

# Pensions in Dispute

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Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent cases that have practical implications for schemes generally. For more information, please contact [pensions.team@allenoverly.com](mailto:pensions.team@allenoverly.com).

## Benefit mistakes: forfeiture and recoupment

Most trustees will have encountered situations where historic benefit issues are uncovered, meaning that members have been underpaid and need to be paid their missing benefits, or overpaid, where the starting position is to try and claim back what wasn't due. The High Court has recently given some interesting guidance on the limits of both repayment and recoupment in these scenarios:

### ***CMG Pension Trustees Ltd v CGI IT UK Limited.***

In this case, the scheme had been administered incorrectly due to mistakes in implementing benefit changes in 1996 and 1997, meaning that members' benefits had been underpaid. The scheme trustee had begun to correct this by making arrears payments to members. The employer challenged the payments on the basis that the scheme had a forfeiture rule which meant that benefits that hadn't been claimed for six years should not be paid. The judge found in the employer's favour, meaning the trustee should recoup arrears payments made in respect of benefits due more than six years earlier.

#### *Forfeiture*

Much of the ruling focuses on whether the specific rule in question was a forfeiture rule. The rule said: *'if a benefit or instalment of benefits is not claimed by or on behalf of the person entitled to the benefit or instalment in accordance with these Rules within 6 years of its date of payment it shall be retained by the Trustees for the purposes of the Scheme'*. The

judge found that the rule was not just intended to cover missing beneficiaries, as the trustee contended, and was an automatic forfeiture rule, despite not mentioning the word forfeiture.

The judgment includes commentary on points of broader interest to trustees. It gives guidance on what counts as a 'claim' (which was not defined in the rules) that would be sufficient to stop forfeiture taking effect: this must be more than a general request for a pension to be put into payment but doesn't require the member to know about the specific entitlement. For example, if a member has concerns about her benefits, and asks for all the benefits she is owed, that would be sufficient. The claim must be made after the benefit has fallen due.

The judge also found that members do not need to be informed about the entitlement or the need to claim before it is forfeited.

#### *Recoupment*

The case also gives some interesting guidance on recouping overpaid benefits. The Limitation Act 1980 does not apply to recoupment, meaning there is no time limit on the benefits that can be recouped. However, section 91 of the Pensions Act 1995 puts conditions on recoupment, including that where a member disputes the amount, the trustees must get an 'order of a competent court' to enforce the payment. The judge found that this was invoked both where there was a dispute as to the amount being recouped and as to the rate of deduction. He

also found that the Pensions Ombudsman (TPO) does not count as a 'competent court' for these purposes, in line with the judgment in *Burgess v BIC UK Ltd*, but contrary to a statement by TPO.

#### What does this ruling mean for trustees?

If your scheme has a rule which is similarly worded to the one in this case, or has a requirement for members to 'claim' benefits to prevent them being forfeited, you should consider whether your approach on forfeiture is in line with the judgment.

Whether or not you have a similar rule, the guidance on recoupment is relevant for any scenario where you might need to try to recover overpaid benefits. In particular, the decision that TPO is not a 'competent court' will change the process of recoupment for many schemes that currently rely on a TPO decision as a basis for enforcing payment.

### Contributions: not just an employer problem

A recent decision by TPO has warned trustees of the risk of treating the payment of correct contributions as an employer issue: **PO-23597**.

In this case there were a number of mistakes with enrolling a member and making correct contributions, including a year in which no contributions were made. It is not surprising that TPO found in the member's favour when they complained, but what is interesting is the commentary on the trustee's role in the failures.

The decision highlighted trustees' responsibilities to ensure scheme rules/governing documents reflect the minimum contributions required by law; have a payment schedule in place; have processes for monitoring contributions; report outstanding contributions to TPR; and support auto-enrolment compliance.

The decision found that the trustee in this case had wrongly seen payment of correct contributions as a matter for the employer, and its loose controls and failure to spot the errors amounted to maladministration. The trustee was directed to pay £500 for distress and inconvenience.

#### What does this ruling mean for trustees?

It is important not to see payment of contributions as an employer-only problem. Trustees should ensure that robust processes are in place for monitoring contributions and investigating missing or unexpected payments, and that any issues are raised quickly with the employer and the Pensions Regulator where necessary.

## Contact us



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Jason is a Counsel in the Pensions Litigation group. He specialises in all aspects of pensions disputes, including advising clients in relation to internal disputes and disputes before the Pensions Ombudsman, the Financial Ombudsman Service, the Pensions Regulator, the PPF Ombudsman and the courts. The Chambers & Partners Directory includes quotes from clients that Jason 'anticipates issues and handles detail well'.