

Cost Management, Benefit Design and Administration Committee

Item 8 Paper C

AMENDMENT TO FORFEITURE REGULATIONS

Issue

1. The Technical Group has requested that the Scheme Advisory Board should consider making recommendations to MHCLG to amend the provisions of the scheme to ensure that forfeiture of pension rights can still apply where conviction occurs after the termination of the member's employment.

Background

2. The request from the Technical Group is shown below –

“Formal request by the National LGPS Technical group for a change to the forfeiture regulations

This email is a formal request, by the National LGPS Technical Group, to change the policy behind the application of the forfeiture regulations. The group requests an amendment to regulation 91(2) of the LGPS Regulations 2013 [SI 2013/2356].

Regulation 91(1) of the LGPS Regulations 2013 (Forfeiture), prescribes that if a member is convicted of a relevant offence, the former [Scheme employer](#) may apply to the Secretary of State to issue a forfeiture certificate. A ‘relevant offence’ is defined in regulation 91(2) as “an offence committed in connection with an employment in which the person convicted is a member, and because of which the member left the employment”.

The group requests that the definition of ‘relevant offence’ in regulation 91(2) (and equivalent predecessor regulations) be changed to “an offence committed in connection with an employment in which the person convicted is a member, ~~and because of which the member left the employment~~”.

Reason for request

There have been several high profile cases by which individuals have circumvented the forfeiture provisions, by simply leaving employment before conviction. There was a fraud case earlier this year where a Chief Finance Officer stole over £400,000 though it didn't come to light until after the individual had left employment.

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The problematic wording within the regulations is as follows “*A relevant offence is an offence committed in connection with an employment in which the person convicted is a member, and because of which the member left the employment*”.

The problem with the extant prescription is that the individual must have left employment because they have been convicted of an offence in relation to that employment. In the majority of cases, the only part of the definition satisfied is “*an offence committed in connection with an employment in which the person convicted*”. The wording does not address historical events coming to light, which are now more frequent in today’s society.

The group believes that the policy should be, where an individual is convicted of an offence in relation to the employment in which the individual is a member, the former Scheme employer should be able to apply for a forfeiture certificate, regardless as to the reason as to why the individual is no longer in that employment (i.e. this would close the loop hole, so that an individual who voluntarily leaves employment before conviction, may still be subject to a forfeiture certificate at some point in the future, whilst retaining the link to a conviction in relation to that employment).”

3. A paper describing the case referred to above by the Technical Group is at Annex A.

Consideration

4. The committee is invited to consider the proposal made by the Technical Group and to make a recommendation to the Scheme Advisory Board. In addition, the committee may wish to consider the following –

- Should a time limit after termination of employment be applied during which forfeiture can apply?
- How would the proposal work when benefits have been legitimately been paid on termination or subsequently transferred before any post-employment conviction comes to light?
- Would consideration also need to be given to making similar amendments to the provisions on recovering a monetary obligation?
- Should further work be undertaken to establish how forfeiture provisions operate in other public service pension schemes?

Recommendation

5. That the committee considers the proposal made by the Technical Group and invites the Scheme Advisory Board to consider whether a

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recommendation should be made to MHCLG for appropriate amendments to be made to the scheme.

Annex A

Background

A recent decision by the Pensions Ombudsman (copy attached) held that Enfield LBC, a scheme employer in the local government pension scheme, did not have the power under Regulation 74 of The Local Government Pension Scheme (Administration) Regulations 2008 to recover a monetary obligation from a former member's pension rights.

The relevant section of Regulation 74 provided that :-

"74.—(1) This regulation applies where a person—

(a) has left an employment, in which he was or had at some time been a member, in consequence of a criminal, negligent or fraudulent act or omission on his part in connection with that employment;

(b) has incurred some monetary obligation, arising out of that act or omission, to the body that was his employing authority in that employment; and

(c) is entitled to benefits under the Benefits Regulations.

(2) The former employing authority may recover or retain out of the appropriate fund—

(a) the amount of the monetary obligation; or

(b) the value at the time of the recovery or retention of all rights in respect of the former employee under the Scheme with respect to his previous membership (as determined by an actuary),

whichever is less."

Facts

The member in question had worked as Head of Finance for the council. Between June 2008 and December 2010, the member sent a total of 104 payments to his personal bank account from the council's staff provider account totalling £448,207. The member was made redundant in December

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2010 and later in 2011, the City of London Police investigated a fraudulent property deal in which the member had invested heavily using the monies fraudulently obtained from the council. The member was convicted of fraud in July 2012 and sentenced to four years imprisonment.

The council secured a judgement in the sum of £509,889.23 and in October 2012, wrote to the member giving notice of the proposal to retain £476,300 of the value of his pension rights using the power to recover a monetary obligation under Regulation 74 of The Local Government Pension Scheme (Administration) Regulations 2008. The exercise of this power was challenged by the member's legal advisers who claimed that their client had left the council's employment by reason of redundancy and not, as required by Regulation 74, in consequence of his fraudulent act and subsequent conviction.

The council argued that applying the strict interpretation of Regulation 74 as argued by the member's legal adviser produced an absurd result that Parliament could never have intended. The council also relied on the general principle that a person should not benefit from their own wrongdoing.

The matter was eventually passed to the Pensions Ombudsman for determination.

The Pension Ombudsman's conclusion

In his determination, the Pensions Ombudsman concluded that on a literal construction of Regulation 74, the regulation does not allow the council to retain any of the member's pension rights. The member had left the council's employment as a result of their redundancy programme and not in consequence of his fraudulent act.

The Pensions Ombudsman also refuted the council's argument that applying the literal interpretation of Regulation 74 produced an absurd result. He said :-

"Whilst I agree that the overriding objective in statutory construction is to give effect to the presumed intention of Parliament. I do not consider that there are sufficient grounds to suggest that Parliament intended for those who had left employment not in consequence of their fraud, to be caught by the Regulation."

The determination upheld the complaint and required the council to reconsider their interpretation of Regulation 74 and whether in seeking to retain the member's pension rights, it has applied these correctly.

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The Pensions Ombudsman concluded that the council should reassess the method it wishes to apply in its recovery of the member's debt and take the appropriate steps to allow the member to access his benefits. The council was given three months to complete its reassessment.

The statutory background

The power to enable occupational pension schemes like the LGPS to forfeit, retain or recover a member's pension rights is given by Sections 92 and 93 of the Pensions Act 1995 :-

92. Forfeiture, etc

(1) Subject to the provisions of this section and section 93, an entitlement, or accrued right, to a pension under an occupational pension scheme cannot be forfeited.

(2) Subsection (1) does not prevent forfeiture by reference to—

(a) a transaction or purported transaction which under section 91 is of no effect, or

(b) the bankruptcy of the person entitled to the pension or whose right to it has accrued,

whether or not that event occurred before or after the pension became payable.

(3) Where such forfeiture as is mentioned in subsection (2) occurs, any pension which was, or would but for the forfeiture have become, payable may, if the trustees or managers of the scheme so determine, be paid to all or any of the following—

(a) the member of the scheme to or in respect of whom the pension was, or would have become, payable,

(b) the spouse, widow or widower of the member,

(c) any dependant of the member, and

(d) any other person falling within a prescribed class.

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(4) Subsection (1) does not prevent forfeiture by reference to the person entitled to the pension, or whose right to it has accrued, having been convicted of one or more offences—

(a) which are committed before the pension becomes payable, and

(b) which are—

(i) offences of treason,

(ii) offences under the Official Secrets Acts 1911 to 1989 for which the person has been sentenced on the same occasion to a term of imprisonment of, or to two or more consecutive terms amounting in the aggregate to, at least 10 years, or

(iii) prescribed offences.

(5) Subsection (1) does not prevent forfeiture by reference to a failure by any person to make a claim for pension—

(a) where the forfeiture is in reliance on any enactment relating to the limitation of actions, or

(b) where the claim is not made within six years of the date on which the pension becomes due.

(6) Subsection (1) does not prevent forfeiture in prescribed circumstances.

(7) In this section and section 93, references to forfeiture include any manner of deprivation or suspension.

93. Forfeiture by reference to obligation to employer

(1) Subject to subsection (2), section 92(1) does not prevent forfeiture of a person's entitlement, or accrued right, to a pension under an occupational pension scheme by reference to the person having incurred some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by the person.

(2) A person's entitlement or accrued right to a pension may be forfeited by reason of subsection (1) to the extent only that it does not exceed the amount of the monetary obligation in question, or (if less) the value

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(determined in the prescribed manner) of the person's entitlement or accrued right to a pension under the scheme.

(3) Such forfeiture as is mentioned in subsection (1) must not take effect where there is a dispute as to the amount of the monetary obligation in question, unless the obligation has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff.

(4) Where a person's entitlement or accrued right to a pension is forfeited by reason of subsection (1), the person must be given a certificate showing the amount forfeited and the effect of the forfeiture on his benefits under the scheme.

(5) Where such forfeiture as is mentioned in subsection (1) occurs, an amount not exceeding the amount forfeited may, if the trustees or managers of the scheme so determine, be paid to the employer.

Consideration

The key point here is that neither section 92 nor 93 of the Pensions Act 1995 requires there to be a causal connection between the offence or misconduct and termination of employment, the main requirement being that the offence or misconduct occurred before benefits become payable. Had Regulation 74 of the 2008 Administration Regulations adopted the strict wording of Section 93 of the Pensions Act 1995 without any causal connection, there is a very strong likelihood that the Pensions Ombudsman would have reached a determination in the council's favour.

The essential question therefore is whether the stricter tests adopted by Regulations 91 and 93 of the LGPS Regulations 2013 and their corresponding provisions under the 1997 and 2008 Regulations, puts a scheme employer in a position where recovery of a monetary obligation is frustrated unless the act which gives rise to the obligation is discovered before benefits become payable and employment terminated by reason of that misconduct. In this respect, it is relevant to note that in the recent Pension Ombudsman's case, the council claimed that by late 2015 they had only been able to recover about £50,000 of the total monetary obligation of £509,889.

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It is also relevant to note that no other major public service pension scheme requires there to be a causal connection between the act giving rise to a monetary obligation and termination of employment.

There might also be a case for considering different approaches to forfeiture under Regulation 91 and recovery or retention of a monetary obligation under Regulation 93 of the 2013 Regulations.

Forfeiture cases typically do not involve a direct monetary obligation to a scheme employer. They are more concerned with cases where a member has abused a position of responsibility which results in a serious loss of confidence in the public service or is gravely injurious to the State. Would such loss of confidence or grave injury to the State be any less because an offence only came to light and a conviction made after employment had been terminated on normal grounds? There is perhaps a strong case therefore to extend Regulation 91(2) of the 2013 Regulations with the underlined words shown below :-

“(2) A relevant offence is an offence committed in connection with an employment in which the person convicted is a member, and because of which the member left the employment or the scheme employer would have terminated the employment.”

Conversely, Regulation 93 of the 2013 Regulations is used by a scheme employer to recover a monetary obligation from a member's pension rights. But the same principle applies, that is, whether recovery or retention of a member's pension rights should depend solely on the act or omission resulting in the monetary obligation being identified prior to and resulting in the termination of employment. However, if the general policy aim is to ensure that a scheme employer is able to fully recover any monetary obligation owed to it by one of its employees, it is reasonable to examine other ways in which the monies can be recovered outside of the scheme. For example, how would a local authority employer recover a monetary obligation from an employee who was not a member of the pension scheme?

If, upon examination, recovery of a monetary obligation by a scheme employer outside of Regulation 93 of the 2013 Regulations is as effective, it would be reasonable to conclude that Regulation 93 need not be amended to cover those cases where the monetary obligation only comes to light after employment has been terminated.

Conclusion and recommendations

It is clear that the forfeiture, recovery and retention provisions of the LGPS in England and Wales goes far beyond that set out in primary legislation and

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the provisions adopted by similar schemes in the public sector. This undoubtedly restricts the number of cases where forfeiture and recovery/retention of pension rights can be secured by LGPS scheme employers but there is no evidence available to determine the number of cases frustrated by the scheme's stricter test of causation.

For the reasons given in paragraphs 16 to 19 above, different considerations should apply to the provisions under Regulations 91 and 93 of the 2013 Regulations.

In the case of the forfeiture provisions of Regulation 91, the view is taken that the causation test between conviction and termination of employment should be removed to ensure that pension rights can be forfeited in cases where the offence was committed before benefits become payable but where conviction of that offence occurs after employment has been terminated on normal grounds. Some consideration may need to be given to time limiting applications after employment has been terminated to avoid cases where the passage of time has lessened the social impact of any earlier employer-related offence.

In the case of Regulation 93, the view is taken that no amendment to remove the causation test should be considered until it is shown whether other means of recovering a monetary obligation provides scheme employers with a reasonable guarantee of recovering such monies.

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