

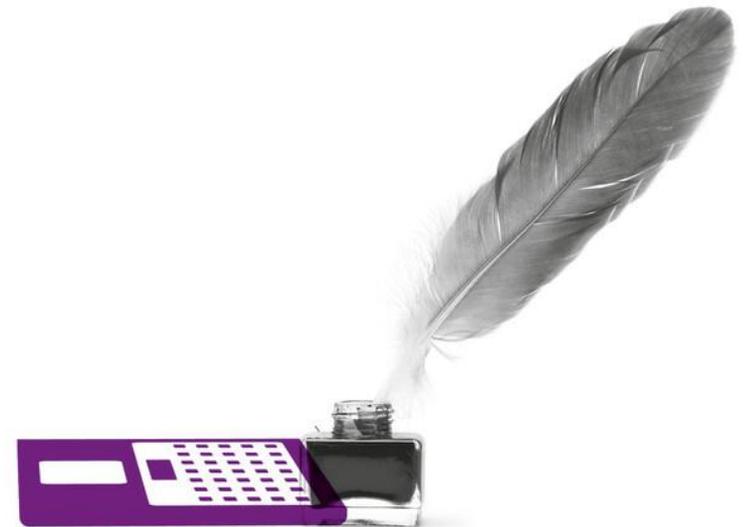
White Paper Conference

Correction Exercises

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Correction Exercises

Administration Errors

- Overpayments
 - Future Payments
 - Past Payments
- Restitution
- Recoupment
- Defences
 - Change of Position
 - Estoppel
- Underpayments
- Tax
- Limitation
- Forfeiture

Overpayments and Underpayments

Cause:

- interpretation errors
- calculation errors
- inaccurate/incomplete records

Discovery:

- on change of administrator/adviser
- administrator admission
- member event, query or admission

Future payments

Trustee duty – must pay the benefits set out in the rules

Difficult for members to prevent correction of future payments

Change of position defence – establishment of causal link between anticipated future payments and change of position (*see later*)

Recovery of Past Overpayments

Under duty to recover trust property, includes funds owed to the trust

But not if reasonable to believe it will produce no useful result due to:

- financial position of member
- amount owed
- probability of proceedings being successful

Test threshold - reasonably sure the necessary steps will be futile

Therefore careful consideration required before deciding pursuit is pointless

Capita ATL Pension Trustees Ltd v Gellately [2011]:

Trustees ordered not to seek recoupment from widows due to

- sums recoverable from each widow were relatively small
- likely cause of distress to widows
- not cost effective in time and money to explain reasons and agree recoupment timetable

Trustee discretion

Each case will turn on its own facts – the larger the loss or number of affected members, or both, the more difficult to justify doing nothing

Usual exercise of trustee discretion rules - consider only relevant considerations, discard irrelevant and make a decision which is rational and not perverse

Adviser negligence – failure to recoup = failure to mitigate loss?

Failure to recover overpayment to one sex = error in implementing equal treatment? = obligation to upgrade the opposite sex?

Probably not, provided good reason not to recoup and mistake not upgraded to scheme benefit by augmentation

Equal treatment applies to benefits properly payable, not to mistaken benefits (otherwise perpetuation of mistaken benefits more broadly)

Restitution

Repayment of the overpayment

May include proprietary declaration over an asset if the overpayment has been used to purchase an asset – assets is conveyed to the Trustees' ownership with entitlement to sell and take restitution from proceeds

Declaration gives priority over unsecured creditors of bankrupt member and may include freezing order to prevent sale before end of bankruptcy proceedings

Restitution entitlement arises once legal or factual mistake of Trustees is established

Court has no discretion to reject restitution claim due to Trustees' error, no matter how careless or negligent the Trustees have been

If Trustees negligent (eg investigate but fail to spot the error) they can still recover

However, if Trustees are reckless (eg there was doubt but the Trustees paid anyway without further enquiry) Trustees may lose right to restitution

Transfers – restitution may be the only remedy as recoupment will not be available

Recoupment

Equitable remedy of recovery by deduction from future benefit payments

Part of equitable accounting process in the administration of the trust and does not require Court authorisation (*but see CMG, later*)

Preferable to Restitution:

- no direct claim against the member's assets so potentially less traumatic
- lower reputational risk for the trustees;
- flexibility to set recoupment so as not to cause unnecessary difficulties for the member
- equitable remedy therefore should be applied in an equitable manner so the reduction to future benefits must not cause the member undue hardship;
- the risk of a successful change of position defence is significantly reduced;
- not barred by statutory limitation periods, only by the equitable defence of laches (delay)

But depends on the member continuing to receive benefits – ends when the member dies

Replaced by restitution claim vs the deceased's estate

Defences to Restitution: Limitation

6 years from the date the mistake was discovered or with reasonable diligence ought to have been discovered (Ss 5 and 32(1)(c) Limitation Act 1980)

6 years crystallises on date the claim form is issued, or in proceedings before the Court on the date proceedings are commenced

Time continues to run before the Ombudsman until the Ombudsman receives the administrator's reply to the member's complaint (*Webber v Dept of Education [2016]*)

To reduce delay risk, the Ombudsman has issued a protocol to identify and prioritise limitation sensitive cases; once invited to respond the Trustee need only issue the Ombudsman a written intention to reply to stop time running

Each overpayment is its own cause of action

Defences to Restitution: Change of Position

Most common defence to repayment claims

Must be made in good faith as a result of the overpayment

Member's liability can be reduced pro tanto where position has only partly changed and Court may also apply terms

Principle not sympathy, disappointment at having to repay is not a defence

Causal link must be established between the benefit and the change of position, which must be irreversible, so:

- payment of debt no defence if debt would have been repaid sooner or later
- expenditure on items that can be re-sold (eg car) only a part defence to extent of difference between purchase and re-sale prices
- however a defence of reliance on the overpayments to raise everyday expenditure and living standards might succeed

Change of Position defences before Ombudsman

Successful:

- making charitable donations
- agreeing substantial financial commitments in negotiations during divorce proceedings
- gifts to family members used to purchase property (sometimes successful... other times the Ombudsman has decided the overpayment can be realised on a sale)
- adopting a higher standard of living
- taking out loans
- upgrading holidays
- reducing working hours
- giving up work

Failed:

Where the member knows of the overpayment, or fails to enquire where they have grounds for believing they may have been overpaid (*Webber v Dept for Education 2014*)

Where overpayment caused by recipient's own actions – eg failure to tell the scheme of the death of a member (Post Office)

Defences to Restitution: Estoppel

Similar to change of position defence, but more complex (and therefore may be easier to rely on just change of position)

By representation or convention

By representation (*Steria Ltd v Hutchinson [2006]*) – unconscionability is key, requiring:

- a clear representation by the trustees/administrator on which it is reasonably foreseeable the member will act
- the member acts in reasonable reliance on the representation; and
- after the act, the member shows they will suffer detriment if the Trustees/administrator not held to the representation

Defences to Restitution: Estoppel

By convention – requires:

- common understanding to have been expressly shared between the parties
- conveying to the member an understanding that the member is expected to rely upon it
- reliance on the understanding by the member to his detriment sufficient to make it unjust or unconscionable for the Trustee/administrator to assert the true legal (or factual) position

Catchpole v Alitalia Pension Trustees [2010] - scheme secretary incorrectly told member she did not need to marry her partner for partner to be entitled to benefits on member's death

Defences to Recoupment

Limitation: recoupment an equitable self-help remedy, not restitutionary claim, so only equitable doctrine of laches would be applicable

Change of position more difficult to establish – not seeking a repayment, only a deduction from future payments, and having already spent the overpayment is not a sufficient defence

Estoppel – available as a defence to recoupment but application of recoupment on an equitable basis may render estoppel defence unnecessary or defeat it

Repayment Plans

Ombudsman has directed reasonable repayment terms to be agreed with the member, by reference to the member's ability to make such repayments, eg:

- general rule: period of repayment must be at least as long as the period during which the overpayment took place and should not cause undue financial hardship;
- Ombudsman directed the trustees in one case to spread the recovery of overpayments over ten years, where the overpayments had been made for seven years

How to recover

Member is usually blameless – therefore:

- explain with sensitivity
- apologise
- offer ex-gratia payment for stress and inconvenience
- raise change of position defence
- consider evidence advanced for ChoP
- give opportunity for provision of further evidence if initial evidence is lacking

Correspond as if Pensions Ombudsman is watching you (overpayments usually considered maladministration and insensitive or aggressive language will be viewed unsympathetically)

Carefully minute Trustee decision to reject ChoP defence with reasons

Case law round-up

CMG Pension Trustees v CGI – forfeiture, remediation and recoupment

What was the case about?

- benefit errors discovered 2009 onwards
- remediation exercises in 2016 and 2019: trustee paid out substantial benefit arrears
- employer then argued that a mandatory forfeiture clause had been overlooked:
 - any benefit not claimed within 6 years of its date of payment "*shall be retained by the Trustees for the purposes of the Scheme*"
- if correct, trustee had now **overpaid** arrears (by about £1.7m)
- questions for court included:
 - was the relevant provision a forfeiture clause?
 - did it apply even if the member could not have known about the underpayment?
 - what kinds of “dispute” will prevent recoupment without a court order?
 - is the Pensions Ombudsman a “competent court” for these purposes?

Case law round-up

CMG Pension Trustees v CGI – forfeiture, remediation and recoupment

Forfeiture

- Rule was a forfeiture clause: not essential for term “forfeiture” to be used
- Wording covered shortfalls in lump sum as well as pension

Member knowledge

- No implied exclusion where member not told (and couldn't have known) of shortfall
- “Claiming” a benefit means asserting a right, **after** due date for payment

Recoupment – what counts as a “dispute”?

- Includes dispute as to how much is recouped from **each** pension instalment, even if no dispute as to aggregate amount owed

Recoupment – what “competent court” can resolve the dispute?

- TPO does **NOT** count as a “competent court”

Tax and Overpayments

Accidental overpayments not an unauthorised payment provided:

- payment made in genuine error - no intention to make a payment to that extent or at all
- spotted by someone involved with the management of the scheme, or the recipient or the recipient's adviser; and
- the error is rectified and the overpaid sum repaid as soon as reasonably possible

Tax and unrecovered overpayments

Overpayments not repaid are exempt from being an unauthorised payment, provided:

- the payment made in error represented a payment permitted by the scheme and the trustees believed the recipient was entitled to the payment;
- if the error relates to the recipient having died (eg the overpayment occurred due to the trustees not being aware of the death,) the payment is exempt only if:
 - it is paid before the expiry of six months from the member's death; and
 - the trustees either did not know and could not reasonably have been expected to have known of the death before the payment was made, or they did know of the death before the payment was made, and took all reasonable steps to prevent the payment being made;

Tax and unrecovered overpayments

- a pension payment made in error even after the error is discovered is exempt provided:
 - the trustees took reasonable steps to prevent the payment being made; or
 - the payment was made while the trustees were considering whether the scheme rules should be amended to permit the payment, provided the trustees have not taken an unreasonable amount of time to decide; or
 - the payment was made while the trustees were in the process of amending the scheme rules to permit the payment, provided the trustees have not taken an unreasonable amount of time to amend the rules;
- similar exemptions for mistaken payments of PCLSs in excess of the permitted maximum

Parts 3 and 4 of the Registered Pension Schemes (Authorised Payments) Regulations 2009 (Authorised Payments Regulations)

Underpayments

Lloyds 1, Lloyds 2, Axminster

Must pay benefits as per Scheme Rules

Claim for account of sums due under the trust with an order for payment, and a claim for equitable compensation for breach of trust

Proprietary claim against the assets of the scheme where rights to benefits have crystallised

Most often: complaint to the Pensions Ombudsman alleging maladministration

Interest

Members have no legal entitlement to interest

Lloyds 1 – common ground that interest should be added (BoE + 1%, simple interest, not compound) but BoE rates v low

Claim for equitable compensation for breach of trust enables the Court to award interest

S31A Senior Courts Act 1981 – interest in proceedings for recovery of debt or damages

Pensions Ombudsman statutory jurisdiction to award interest at BoE base rate

Each case will be determined on its own facts and if the Trustees/administrators are culpable one would expect Trustees to award interest at the PO rate at least

[No] Limitation

S21 LA 1980 – 6 years from cause of action for claims against trust property

But S21(1)(b) no limitation for *"an action ... to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use"*

Lloyds 1 and *Axminster* – exception applies for underpaid benefits

Trustee delay (laches) – highly unlikely Court will permit a trustee to rely on its own or predecessor trustee's delay

Forfeiture

S92(1) PA95 – OPS benefits cannot be forfeited

S92(5)(b) – “does not prevent forfeiture by reference to a failure by any person to make a claim for pension ... where the claim is not made within six years of the date on which the pension becomes due.”

Scheme rules must permit forfeiture and come within S92(5)(b)

Trustee discretion - can take unfairness/harshness of the impact on the member but only if rule gives a discretion, not obligation, to forfeit

Introduction of a forfeiture rule – controversial support for this in *Axminster* – not hindered by restriction in the power of amendment

Former members

- Limited guidance in Lloyds 2 for Trustees iro deferred and transferred out members
- Trustees expected to be proactive – underpayment = breach of fiduciary duty so Court would likely say Trustees should deal with the issue rather than do nothing. However, as to what exactly...

"... all that I can usefully say is that the Trustee does need to be proactive in that it must consider the rights and obligations which I have identified, the remedies available to members and the absence of a time bar and then determine what to do."

Some practical guidance

- Each case will turn on its own facts
- Take advice and keep paper trail of actions and decisions with reasons
- Undertake a cost-benefit analysis – circs will dictate what is reasonable
- Reasonable steps to identify affected members and the underpayments
- Sensible protocols for assessing compensation, eg reasonable actuarial assumptions where financial information unavailable
- Reasonable steps to track down members if contact info out of date
- Reasonable steps to make good the underpayments
- Should not prioritise actives and pensioners over deferreds

Questions?



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