

## Ombudsman's Determination

Applicant	Mrs R
Scheme	HSBC Bank (UK) Pension Scheme ( <b>the Scheme</b> )
Respondents	HSBC Bank Pension Trust (UK) Limited ( <b>the Trustee</b> ) Willis Towers Watson ( <b>WTW</b> )

## Outcome

1. Mrs R's complaint against the Trustee and WTW is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, WTW shall pay Mrs R £500 in recognition of the significant distress and inconvenience she has suffered because of its error. I do not uphold the complaint against the Trustee.

## Complaint summary

2. Mrs R's complaint concerns the failure to apply a deduction to her pension benefits from age 60. Consequently, an overpayment has occurred which the Trustee is seeking to reclaim. Mrs R disputes the repayment of these funds.
3. Further, Mrs R says she was not informed that the deduction was a feature of the Scheme and says she did not agree to this.

## Background information, including submissions from the parties

4. Mrs R worked for HSBC (formerly Midland Bank) and is a member of the Scheme.
5. In 2005, Mrs R took her retirement benefits.
6. On 19 March 2018, WTW wrote to Mrs R saying:

"Following a recent audit of pensioner records I have established that, unfortunately, you are not receiving the correct level of pension. When you reached State Pension Age (SPA), under the Rules of the Scheme a State Deduction of £638.40 should have been deducted from your annual pension. Regrettably, as the Scheme administrators, we omitted to deduct the State

Deduction when you reached SPA and therefore you have received too much pension and been overpaid since 6 March 2010.

...

#### Correcting your pension in payment

I have made arrangements to amend your current monthly pension of £339.99 (gross) and reduce it by the monthly State Deduction of £53.20 to provide the correct monthly pension of £286.79 (gross) equating to an annual pension of £3,441.48 (gross) with effect from 1 July 2018. This allows for a 3 month notice period, to provide sufficient time to amend any standing orders or direct debits.

#### Reclaiming the overpaid pension

Whilst I appreciate that your pension has been overpaid through no fault of your own, the Trustee is obliged to recover payments that have been made in error. We will be writing to you separately about this in the next few weeks.”

7. On 15 May 2018, WTW wrote to Mrs R setting out how the overpaid pension could be repaid. This was as follows:-
  - Returning it as a single amount of £4,243.88 by cheque or electronically.
  - Paying the overpayment back at £45.63 per month over the next 93 months, with the amount deducted from Mrs R’s future pension.
  - Through deductions from Mrs R’s pension at a faster rate than proposed above.
8. Mrs R subsequently asked WTW for a full breakdown of the overpaid pension.
9. On 29 June 2018, WTW provided this. It said it was with regret that upon review of the overpayment, WTW had discovered an error in its calculation, so the total overpayment now amounted to £4,403.48. WTW however agreed to reimburse the Trustee with the additional amount of £159.60.
10. On 13 July 2018, Mrs R replied to WTW saying that she did not accept its right to seek repayment and had spoken to a solicitor. She had been advised that the principles of equity, waiver and estoppel were relevant to her case.
11. WTW replied saying the repayment options it had given were in line with the guidelines issued by The Pension Advisory Service (**TPAS**). It also said that if Mrs R was suggesting she had changed her position as a result of the overpayment, she would need to demonstrate her claim in detail and provide documentation detailing her expenditure. It said it wished to offer £300 in full and final settlement of the matter.
12. After further exchanges, Mrs R formally complained under the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). The Trustee replied on 23 October 2018. The main points were:-

- Mrs R had raised the question of the Limitation Act 1980 (**the Limitation Act**) and said the Trustee could only seek to recover payments from the last 72 months. However, where the Trustee's proposal was to recoup the overpaid sums from future payments of pension, there was no claim being made to which limitation applied.
- The Pensions Ombudsman expected members to be given the option to repay overpayments in the same timeframe over which they were received. This option had been provided. Mrs R said she had adjusted her lifestyle in reliance on the pension but declined to provide any evidence of this. She said she would be prepared to provide evidence to the court if a claim was issued against her.
- It was correct that if an agreement could not be reached on the recovery of the funds, the Trustee would be required to issue court proceedings. The court would consider the issue and determine the level of repayments to be paid after hearing from both parties.
- Mrs R had also said that HSBC had a duty of care to provide information on the Scheme and offer advice according to her personal circumstances. It could not comment on what HSBC had said; the Trustee was separate to HSBC and did not owe a duty to provide scheme members with advice. The State Deduction had been explained to members in Scheme booklets and the Trustee had done what was required to make members aware of this feature of the Scheme.

13. Mrs R appealed the Trustee's decision.

14. On 4 March 2019, the Trustee replied under the second stage of the IDRP saying:-

- It wished to apologise for the errors made by WTW. However, the starting point was that a member should only receive their correct entitlement in accordance with the Scheme Rules.
- It was proposed that Mrs R should repay the funds over 93 months. This would result in a monthly repayment of £45.63 per month over 92 months, with a final payment of £45.92. If this would cause difficulty, Mrs R could propose an alternative repayment period and this would be willingly considered.
- WTW had offered £300 in recognition of the distress and inconvenience Mrs R had suffered. If she wished to accept this, she should contact WTW directly.

15. Mrs R's position is as follows:-

- She worked for Midland Bank between 1986 to 2006 and during this time, she was automatically enrolled into the Midland Pension Scheme. She was not given any advice or documentation when she was enrolled. She did not know how the Scheme operated or how benefits were calculated.
- She recalled during the latter part of her career being provided with annual pension statements outlining her "total package", summarising her annual salary

and any benefits, including pension. She did not recall there being any information that her pension payments could be reduced upon receipt of her state pension. Further, she did not recall agreeing any right of clawback or set-off if the Trustee erred in its calculations.

- She was not properly advised when she was enrolled in the Scheme or provided with any documents explaining how the Scheme operated. She was prepared to accept HSBC reducing her pension going forward but she was unable to return the funds purportedly paid to her in error. She had no income and relied on her pension for subsistence.
- She understood that English Law principles of equity, waiver and estoppel were relevant. She had relied on HSBC to perform its functions professionally and had adjusted her lifestyle in reliance on the pension received to date. She did not agree to any form of repayment or deduction.

16. The Trustee's position (set out by its solicitors) is as follows:-

- Mrs R's benefits were subject to a deduction upon her attaining state pension age. This was referred to as a 'relevant deduction' in the Scheme Rules but was more commonly known as the 'state deduction.' Part 2, Rule 2 provided for this deduction, with 'relevant deduction' being defined under part 1 of the Scheme Rules.
- The Trustee appreciated Mrs R was upset that her pension had been overpaid due to an error by WTW, however, the State Deduction was part of the Scheme's benefit design.
- Furthermore, the State Deduction had been explained to members in Scheme booklets and the Trustee had done what was required to make people aware of this feature of the Scheme. In addition, in a letter of 1 November 2005, Mrs R was specifically informed that the State Deduction of £638.40 would be applied to her benefits from age 60.
- It did not consider that there had been any failing in terms of the communication of the State Deduction. Further, as this is part of the Scheme Rules, Mrs R was bound by this by reason of her membership. There was no requirement for her to have agreed to the implementation of the State Deduction. Her only other option would have been to have opted out of the Scheme.
- Mrs R had not evidenced the elements of a change of position defence. The requisite elements of equity, waiver and estoppel had also not been met.

17. WTW was approached for its response to the complaint. It replied saying that cases concerning the State Deduction were usually dealt with by the Trustee. It understood that the Trustee had already responded.

18. Mrs R made the following further comments:-

- The Trustee had made assertions which were wrong. It said that the State Deduction was explained to members in booklets over a long period of time. At no stage had HSBC disclosed a copy of the booklet it claimed was provided. She had no recollection of ever receiving such a booklet.
  - In any case, she did not accept that the simple provision of a booklet by HSBC to her was sufficient to put her on notice of the risks faced, discharge the duty of trust and confidence owed to her by her employer, and/or discharge the obligations to treat her fairly by ensuring she understood the implications of the Scheme. These failures by HSBC had prejudiced her. As such, HSBC was estopped from taking this position; she would argue this in a small claims court if necessary.
  - She did not recall receiving the letter dated 1 November 2005, referred to by the Trustee. A copy should be provided.
  - It had been suggested that she should provide evidence of her finances. She could assure the Trustee that the pension was her main source of income and this deduction would impact on her lifestyle.
19. As part of the Adjudicator's investigation, she asked the solicitors representing the Trustee to provide a copy of the 1 November 2005 letter referred to and a copy of the Scheme booklet. It provided this; key extracts are quoted below:-
- Scheme Booklet of 1 October 1990 – Under the section 'Early Retirement' the following is stated: "In this case your pension is calculated according to the 1/60 formula (see Para 1) using your final salary and the State deduction at the date of your early retirement and your pensionable service completed to the date when you retire early. However, the State deduction is not applied until State pension age."
  - 1 November 2005 letter – "Further to recent correspondence, we note that you wish to receive a lump sum totalling £9,923.29. This will leave you with a reduced pension of £2,821.20 per annum, less the State Deduction of £638.40 per annum. The State deduction only applies from age 60, and the pension will be reduced accordingly from that date."

## **Adjudicator's Opinion**

20. Mrs R's complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of WTW. The Adjudicator's findings are summarised below:-
- In the case of *Burgess & Ors v BIC UK Limited* [2018] EWHC 785 (Ch) (**Burgess**), 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 any claim for repayment of the monies paid in the

past and instead required an adjustment of accounts in the future. Hence, equitable recoupment was not subject to a six-year limitation period under section 5 of the Limitation Act and the Limitation Act did not apply as the Trustee was seeking to recover the overpayment by recoupment.

- The most common defence against the recovery of an overpayment was that of a change of position. This was where the applicant had changed their position such that it would be unjust to require them to repay the overpayment either in whole or in part. The applicant must, on the balance of probabilities, show that because of the overpayment, which he received in good faith, he detrimentally changed his position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure was irreversible.
- Regarding good faith and whether this was satisfied, Mrs R said she was not aware of the State Deduction. The Trustee had however referred to the 1 November 2005 letter which explained that the State Deduction would apply from age 60. Mrs R could not recall this letter but the address on this corresponded with where she resided, so this was correctly addressed. Generally, it was more likely than not that correctly addressed correspondence was received by the intended recipient, unless there was evidence to indicate otherwise.
- Whilst there was no reason to doubt that Mrs R was unaware of the State Deduction, objectively, she was provided with the information to draw this to her attention at an appropriate time, around the point of retirement. The good faith requirement did not only concern instances where the applicant might have known of the error, but also where they had the information available to them to realise any discrepancies. Mrs R therefore had the requisite information available to know the State Deduction was to apply from 2010. Although, Mrs R might not have recalled what this amounted to, it was made clear that a deduction would apply, meaning there would be a decrease applied that year. As Mrs R would reasonably have been expected to make enquiries when this did not happen, she did not meet the test for good faith. An estoppel defence would not succeed either as applicants would also be expected to have acted in good faith.
- Mrs R had made reference to equity as a further defence. She had not identified any specific principle within this, aside from estoppel, which had already been considered. Mrs R had alluded to “waiver” as well, however this did not apply and was not a term which fitted the analysis of this case.
- Mrs R had said that she was not provided with any advice by HSBC on the Scheme when she joined. HSBC was not a party to the complaint so no further comment could be made on this point. Generally speaking, it was fairly commonplace for schemes to automatically enrol employees into workplace pensions and for trustees to issue literature explaining how the scheme worked. The Scheme booklet from 1990 did explain the State Deduction and how to opt out of the Scheme (should a member not deem the Scheme to be appropriate for

them). The Trustee had therefore not misled Mrs R on this point or made an administrative error.

- As no defences to recovery applied, the overpayment could be recouped from Mrs R.
- However, the position in which Mrs R has found herself was caused by WTW's failure in the Scheme administration. WTW had offered Mrs R £300 in recognition of its error. This award ought to be increased in line with The Pensions Ombudsman's guidance on non-financial injustice, to reflect the significant distress and inconvenience caused to Mrs R because of WTW's mistake.
- The complaint was partly upheld and it was recommended that WTW pay Mrs R £500 for the significant distress and inconvenience she had suffered.

21. Mrs R and WTW accepted the Adjudicator's Opinion but Mrs R has since said to the Trustee that she can only afford to repay £10 per month. The Trustee has asked for the matter to be referred for an Ombudsman Determination because there still remains a disagreement over the rate of recoupment and so the complaint was passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the main points made by the parties for completeness.

### **Ombudsman's decision**

22. The Limitation Act does not apply, as the Trustee is seeking to recover the monies by recoupment. In terms of whether other defences apply, I agree that Mrs R fails the test for good faith necessary to invoke a change of position defence, where she had been sent information which made her aware that the State Deduction would apply from age 60. Mrs R would reasonably be expected to have made enquiries when no such deduction was applied.
23. Mrs R is also arguing estoppel as a defence. Broadly, the three requirements that need to be satisfied to establish estoppel by representation are: (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he/she will suffer detriment if the defendant is not held to the representation or promise.
24. Mrs R has said that she has adjusted her lifestyle in reliance on the pension received to date. However Mrs R's reliance was not reasonable; it was not reasonable for her to rely on or become adjusted to the level of income she was receiving from age 60, as she had been sent information which suggested that a deduction would be put in place from this point. Similarly, because of the information Mrs R was sent, it cannot be argued that there was a common assumption between the parties that Mrs R would receive the level of benefit she was (erroneously) receiving, which would have

been necessary to establish a defence of estoppel by convention. For this reason, I do not find that Mrs R has a valid estoppel defence.

25. In respect of Mrs R's financial hardship claim, this will be a matter for the Trustee to consider further when agreeing a repayment plan with Mrs R.
26. I agree that WTW made an administrative error in failing to apply the State Deduction to Mrs R's benefits and that it should pay her an increased non-financial injustice award in recognition of this.
27. I partly uphold Mrs R's complaint.

## **Directions**

28. Within 21 days of the date of this Determination, WTW shall pay Mrs R £500 in recognition of the significant distress and inconvenience caused to her by its error. It should give Mrs R the option of having this amount paid directly to her, or offset against the overpayment.
29. The Trustee shall also give Mrs R a reasonable opportunity to present it with further information, evidencing her claim for financial hardship.
30. The Trustee shall recalculate the overpayment owed by Mrs R and recoup the amount owed over a period not less than that over which the overpayments occurred. It is open to the Trustee to recoup over a longer period, taking into account any evidence presented by Mrs R in accordance with paragraph 29 above, if this is agreed between the Trustee and Mrs R.

**Anthony Arter**

Pensions Ombudsman  
19 June 2020