

## Ombudsman's Determination

Applicant	Mr D
Scheme	The Bic UK Pension Scheme ( <b>the Scheme</b> )
Respondents	Atkin & Co ( <b>Atkin</b> ), MJB Independent Trustee ( <b>the Trustees</b> )

## Outcome

1. Mr D's complaint against Atkin and the Trustees is partly upheld, but there is a part of the complaint I do not agree with.
2. To put matters right (for the part that is upheld) the Trustees should write off the overpayments which are subject to limitation defence. The Trustees are able to recover the overpayments which occurred from 25 May 2010 onwards.
3. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

4. Mr D has complained that he has been overpaid by the Trustees in relation to his pre 88 Guaranteed Minimum Pension, (**GMP**), to which he was not entitled to and the Trustees are now seeking recovery of the overpayment.
5. Mr D would like the Trustees to write off the overpayment and reinstate his pension payments to the original amount paid.

## Background information, including submissions from the parties

6. Atkin took over the administration of the Scheme from Alexander Forbes in May 2011, and inherited basic electronic data and member prints relating to each member's benefits.
7. Mercer preceded Alexander Forbes and was the Scheme administrator at the time Mr D retired.
8. Atkin says it did not have the file papers or copies of benefit calculations from the time Mr D retired, so it assumed that the pension in payment and breakdown of this provided by Alexander Forbes in 2011, was accurate.

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9. Atkin says it had no reason to review Mr D's benefits when it took over the Scheme administration, as the pension had been in payment since 1996 and there was nothing to suggest that his benefits were incorrect.
10. At the time Mr D took benefits, Dalriada was the Scheme Trustee. In early 2015 Dalriada was replaced by the current Trustees.
11. Atkin in response to a query from Dalriada, undertook a full GMP reconciliation exercise. It was then that Atkin realised that Mr D had received higher increases on the GMP element of his pension than his entitlement.
12. In November 2014, Atkin notified Dalriada of this, who then wrote to Mr D explaining the error. The Trustees told Mr D that it intended to correct his benefits from September 2015 and reclaim the overpayment by making a deduction to his pension payments for a period of 10 years.
13. On 3 August 2015, Atkin wrote to Mr D confirming that his pension would be reduced in September 2015 from £17,278.80 to £16,343.16 per annum. Atkin also confirmed the overpayment of £6,653.49 should be repaid at the rate of £55.49 per month over 10 years starting from October 2015.
14. On 10 January 2016, Mr D raised a complaint under the Internal Dispute Resolution (**IDR**) procedure. The complaint was not upheld.
15. Mr D made a number of points in his complaint. He explained that he could not understand why the Trustees were reducing his pension and requesting payment for the overpayment, when it was not his mistake but one made by the previous administrator.
16. The Trustees' response was that it is obliged to reduce Mr D's pension to the correct amount and to seek recovery of the overpaid pension as the Trustees should ensure that benefits are paid correctly under the rules of the Scheme and seek to correct any errors. It said that under rule 17.2, Mr D was not entitled to receive increases on the pre 88 GMP from 1988. Therefore, any pension increase in respect of pre 88 GMP paid after this point, would need to be recovered.

## Adjudicator's Opinion

17. Mr D's complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustees. The Adjudicator's findings are summarised briefly below:-
  - Any money paid in error can be recovered as the Trustees of a pension scheme can only pay the benefits specified in the Scheme rules. Mr D would only be able to keep the overpayment if he had raised a successful defence against recovery.
  - Mr D has argued that recovery should not be sought. The recovery of any overpayment is subject to The Limitation Act 1980 (**the Limitation Act**). Under

section 5 of the Limitation Act the time limit for seeking recovery of an overpayment is six years from the date of incorrect payment. However this might be longer if section 32 applies. The Adjudicator was not satisfied that the Trustees should be afforded a longer limitation period than that set out in section 5 of the Limitation Act. As such the Trustees had six years from 2004 in order to effect recovery for overpayments occurring in that year (so until 2010) and six years from 2005 in order to effect recovery for overpayments occurring that year (so until 2011) and so on.

- In the recent case of *Webber v Department for Education* [2016] EWHC 2519 (Ch), the High Court held that the applicable cut-off date for Limitation Act purposes was the date when Teachers' Pensions brought its claim during the course of The Pensions Ombudsman's complaints procedure. In Mr D's case the Trustees' response to the complaint was received by The Pensions Ombudsman on 25 May 2016. As such it is that date which had been established as the cut-off date for the purposes of the Limitation Act, so the Trustees are able to recover back six years from 25 May 2016.
- The Trustees cannot recover any of the overpayment amount that occurred prior to 25 May 2010. However as the Trustees made its claim within the required limitation period of six years, the overpayment from 25 May 2010 onwards is recoverable.
- The Adjudicator found that Atkin had correctly relied on the Scheme rules in asserting its right to request that the overpayment in question be repaid.
- Under the Scheme rule 17.2, the pension which is attributable to the GMP for the tax years 1988 to 1999 inclusive, will be increased by 3% per year compound. But these increases do not apply to pre 1988 GMP. When Mr D reached age 65, he continued to receive increases on his pre 88 GMP when he should not have done.
- Mr D contends that the overpayment should be waived and he should receive the amount that he was originally told he would get. However members can only receive the benefits that they are entitled to receive under the rules of the Scheme and the Trustees have a legal right to reclaim money which has been overpaid.
- Mr D said that the Trustees should seek the overpayment from the previous administrators of the Scheme. However Mr D would still have to repay the outstanding amount, as the rules of the Scheme apply in any event.
- The Adjudicator was of the view that Mr D had not provided any evidence that showed he changed his position in reliance on the incorrect payments and did not uphold his complaint in this respect.

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18. The Adjudicator was satisfied that the complaint should be upheld to the extent that the Trustees are unable to recover the overpayment which occurred prior to 25 May 2010. However, the Trustees are able to recover the overpayment which occurred from 25 May 2010 onwards.
19. The Trustees did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Trustees' provided their further comments which were:-
  - The Limitation Act restriction upon recovery is a defence to a claim in respect of a debt, it is not available in respect of equitable recoupment.
  - If the Limitation Act does apply then the Trustees should be afforded the longer limitation period set out in section 32 of the Limitation Act as they only became aware of the issue in November 2014.
  - The Trustees should be able to recover all overpayments that have been made to Mr D.
  - The Trustees have confirmed the overpayment will be £4,897.01 using the cut-off date of 25 May 2010. The amount the Trustees have already recouped up to August 2017 is £1,275.12.

## Ombudsman's decision

20. The Trustees have argued the Limitation Act should not apply. However, the balance of authority is that restitutionary claims for unjust enrichment (such as overpayment cases) are generally statute barred after six years under section 5 of the Limitation Act (being claims founded in contract); and the start date (for the purposes of the Limitation Act) is normally the date that the claimant receives the benefit (i.e. when each overpayment occurs). Recently, in High Commissioner for Pakistan in the UK v Prince Mukkaram Jah and others [2016] EWHC 1465 (Ch), it was considered that the limitation period for restitutionary claims for unjust enrichment was now settled law following the Supreme Court decision in Aspect Contracts (Asbestos) Limited v Higgins Construction Plc [2015] UKSC 38, [2015] 1 WLR 2961 (paragraphs 135 – 137 of the judgment, below).

“Pakistan's simple argument is that these claims are all time barred, because section 5 of the 1980 Act (or section 2(1)(a) of the 1939 Act) has consistently been held to apply to restitutionary claims for unjust enrichment, despite the absence of any contractual basis for the claim. The point was first clearly decided, albeit obiter, by Hobhouse J (as he then was) in Kleinwort Benson Limited v Sandwell Borough Council, reported together with Westdeutsche Landesbank Girozentrale v Islington London Borough Council, [1994] 4 All ER 890 at 942–943. This view was subsequently assumed to be correct by the House of Lords in Kleinwort Benson Limited v Lincoln City Council [1999] 2 AC 349, and has recently been affirmed by the unanimous judgment of the Supreme Court (given by Lord Mance JSC) in Aspect Contracts (Asbestos)

Limited v Higgins Construction Plc [2015] UKSC 38, [2015] 1 WLR 2961 , at [25].

In the Aspect case, the relevant issue was whether a fresh cause of action in restitution arose on the making of a payment pursuant to an adjudication under the Housing Grants Construction and Regeneration Act 1996, in circumstances where the Adjudicator's decision was subsequently shown to be erroneous and the claimant sought to recover the payment which had been made. If the correct view was that no fresh cause of action arose, and if section 5 of the 1980 Act applied, the claim to recover the overpayment would have been time barred. The Supreme Court answered both these questions in the claimant's favour, and at [25] Lord Mance said this:

“Since Aspect's cause of action arises from payment and is only for repayment, it is, whether analysed in implied contractual or restitutionary terms, a cause of action which could be brought at any time within six years after the date of payment to Higgins, i.e. after 6 August 2009. For this purpose an independent restitutionary claim falls to be regarded as “founded on simple contract” within section 5 of the Limitation Act 1980 : Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1994] 4 All ER 890 , 942–943, per Hobhouse J, not questioned by the House of Lords in Kleinwort Benson Limited v Lincoln City Council [1999] 2 AC 349 , when it had to consider whether, in the circumstances of that case, section 32(1)(c) of the Act operated so as to extend the normal six-year limitation period.”

21. More recently, and specifically in relation to overpayment cases before the Pensions Ombudsman, the case of Webber v Department for Education 2016] EWHC 2519 (Ch), dealt with relevant limitation periods and the cut-off date for overpayment complaints before the Ombudsman. It follows that I do not agree with the Trustees assertion that the Limitation Act does not apply to Mr D's complaint and I agree with the Adjudicator that the cut-off date in Mr D's case (for Limitation Act purposes) is 25 May 2016, the date the formal response was received by my office.
22. The Trustees have argued that if the Limitation Act does apply, then it should be afforded a longer period under section 32 of the Limitation Act, because the overpayment was the result of a mistake and the mistake was not discovered until November 2014 on completion of a GMP reconciliation exercise. However, there is no suggestion in Mr D's case that the Trustees needed to take excessive or exceptional measures in order to be able to identify that an overpayment would occur. They had all of the information to know that they would inevitably be making an overpayment in 2004, when Mr D turned 65 and, as they have said, offsets should have been applied in the pension increase calculations because Mr D reached state pension age. The Trustees have cited various failings with previous administrators which led to the overpayment, including incomplete records and calculations. However, that is a matter for the Trustees and, on balance, I am satisfied that had the Trustees been more diligent then the overpayments would not have occurred. It

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follows that I am not persuaded that with reasonable diligence the Trustees could not have discovered these until 2014.

23. Therefore, I agree with the Adjudicator that the overpayment from 25 May 2010 onwards is recoverable. The Trustees had six years from the date of each overpayment in order to effect recovery (applying section 5 of the Limitation Act). They made their claim on 25 May 2016, when my office received the Trustees' response, and can therefore claim back six years from this date. The Trustees have confirmed the overpayment will be £4,897.01 less any amount they have already recouped.
24. Therefore, I partly uphold Mr D's complaint.

## **Directions**

25. Within 21 days of the date of this determination the Trustees will notify Mr D that it will only recover overpayment from May 2010 onwards taking into account the amounts already recouped. Usually, any overpayment is repaid within the same period of time that the overpayment occurred.

**Anthony Arter**

Pensions Ombudsman  
1 September 2017