

# White Paper Conference

*How are recent Ombudsman cases on scheme administration and trustee decision-making influencing current practice?*

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# News from the Ombudsman's Office

# A year of change

- Corporate Plan - <https://www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Corporate%20Plan%202024-25.pdf>
  - Recruitment challenges
  - Operating Model has been developed following review
  - PDU funded down to March 2025
- King's speech – Pension Schemes Bill will overrule the CoA's conclusion in *CMG* that TPO is not a competent court for the purposes of s 91(6) PA 1995

# Determinations and broad trends

## ***Ms E (CAS-50008-T7M8) - Dec 2023***

- Facts: Similar to *Catchpole v Trustees of Alitalia Airlines Pension Scheme & Anor* [2010] Pens LR 387.
- Decision:
  - *Grievson v Grievson* [2011] Pens. L.R. 283 at [28] – generous allowance for unrepresented complainants
  - Estoppel by representation made out – survivor’s pension awarded.
- Action points:
  - When dealing with member queries as to entitlements (particularly by telephone), ensure all necessary information is obtained to ensure accurate advice as to eligibility is provided.

## ***Miss D (CAS-58806-H1J6) – Feb 2024***

- Facts: Misinformation case – annual benefits statement repeatedly stated LGPS benefits payable from 60 without reduction.
- Decision:
  - Disclaimer was adequate.
  - Adjudicator’s opinion upheld save for an increase in the non-financial injustice award.
- Action points:
  - Disclaimers remain central in misinformation cases (see also *Mr S (CAS-36187-V5N1) – Feb 2024*).
  - Ensure wording used to communicate assumptions is precise (*Mr S (CAS-79505-D9P2) – Aug 2024*)

**Detailed case study  
– Mr E and the Bic  
UK Pension Scheme  
(CAS-55100-G3W9)**

# Chronology

- 1991 Decision to introduce LPI5% increases to pensions in payment in excess of GMP
- 1992 Announcement to members reflecting the purported change
- 1993 TD&R limits increases to pensions in payment to GMP element
- 2003 Mr E moves to Spain with wife having retired in December 1995
- 2011 Problem identified
- 2013 Increases stopped for pre-97 excess pensions going forward – announcement to members
- 2017 Announcement to members re forthcoming High Court case
- 2019 CoA decision - Notification to members trustees considering implementation
- 2020 Mr E informed of reduction of pension and proposed recoupment of £90,934 over 24 yrs and 8 months
- 2021 New home in UK purchased by Mr E and his wife following illness

## 2013 – Announcement to members

*"Since 1992, the administrative practice has been to increase Pre 97 and Pre 1997 Excess by [LPI5%]. However, the Trustees and Employer have received opposing advice as to whether the payment of these increases was in accordance with the Scheme Rules and therefore uncertainty has arisen as to whether members are entitled to be paid these increases...*

*As the Trustees can only pay benefits in line with the Scheme Rules, it will be necessary to suspend increases to Pre 97 and Pre 97 Excess pensions until the matter is resolved. **The suspension is effective from 6 March 2013 and will only affect future increases. The Company has agreed that there should be no deductions, at this time, for increases already applied that may not have been paid in line with Scheme rules.***

*Should it be concluded that members are entitled to suspended increases they will be reinstated and fully backdated."*

## 2017 - Announcement

*"The case is directly relevant to members who accrued pensions in the Scheme prior to 6th April 1997 (Pre-97 Member). The suspension in relation to pre-1997 Increases will continue until the court process is concluded meaning that a Pre-97 Member whose pension is in payment will not have any Pre-97 Increases applied. Any Pre-97 Member whose pension is due to come into payment prior to the conclusion of court proceedings will also be treated in the same way.*

...

*The Trustees will update the Scheme membership in due course and in particular once the High Court proceedings have concluded and the judgment is delivered in that case"*

# Increase letters

26 April 2012

Dear Mr [L]

BIC UK Pension Scheme

I write to inform you of the annual increase which is due on your pension from May 2012.

The increases are paid in accordance with the Scheme rules and your current and new pension amounts are as follows:

	Annual	Monthly
Current Pension before tax	[ ]	[ ]
New Pension before tax	[ ]	[ ]

If you have any queries please do not hesitate to contact me

Yours sincerely

[ ]

## How would the proposed recoupment affect Mr E?

Mr E's pension as at 6 July 2020 on the mistaken basis:

- **£18,624 p.a. gross (£1,552 pcm)**

N.B. this had effectively been frozen from 1 April 2014

Mr E's pension on the correct basis (i.e. implementing the CoA decision) as at 6 July 2020:

- **£12,660 p.a. gross (£1,055 pcm)**

Mr E's pension taking into account the recoupment proposed

- **£8,976 p.a. gross (£748 pcm)**

# Recoupment – in TPO's practice

## TPO's approach

*"I consider it is... open to me (as it would be to a court) to have regard to the underlying equitable principles applied by the courts in determining whether it is equitable to permit a change of position or estoppel defence to recovery of an overpayment.*

*For the avoidance of doubt, this is not on the basis that they are freestanding defences to recoupment, but rather that the factors and equitable principles considered by the courts in these cases are also of assistance to me in making a decision under the Re Musgrave principle as to whether it is equitable to allow recoupment."*

*Bic (TPO) at [§111]*

## Action points for clients

- Trustees will need to be proactive and consider all potential defences: “... *it is of considerable assistance to all parties if trustees and managers of schemes explore whether a defence may be available to an overpaid member during the scheme’s own dispute resolution process – and, in my view, that is good practice for trustees and managers*” (*Bic* (TPO) at [§88])
- Where a specific defence is not (explicitly) raised:
  - TPO *should* make “*generous allowance*” if applicant is unrepresented: *Grievson v Grievson* [2011] Pens. L.R. 283 at [28] per Lewison J
  - TPO *may* invite applicant to add to his complaint and suggest new matters of defence: *Hamar v French* [1998] Pens. L.R. 321 at [73] per Millett LJ

**Is recoupment  
inequitable in Mr E's  
case?**

# Change of position – decision

- 2 stage analysis
  - Down to 2013 Announcement – i.e. before members notified
    - Good faith ? - Yes – no reason to suspect – payslips [§136]
    - Detriment ? – Yes – standard of living increase [§138] and [§142]
    - Causation ? – Yes – lives within means [§§151-152]
  - Post-2013 Announcement
    - Good faith ? - Yes – criticism of 2013 announcement [§162] payslips contained no new caveats – No Nelsonian knowledge
    - Detriment ? – Yes – standard of living increase down to 1 Aug 2019 [§170]
    - Causation ? – Yes – lives within means [§171]

# Estoppel by representation

- *Steria v Hutchison* [1991] 2 AC 548 – unconscionability test
  - A clear representation – reasonably foreseeable that Mr E would act on it
  - An act on the part of Mr E in reliance on the representation or promise
  - Mr E must show he will suffer detriment if the representor is not held to the representation or promise
- What were the representations pre-2013 Announcement? [§176] [§§179-182]
  - Retirement statements
  - Increase letters
  - Pay slips
  - P60s
    - Ombudsman finds **all** were unambiguous representations of entitlement – no caveats – in circumstances where the payments are made by a fiduciary who ought to calculate the sum correctly
- Other two elements dealt with v. briefly [§§183-184]

# Estoppel by convention

- §200 sets out relevant principles:
  - Expressly shared common assumption crossing the line
  - Responsibility for the common assumption
  - Reliance on the common assumption – not the person's own independent view
  - Reliance occurs in the context of mutual dealing
  - Detriment
- TPO accepts that applying analogous equitable principles in a recoupment claim would not provide a defence. Estoppel by convention seems doomed in such cases: [§201-§203] and [§207]
  - In any event no common assumption – Mr E had no independent view.

## Lessons to be learned

- Caveats – to avoid a representation
  - Payslips
  - Retirement statements
  - P60s?!
- Clear announcements
- Prompt action

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**And finally...**

## Laches - decision

- Time started to run when Trustees first became aware of the potential issue regarding the increase rule in December 2011, not in May 2019 when the CA conclusively established that there had been a mistake
- Laches applied to bar recovery of overpayments made between the date of the February 2013 announcement and 31 July 2019

*"I do not see why the matter could not have been resolved much earlier if the Trustees had pursued the matter with the level of diligence I would have expected the Trustees to apply given the importance of the issue to the membership and the implications for the members if the Court found that the increases had not been validly granted" (Bic (TPO) at [§226])*

## Period/rate of recovery – action points

- Ombudsman's general rule of thumb: period of recovery should be at least as long as the period over which overpayments built up
- Affordability also relevant
- May be revisited as a member's circumstances change for the worse

*"What is equitable in the circumstances of a recoupment plan may change over time. If at a future date Mr E can demonstrate, to the satisfaction of the Trustees, that the rate of recovery is no longer affordable the Trustees should, at Mr E's request, revisit whether the above rate of recovery remains equitable" (Bic (TPO) at [§247])*

## Distress and inconvenience

- Maladministration by Trustees x3
  - Failure to pay members correct benefits
  - Failure adequately to explain the position in the February 2013 announcement
  - Failure promptly to resolve the uncertainty over the increase rule
- Mr E awarded £1,000 for serious distress and inconvenience

## Action points on laches

- Prompt communication of issues on discovery
  - N.B. It may be necessary to add caveats if Court proceedings pending
- Prompt communication of potential implications of the issues
- Ensuring (so far as one can) that matters are progressed with due expedition if Court proceedings are required.

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