipient, even if the error was careless. However, there are some circumstances where the recipient may be allowed to keep some or all of the overpayment and I will also consider these.
24. DLA Piper have confirmed that USS Ltd is seeking recovery of the whole overpayment via recoupment. It is no longer pursuing its claim for repayment, initially made in its letter of 2 November 2015.
25. Recoupment itself is a long-established equitable self-help remedy which allows trustees to recover overpayments from recipients by making deductions from future payments. As it is an equitable remedy, it must be used fairly, and while there are limitations and defences to its use, unlike claims for restitution or repayment of the money, it is not subject to the six year 'time bar' under the Limitation Act 1980.
26. This was the established legal position before the Burgess case was decided. Burgess merely restated and applied the law. Whilst Dr S is right that Burgess was appealed and, indeed, the appeal succeeded, the appeal court did not change the law in relation to recoupment.
27. Dr S argues that there is a contradiction between Burgess and earlier cases, (such as *Webber v Department for Education* (2014))¹. However, these were cases about claims for repayment rather than recoupment out of future income. Consequently, the defence available under the Limitation Act 1980 applied in those cases.
28. I have also considered Dr S's argument, which, in essence, is that his situation differs from the facts of Burgess because the overpayment was in part by way of a cash lump sum. However, where a trustee has made any over-payment to a beneficiary in error, he can recoup the trust money out of any capital or income which subsequently becomes due to the beneficiary. It is a matter for USS Ltd whether it pursues recovery of the overpayment by recoupment from future pension payments coming to Dr S, or via a claim for restitution or repayment. Although USS Ltd had expressed an initial intention to reclaim the money from Dr S, it was entitled to change its mind in favour of recoupment.

¹ *Webber v Department for Education* [2014] EWHC 4240 (Ch)

29. That said, given that Dr S has always disputed that he is under an obligation to repay the money, USS Ltd ought to have had regard to the provisions of section 91(6) of the Pensions Act 1995 before beginning to recoup.
30. In summary, section 91(6) applies where there is a dispute as to the amount of any charge or lien on or set-off against a person's entitlement to a pension under an occupational pension scheme, which is to discharge a monetary obligation owed by that person to the scheme because of a payment made in error. It provides that 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 or in consequence of an award of an arbitrator (with differences for the Scottish legal process).
31. In the Burgess case, the parties and the court proceeded on the basis that section 91(6) applied to the exercise of the equitable right of recoupment, regarding it as a form of set-off. Therefore, USS Ltd strictly should not have commenced recoupment until Dr S's monetary obligation had been determined and became enforceable and their conduct in pursuing recoupment while the amount was in dispute amounted to maladministration.
32. In this regard, a determination by the Pensions Ombudsman to the effect that the trustees of an occupational scheme may or may not recoup pension trust monies paid in error, satisfies the requirements of section 91(6) and the Pensions Ombudsman is a competent court within the meaning of that section.
33. It is not necessary, in my view, to set out all of the reasons for this conclusion in detail for the purposes of this determination. They include that a determination by the Pensions Ombudsman and any direction given by him is final and binding and enforceable as if it were a judgment or order of the County Court, subject only to an appeal on a point of law to the High Court (section 151 PSA 1993). Therefore, a determination brings a dispute to an end.
34. Whilst the judge in Burgess made comments to the contrary, he did not have to decide the point in view of his conclusion on the facts of the case before him and he did not have the benefit of hearing full arguments on the issue
35. Therefore, I shall now consider whether Dr S can resist recoupment of some or all of the overpayment by USS Ltd from his pension payments.
36. In essence, there are two defences available to Dr S against USS Ltd's claim that it is entitled to off-set the overpayments against his future pension:
 - (i) that he detrimentally changed his position because of the overpayment, which he received in good faith (the defence of change of position). If a reasonable person in his position should have realised the overpayment, the requirement of 'good faith' is not met;
 - (ii) that he reasonably relied on a clear and unambiguous statement made by the trustees or managers of the scheme to his detriment, such that USS Ltd

should not be allowed to go back on the statement it made (the defence of estoppel).

37. Dr S's argument that he should not have to repay is twofold: first, he could not reasonably have been aware that he had received overpayments; and second, that he made financial commitments based on the higher tax-free cash lump sum and pension.
38. I have considered all the available information and the parties' representations and I have concluded that Dr S is unable to rely on either defence for the following reasons.
39. Dr S had signed a document in which he declared that he only had 40 years' service in the USS, only nine months before USS Ltd issued the incorrect statement. He had also previously received information confirming that he had reached 40 years' service in July 2010 and August 2011. He had also made an active arrangement to have surplus contributions allocated to his AVC account. Therefore, on receiving the statement in May 2012 showing that he had accrued over two years additional service, within a nine-month period, he ought to have realised there had been a mistake and questioned this with USS Ltd.
40. I have looked at the benefit statements to understand the point which Dr S is making about the terminology which they use. I agree that it would have been difficult to tell from the benefit level figures or from the breakdown of extra service or continuation contributions that there had been an error. It is true as Dr S observes, that there is no element of the contribution record which relates directly to those contributions which were refunded and paid into his AVC account. I do not doubt him when he says there was no reason he should have been able to detect the error from these aspects of the information provided to him. However, the pensionable service total of 42 years and 164 days is clearly shown. I conclude that Dr S ought reasonably to have noticed and questioned the inaccuracy in relation to the total number of years pensionable service, because he was aware of the point at which he had achieved 40 years accrual, had made an active choice to take a refund of contributions overpaid since that date into his AVC scheme and had recommenced payment of contributions from 19 September 2011, less than a year before the statement date.
41. It is for this reason that Dr S does not meet the requirement of good faith necessary to rely on change of position as a defence to recovery of the overpayment by recoupment. For the same reason, I do not consider he can demonstrate that he reasonably relied on the erroneous information from USS Ltd for the purposes of the defence of estoppel.
42. I have also considered whether Dr S can demonstrate that he relied on the higher tax-free cash lump sum and pension when he made his financial decisions to renovate and gift money and conclude that he cannot. The difference in the amount that was paid and the correct amount that should have been paid is less than four percent. The overpayment also amounted to a far smaller sum than that which Dr S says he spent in reliance upon it. I have to consider what Dr S was likely to have

done if he had been paid the correct benefits initially, without benefit of hindsight. On the balance of probabilities, I do not consider the difference in payment amounts was significant enough to have prevented Dr S from undertaking the renovations of his property and gifting money to his daughter. I consider it is more likely than not that Dr S would have acted in the same way had he received the correct benefits at retirement.

43. Therefore, I conclude that USS Ltd is entitled to recoup the overpayment. As recoupment is an equitable remedy, the rate of recoupment should not be unduly harsh so that it would be unfair to Dr S. As a general rule, the courts and the Ombudsman expect that recoupment of overpayments/deductions are spread over a similar period of time to the period during which overpayments were made. In this case, part of the overpayment was in the form of a lump sum. I can see no reason in principle why the lump sum should not also be recouped against future periodic payments subject always to considerations of affordability, which may extend the repayment period beyond that over which the overpayments were made.
44. Trustees should enquire into the member's financial circumstances when looking at adjusting future payments and give the member the opportunity to make representations. I understand that USS Ltd has made the offer of recouping the amount over a three year period from Dr S' pension in payment but are open to any representations from Dr S as to the hardship this may cause him. Should he feel that this would cause him hardship, then it is open for him to contact USS Ltd directly to discuss a suitable rate of recoupment.
45. On the facts in this case, I consider that the offer of £750 is sufficient recognition of the significant maladministration found above and no further direction is necessary. Therefore, I do not uphold Dr's complaint and USS Ltd are entitled to recoup the overpayment subject to making any transfer of funds to the scheme which is necessary to permit Dr S to retain £750 of the overpayment.

Karen Johnston

Deputy Pensions Ombudsman
20 November 2019