

Recoupment in overpayment cases: the Pensions Ombudsman is a ‘competent court’

We thought it would be helpful to provide a factsheet of our view in response to Mr Justice Arnold’s comments in *Burgess v BIC UK Ltd* [2018] EWHC 785 that the Pensions Ombudsman is not a ‘competent court’ for the purpose of section 91(6) of the Pensions Act 1995.

Background

Where the trustees of an occupational pension scheme have mistakenly overpaid benefits, they may be entitled to recover the overpayment by off-setting against future benefit payments, using the equitable ‘self-help’ remedy of recoupment.

But, where there is a dispute regarding the amount to be repaid, the set-off cannot be exercised, under section 91(6) of the Pensions Act 1995 (PA 1995), unless the obligation to repay has become enforceable under an order of a ‘competent court’ or in consequence of an award of an arbitrator.

In the case of *Burgess v BIC UK Ltd* [2018] EWHC 785, Mr Justice Arnold suggested:

- i) a Determination made by the Pensions Ombudsman was not an order of a ‘competent court’, because the Pensions Ombudsman is not a court; however
- ii) an order of the county court enforcing any Determination of the Pensions Ombudsman, or any direction made by the Pensions Ombudsman in a Determination, pursuant to section 151(5) of the Pension Schemes Act 1993 (“PSA 1993”) would be an order of a ‘competent court’.

If this was so, the consequence would be that a direction by the Pensions Ombudsman permitting trustees to recover overpaid benefits by offsetting them against future benefit payments would be of no practical use to the trustees, unless they obtained an order from the county court in effect to ‘recognise’ that direction.

Our position

We regard Mr Justice Arnold’s comments as obiter. That is, he was not required to decide whether the Pensions Ombudsman is a ‘competent court’ for the purposes of section 91(6) of the PA 1995 in view of his conclusion on the facts of the case before him. He merely gave a provisional view on the matter, which did not form part of his judgment on the issues before him.

The court did not have the benefit of hearing full legal arguments on the issue, including from the Pensions Ombudsman himself, who was not a party in the appeal.

The following is a non-exhaustive list of reasons why the Pensions Ombudsman considers he is a 'competent court':

A Pensions Ombudsman Determination brings a dispute to an end

- The Pensions Ombudsman has jurisdiction to investigate complaints or disputes about overpayments under section 146 and determine them in accordance with section 151 of the PSA 1993.
- The Determination by the Pensions Ombudsman of the amount of the overpayment that can be recovered concludes the dispute, including also for the purposes of section 91(6) of the PA 1995.
- This is because under section 151(3) of the PSA 1993, the Determination by the Pensions Ombudsman of a complaint or dispute and any direction given by him is final and binding, subject only to an appeal on a point of law to the High Court.

The Pensions Ombudsman is judicial, and Determinations are orders or judgments.

- There is established judicial authority, *Peach Grey & Co. v Sommers* [1995] I.C.R. 549, that tribunals with the characteristics of a court of law are properly to be regarded as courts. The Pensions Ombudsman is such a tribunal.
- The Pensions Ombudsman is a tribunal under the auspices of the Tribunals and Inquiries Act 1992 in respect of its functions under or by virtue of section 146(1)(c) and (d) of the PSA 1993 (disputes of fact or law). It is also of note that section 91(6) of the PA 1995 applies not just to an order of a competent court, but also to an award of an arbitrator, or, in Scotland, a sheriff-appointed arbiter.
- Under Rule 52.1(3)(c) of the Civil Procedure Rules, a 'lower court' is defined as 'the court, tribunal or other person or body from whose decision an appeal is brought'. Hence, the Pensions Ombudsman is a lower court for the purposes of the Civil Procedure Rules.
- The Pensions Ombudsman must decide disputes in accordance with established legal principles and, apart from in relation to his pure maladministration jurisdiction, cannot direct remedial steps to be taken that are not steps that a court of law could properly have directed to be taken.
- The Pensions Ombudsman may refer questions of law to the High Court or, in Scotland, the Court of Session: section 150(7) of the PSA 1993.

- Under section 150(4) of the PSA 1993, the Pensions Ombudsman may certify an offence of contempt of court to the county or sheriff court if any person obstructs the Ombudsman in the performance of his functions or is guilty of any act or omission in relation to his investigation.
- The Pensions Ombudsman's final and binding Determinations or directions cannot be overturned except by appeal on a point of law to the High Court or, in Scotland, the Court of Session: section 151(4) of the PSA 1993.

Pensions Ombudsman Determinations are enforceable

- The county court recognises the Determination for enforcement but cannot re-determine or duplicate a Determination or direction because the substance of the matter has already been heard by the Pensions Ombudsman under s.151(1) & (2) and is final s.151(3) PSA 1993.
- The Pensions Ombudsman's Determinations or directions are enforceable in the county court, section 151(5) of the PSA 1993, as if they were a judgment or order of that court. In Scotland, similarly, but termed as an extract registered decree arbitral bearing warrant for execution issued by the sheriff court. The statutory requirement under s91(6) PA 1995 is not that enforcement proceedings are brought. In practice, it seems unlikely that enforcement measures would be necessary or relevant, as recoupment is a self-help remedy for trustees.