

Ombudsman's Determination

Applicant	Mr A
Scheme	Local Government Pension Scheme (the Scheme)
Respondent(s)	Enfield Council (the Council)

Complaint summary

Mr A has complained that the Council, his former employer, is wrongfully withholding his pension benefits.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against Enfield Council because the legislation in question does not allow for them to withhold Mr A's pension rights, in the manner they have.

Detailed Determination

Relevant Regulations

The Local Government Pension Scheme (Administration) Regulations 2008

Recovery or retention where former member has misconduct obligation

74.—(1) This regulation applies where a person—

(a) has left an employment, in which he was or had at some time been a member, in consequence of a criminal, negligent or fraudulent act or omission on his part in connection with that employment;

(b) has incurred some monetary obligation, arising out of that act or omission, to the body that was his employing authority in that employment; and

(c) is entitled to benefits under the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (S.I. 2007/1166).

(2) The former employing authority may recover or retain out of the appropriate fund—

(a) the amount of the monetary obligation; or

(b) the value at the time of the recovery or retention of all rights in respect of the former employee under the Scheme with respect to his previous membership (as determined by an actuary),

whichever is less.

(3) The rights specified in paragraph (2) (b) do not include rights enjoyed by virtue of the receipt of a transfer value or credited by virtue of AVCs or SCAVCs.

(4) The former employing authority must give the former employee—

(a) not less than three months' notice of the amount to be recovered or retained under paragraph (2); and

(b) a certificate showing the amount recovered or retained, how it is calculated, and the effect on his benefits or prospective benefits.

(5) If there is any dispute over the amount of the monetary obligation specified in paragraph (1)(b), the former employing authority may not recover or retain any amount under paragraph (2) until the obligation is enforceable under an order of a competent court or the award of an arbitrator.

Material facts

1. Mr A worked as Head of Finance for the Council.
2. Between June 2008 and December 2010, Mr A fraudulently sent a total of 104 payments to his personal bank account from the Council's agency staff provider account. In total, Mr A paid himself the sum of £448,207.
3. In December 2010, Mr A deleted his bank details from the Council's system. This was so the fraud would be more difficult to trace.
4. The Council went through a period of restructuring termed, 'the LEANER review', Mr A was made redundant as a result of this programme; 31 December 2010 was his last day of employment. Mr A left employment without his fraud becoming known to the Council.
5. In 2011, the City of London Police were investigating a fraudulent property investment into which Mr A had invested significant amounts. They investigated the origin of the monies Mr A had invested and this led to Mr A's fraud being detected.
6. On 18 March 2011, the Police notified the Council of the fraud.
7. On 11 July 2012, Mr A was convicted of fraud and sentenced to four years imprisonment.
8. The Council secured a judgment in the sum of £509,889.23.
9. On 16 May 2012, Mr A was made bankrupt on the Council's petition.
10. On 12 October 2012, the Council's Director of Financial Resources and Customer Services wrote to Mr A with notice of his proposal to retain £476,300 of the value of Mr A's pension rights.
11. The Council explained that it was relying on Regulation 74 of The Local Government Pension Scheme (Administration) Regulations 2008 (**the LGPS Regulations**), as the legal basis for retaining these rights. These funds would be used as part payment towards the debt which Mr A owed to the Council.
12. The letter said that Mr A could appeal this decision under Regulations 58 to 62 of the LGPS Regulations. Appeals needed to be made within six months of the date of notification.
13. On 9 April 2013, Mr A's legal representative notified the Council of his disagreement with its decision. The following points were made:-
 - Mr A had left his employment as a result of the redundancy programme.
 - The Council only become aware of Mr A's fraudulent conduct after he had left its employment.

- Therefore, Mr A's reasons for leaving his employment were "wholly unconnected with his previous criminal conduct".
- The Council had purported to exercise a statutory power which it only has if the express conditions for the application of Regulation 74 of the LGPS Regulations were met.
- Regulation 74 applied where a person had left an employment in consequence of a criminal, negligent or fraudulent act or omission in connection with that employment.
- Mr A did not leave his employment in consequence of his criminal, negligent or fraudulent act. As the conditions of regulation 74 had not been satisfied, the Council did not have the power to retain Mr A's pension funds as it had set out to do in its letter of 12 October 2012.

14. On 10 May 2013, the Council confirmed that it did not agree with Mr A and his legal representative's position. It said:-

- Regulation 74 of the Regulations made provision for special adjustments to be made to pension payments by way of recovery or retention where a former member has a 'misconduct obligation'.
- In considering Regulation 74, conditions (b) and (c) had been met. Criteria (a) would have been met if Mr A's fraud had been discovered prior to his dismissal. For example, had Mr A's fraud been discovered a day after his dismissal for redundancy, on a strict literal construction of Regulation 74, the Council would not be able to recover the pension. However, had the fraud been discovered a day before and it was coupled with his dismissal, then the regulation would apply.
- The principles of a literal approach to statutory construction are well established, but an exception is where such a reading would produce an absurd result, or one at odds with the statutory purpose. It would be absurd, and in conflict with the statutory purposes of protecting scheme members and public funds if Regulation 74 was applied in a way which prevented recovery in this case.
- In the case of *Devis v Atkins* [1977], the court held that Parliament could not have intended that the compensation owed to a dismissed employee should depend on whether or not he had successfully concealed his own misdeeds after a dismissal. A more recent case which discusses similar points is *R (Welwyn Hatfield Council) v Beesley* [2011].
- On the principle that a person should not benefit from their own wrongdoing, a literal reading of Regulation 74 would allow the more sophisticated fraudster to

benefit from the protection of the Scheme. Parliament cannot have intended this.

15. On 8 November 2013, Mr A's legal representative responded to the Council's submission:-

- The phrase "in consequence of", used in the wording of regulation 74, required a causative link.
- The Council's reasoning that giving the words in the Regulation their plain meaning would mean that Mr A would escape his liability to the Council, is wrong. Mr A remains liable for the debt against him, which is enforceable under the Attachment of Earnings Act 1971.
- The case of *Devis and Sons Ltd v Atkins* [1977] does not address the question at hand, which concerns the interpretation of a clear statutory criterion. However, the case makes reference to *Epping Forest DC v Philcox* [2002], which sets out that there is no, "principle of statutory construction that the plain words of a statute which define what is lawful were to be read subject to a proviso that what is criminal cannot be lawful."
- The causative nexus of the regulation is rational and not absurd. Although Mr A was liable for a wrongdoing against the Council, the wrongdoing did not cause Mr A's dismissal.
- It was plainly the intention of the legislature that debts owed to the Council by employees leaving their employment can be set off against the pension, but only those which cause their departure.

16. The Council responded to Mr A's representative on 8 January 2014:-

- It agreed that on a literal interpretation, the conditions of Regulation 74 are not met.
- The provisions in question deal with the recovery of funds from the Scheme and should be construed in that context. In such a context, it would be absurd to reward the better fraudster over the less effective fraudster.
- An order under the Attachment of Earnings Act 1971 could not be used as effectively as Regulation 74.

Summary of Mr A's position

17. The Council do not have any power under regulation 74 to retain his pension funds. The Council has purported to exercise a statutory power which it only has if the express conditions of the regulation in question are satisfied.
18. The first condition, which applies where a person has left an employer in consequence of a criminal, negligent or fraudulent act or omission, is not satisfied.

19. As a matter of plain English, the term “in consequence of”, requires the former to be proximately caused by the latter.
20. The Council’s assertion, that the literal interpretation of the Regulation leads to an absurd result and should be constructed otherwise, is wrong. The statutory principles put forward cannot operate to rewrite the plain meaning of a statutory instrument.
21. The Council’s argument that giving the legislation its plain meaning would prevent the recovery of funds, is wrong, because Mr A remains liable for the debt.
22. Mr A will not benefit from his wrongdoing should he be paid his pension rights in full as he has paid the penalty of imprisonment for his crime and owes a debt to the Council.
23. The causative requirement of Regulation 74 is not absurd, and in this case, means that although Mr A is liable for a wrongdoing against the Council, as the wrongdoing did not cause his departure, the nexus required by Regulation 74 to set off the pension obligation against the wrongdoing is absent.
24. The authorities which the Council has cited do not support its interpretation of Regulation 74.

Summary of the Council’s position

25. The Council had the power to act as it did; conferred by Regulation 74 on its proper construction.
26. On a literal reading, criteria (a) of Regulation 74 is not met. But it would have been met if Mr A’s fraud was discovered as he would have been dismissed. The inconsistency of this approach can be demonstrated by comparing the differing outcomes which would ensue if the fraud had been discovered the day before Mr A’s dismissal and the day after.

The overriding objective in statutory construction is to give effect to the presumed intention of Parliament. The exception to the normal rule of literal construction is where such a reading produces an absurd result or one at odds with the statutory purpose of the provision.

27. The leading text of statutory construction, ‘Bennion on Statutory Interpretation’ recognises the increasing influence of the purposive construction in recent times. Section 312 outlines the presumption that an ‘absurd’ result is not intended.
28. It cannot be supposed that Parliament intended to provide for recovery in cases where a person leaves employment due to negligent acts or omissions, but not in cases where the employee left for reasons other than his or her fraud being discovered.
29. The general approach taken by the Courts to such frauds is supportive of the Council’s position.

30. A broad analogy can be drawn with the case of *Devis v. Atkins* [1977] AC 931. Three members of the House of Lords commented that, “it is impossible to ascribe to Parliament an intention that the tribunal should be bound to award basic compensation to a fraudulent employee because he has successfully concealed his fraud.”
31. In the case of *Welwyn Hatfield Council v (1) Secretary of State for Communities and Local Government and 2) Beesley* (2011), the court considered whether fraudulent behaviour in a planning application would prevent a landowner from obtaining immunity in circumstances where the literal requirement of the immunity provisions were satisfied. Lord Mance JSC questioned: “whether it can have been the intention of the legislator that a person conducting himself like Mr Beesley can invoke the benefits....”
32. The other principle of this case is that a person should not benefit from their own wrongdoing.
33. The mischief of the Regulation can be met by implying the words, “or would have left his employment as a consequence of...if his employer had known of the fraud at the time he left” to Regulation 74.
34. The authorities cited by Mr A do not engage with the key point, which is the proper construction of Regulation 74 in a fraud case, when considering the principles of statutory construction.
35. The Council has pursued conventional means of recovery in this case. Mr A has contested the Council’s use of Regulation 74. Mr A presumably sees a significant advantage in limiting the Council’s ability to recover funds under Regulation 74. The Council, as at 17 August 2015, had not been able to recover more than £50,000 from Mr A.
36. There is no merit in the complaint. The rules of statutory construction require for the absurd result to be rectified by the words set out above.

Conclusions

37. The Council is of the view that Regulation 74 does provide for an employing authority’s retention of a former employee’s pension rights in the circumstance where a former employee did not leave employment as a consequence of a criminal, negligent or fraudulent act or omission, on his part, in connection with that employment.
38. It is clear that when applying a literal construction of the Regulation in question, the conditions of this rule are not met and therefore, the Regulation does not allow for the retention of Mr A’s pension rights. Specifically, Mr A left employment as a result of a redundancy programme and, not, in consequence of his fraudulent act.

39. The Council has highlighted the inconsistent approach which would follow if the fraud had been discovered the day before Mr A leaving employment and contrasted this to the position where the fraud is discovered shortly after leaving.
40. The Council has also said that Mr A would have been dismissed had his fraud been discovered whilst he was in employment, which would have meant that the Regulation in question would provide for the Council to retain his pension rights. I appreciate the point which is being made, however, I would emphasise that both of these scenarios are hypothetical, and do not apply to the situation I have been presented with here. Further, if the legislation itself does not provide for these differing outcomes, it is not the role of the Council to imply its own wording to remedy the supposed flaw or weakness of the wording.
41. The key question here is whether Regulation 74 can be constructed in the way that the Council intends for it to be.
42. The Regulation is structured so that the words, “in consequence of a criminal, negligent or fraudulent act...” are central to the construction of the overall Regulation. Therefore in my view, the causative requirement of the Regulation, is undoubtedly present and, I would argue, unequivocal.
43. The correct construction of any given legislation is a broad matter. My approach to the construction of legislation is in line with that of one of this Office’s previous determinations. This is that:

“The courts have developed a number of rules and presumptions to assist both in the interpretation and construction of statute. The starting point for the court is to say that Parliament’s intentions are found by giving words their ordinary and natural meaning in context; that is, words should be given their common or ordinary meaning as they apply generally to people. If this approach produces an absurd result or one which is inconsistent with the rest of the statute, the court will modify the grammatical and ordinary sense of a word, but only so far as is necessary to avoid the absurdity or inconsistency. If these approaches do not help, the court may consider the rationale behind the statute for assistance in interpreting it, including looking at the law as it was before the statute was enacted.”
44. I cannot see that giving the legislation its plain and ordinary meaning leads to an absurd result, as the Council contends. The causative requirement is not illogical; it links the consequence of leaving an employment because of misconduct, with the employing authority’s right to the monetary obligation arising out of that misconduct.
45. Whilst I agree that the overriding objective in statutory construction is to give effect to the presumed intention of Parliament, I do not consider that there are sufficient grounds to suggest that Parliament intended for those who had left employment not in consequence of their fraud, to be caught by the Regulation.

46. The Council has implied the words, “or would have left his employment as a consequence of...if his employer had known of the fraud at the time he left” in order to remedy the purported mischief of such a scenario. However, it would be dangerous to imply such wording when there is no indication, either in case law, precedent, or Parliamentary notes, that this was intended.
47. Furthermore, the wording of Regulation 74 is clear and precise; it does not leave any scope for any such wording to be implied. I consider that the causative requirement of Regulation 74 is a significant part of the rule.
48. Equally, I cannot see how the interpretation of the wording “in consequence of” as carrying no causative requirement, and in effect meaning “after” would provide for a plain and ordinary meaning of the Regulation. Rather, such a construction would go beyond the ordinary meaning of the Regulation.
49. The Regulation, in such a context, does not appear to have been formally considered before a court of law. Hence, cases with similar, but not identical considerations, as well as cases which consider the general principles of construction, have been cited by the Council as guidance on how Regulation 74 should be interpreted.
50. The authorities cited by the Council do not, in my opinion, lend weight to its particular construction of Regulation 74. I will not deal with all of the cases cited by the Council, but the pertinent ones put forward to support its argument.
51. The court in the case of *Welwyn Hatfield Council v (1) Secretary of State for Communities and Local Government and 2) Beesley* [2011] considered whether Mr Beesley should benefit from a four year immunity rule concerning the breach of planning control under The Town and Planning Country Act 1990. Mr Beesley had obtained planning permission to construct a hay barn for grazing and haymaking. Although the external appearance of the property which was built was that of a hay barn, the property had the features of a dwelling house, which is what Mr Beesley had used the premises for. After four years had passed, which was the requisite period for obtaining immunity for his breach of planning permission, Mr Beesley submitted an application for a certificate of lawfulness for use of the building as a dwelling house.
52. At [53] of the judgment, Lord Mance JSC said: “Since the ultimate question is whether it can have been the intention of the legislator that a person conducting himself like Mr Beesley can invoke the benefits of sections 171B and 191(1) I do not consider that there can be any absolute principle that public policy can only bear on the legislator’s intention in a context where there has been the commission of a crime.”
53. The aforementioned are the sections pertaining to time limits applying to a breach of planning control and the provisions for a certificate of lawfulness.

54. Lord Rodger at [63] then commented: “in short, it is unthinkable that Parliament would have intended the time limit for taking enforcement action to apply in such circumstances.”
55. In considering the above, whilst I appreciate the broad analogy being made here, I do not consider that this case is directly applicable to Mr A’s situation. Mr Beesley had taken a course of action where he had used the provisions of the Town and Planning Country Act 1990 to achieve a disingenuous outcome, and then sought to rely on another section of the same Act as immunity from the repercussions of his breach.
56. In contrast, Mr A’s act of fraud was an independent act and not an abuse of the legislation which is being relied on here to withhold his pension. Therefore, there is a distinction to be made as, in the Beesley case, the judges had sought to rectify the mischief within a specific set of legislation. It does not have such broad application that the principle can be generalised and applied to Mr A.
57. The Council has also cited the case of *Devis and Sons Ltd v Atkins* [1977] AC 931 concerning the dismissal of an employee, as a broad analogy of the ability to reduce an award of compensation based upon misconduct discovered after a dismissal. Lord Diplock commented: “...I find it impossible to ascribe to Parliament an intention that the question as to whether a dismissed employee who had been guilty of gross misconduct was entitled to substantial compensation should depend upon whether or not he had been successful in concealing his own misdeeds until after his dismissal.”
58. However, again, I do not consider that this case is similar. Mr A is not permitted to retain his fraudulent funds because he concealed his own fraud. Rather, there are specific, criminal consequences which have been applied to Mr A. As well as the criminal consequences which follow his fraud, such as his prison sentence, Mr A will be required to pay back the funds he fraudulently gained by way of a judgment against him. It may be that the debt can be enforced against Mr A’s pension under The Attachment of Earnings Act 1971.
59. Overall, I do not consider that statutory principles and mildly comparable case law overrides a clear, legislative provision.
60. I acknowledge that Mr A has also cited various authorities to support his case, but I do not consider it necessary to comment on these as my view is that the Regulation itself supports his case. However, it is worthy of mentioning that, as is the case with the Council, none of the authorities he has cited considers the wording of Regulation 74.
61. In the circumstances outlined, I do not consider that Regulation 74 makes provision for the Council to retain Mr A’s pension rights.
62. For this reason, the complaint should be upheld and the Council should reconsider their interpretation of Regulation 74 and whether in seeking to retain Mr A’s pension rights, it has applied these correctly.

63. Whilst it is not my intention for Mr A to benefit from his fraud, I do not consider that Regulation 74 allows the retention of Mr A's pension rights.

Directions

64. The Council should reassess the method it wishes to apply in its recovery of the debt from Mr A and take the appropriate steps, or allow Mr A to access his benefits. The Council should complete its reassessment within a reasonable period of time but no later than within three months of the date of this determination.

Anthony Arter

Pensions Ombudsman
28 March 2017