

Recovery in overpayment cases – Court of Appeal judgment that the Pensions Ombudsman is not a ‘competent court’

This Factsheet explains the effect of the Court of Appeal judgment on cases where a pension scheme looks to recover an overpayment by making deductions from a member’s future pension payments.

Background

The Pensions Ombudsman (**TPO**) often deals with complaints or disputes between members and trustees/managers of occupational pension schemes (trust or statutory) about whether benefit payments paid in error should be repaid by the member. Parliament granted TPO powers to handle such matters - for instance, about whether recovery can be made and, if so, the amount or terms (e.g., the period of recovery) on which the pension scheme proposes to recover the overpayment against future pension payments. A Pensions Ombudsman’s (**PO**) Determination is final and binding on the parties, subject only to appeal on a point of law.

Section 91(6) of the Pensions Act 1995 (**Section 91(6)**) provides that where there is a dispute regarding the amount of an overpayment to be repaid or the rate of recovery, a pension scheme cannot recover the overpayment from a member’s future pension payments, unless the obligation to repay has become enforceable under an order of a ‘competent court’ (or in consequence of an award of an arbitrator). Section 91(6) applies to payments that are ‘set-off’ against future pension payments and has been applied by the courts (see below) to trust schemes that ‘recoup’ against future pension payments.

The Pensions Ombudsman v CMG Pension Trustees and Another (**CMG**)

The Court of Appeal ruling in *The Pensions Ombudsman v CMG Pension Trustees and Another* [2023] EWCA Civ 1258 held that the PO is not a ‘competent court’ within Section 91(6). In reaching this view the Court concluded that where a dispute exists a PO Determination alone is not sufficient for a pension scheme to recoup the overpayment from a member’s pension and that an order must also be made by the County Court for enforcement of that PO Determination so as to satisfy Section 91(6).

Future approach

The DWP has said that, when possible, it intends to introduce legislation to effect a change formally empowering TPO to bring an outstanding overpayment dispute to an end without the need for a county court order.

Guidance on managing overpayment disputes

Internal Dispute Resolution Procedure (*IDRP*)

Parties are strongly encouraged to ensure that all possible defences to the recovery of overpayments are raised and properly dealt with during IDRP.

The parties should also have turned their minds to what type of schedule of recoupment can be achieved and directed by the PO, in the event any defences are unsuccessful and a Determination is needed to bring the dispute to an end.

Pre-Determination

The PO anticipates that in the vast majority of cases the parties will be able to come to a mutually satisfactory agreement either before or during the Ombudsman process, so there is no longer a dispute for him to formally determine. The investigation will cease further to that agreement.

If the parties wish to have a Determination, they may request one.

PO Determination

A member can make a complaint to TPO about the scheme's proposal to recoup the overpayment from their pensions. The PO can make a Determination whether the scheme is entitled at law to recoup i.e. determine the merits of the complaint.

If the member (or other party) thinks that the PO is wrong in law, they can appeal a PO's Determination to the High Court (Chancery Division) to seek to have it overturned.

A practical problem now arises following the 'competent court' judgment because to give effect to the recoupment the pension scheme must now take an additional step. It must obtain an order from a County Court enforcing¹ the PO's Determination.

¹ Please note that, in terms of enforcing the PO's Determination, a different court procedure may apply in Scotland and Northern Ireland.

County Court process

The County Court (Pensions Ombudsman) (Enforcement of Directions and Determinations) Rules 1993 provide for enforcement action (in England and Wales) to be brought in a county court. In the case of a scheme looking to obtain an enforcement order to start recouping from a member, the appropriate county court is the one nearest to the member (CPR 70.5, see below).

The County Court (or arbitrator), will **not** revisit the merits of the member's complaint or dispute, i.e. re-hear the case, because the PO's Determination has already decided the case.

Rather, the role of the County Court is to authorise the pension scheme to commence deduction of the overpayments from the member's future pension payments in accordance with the designated schedule.

To facilitate this process, the Determination will set out a schedule of the amount and rate of recoupment.

When issuing the Determination, the Ombudsman will also provide a certified copy of the Determination for the County Court. Civil Procedure Rule 70.5 and Practice Direction 70A set out in detail the procedure that must be followed. The court form (currently N322A) needs to be completed, with attached fee, referencing s151 Pension Schemes Act 1993 (the provision under which enforcement is being sought). The County Court will deal with the matter on the papers.

This Factsheet will accompany overpayment PO Determinations.

The Pensions Ombudsman is an independent organisation set up by law. Our primary function is handling pension complaints and disputes. We act impartially and our service is free. This factsheet is part of a general overview of The Pensions Ombudsman's role and investigation process. It does not constitute legal advice or other professional advice and parties should take their own advice as appropriate. The Pensions Ombudsman will consider each application on a case-by-case basis, having regard to the facts and evidence in each case and in accordance with relevant legislation. You should consult a professional adviser for legal or other advice.

December 2023