Neutral Citation Number: 2017 EWHC 2749 (Ch)

No CH-2017-000101

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE PENSIONS OMBUDSMAN DATED 28 MARCH 2017

AND IN THE MATTER OF REGULATION 74 OF THE LOCAL GOVERNMENT PENSION SCHEME (ADMINISTRATION) REGULATIONS 2008

Royal Courts of Justice, Strand, London, WC2A 2LL

Date: 8th November 2017

Before Mark Anderson QC

BETWEEN:

THE LONDON BOROUGH OF ENFIELD

Appellant

and

MR JOHN JOSSA

Respondent

Mr Wayne Beglan (instructed by the Solicitor to L B of Enfield) for the appellant

Mr Piers Feltham (instructed by Simons Miurhead & Burton solicitors) for the respondent

Hearing dates: 31 October, 1 November 2017

JUDGMENT

Mark Anderson QC

Background

1. This appeal from the Pensions Ombudsman concerns the true meaning of regulation 74 of the Local Government Pension Scheme (Administration) Regulations 2008.

2. Mr Jossa, the respondent, is a member of the Local Government Pension Scheme ("**the Scheme**"). He was employed in local government for some 36 years until reorganisation resulted in his redundancy in 2010, by which time he had reached a senior position as "Head of Finance – SAP Support and Development" with the appellant authority ("**Enfield**"). His pension benefits are valued at £476,300.

3. Between June 2008 and December 2010 Mr Jossa dishonestly abused his position of trust to cause 104 payments to be made from his employer's bank account to his own account. Shortly before he left his employment, he deleted his bank details from the system in the hope of minimising the prospect of detection. However, after he had left the employment he was caught and sentenced to 4 years' imprisonment. Judgment was entered against him for £509,889 but remains unsatisfied. He was made bankrupt and has been discharged but the debt remains payable because it was incurred through fraud.

4. Upon being made redundant, before his fraud had been discovered, Mr Jossa became entitled to be paid his pension. The fraud having been discovered, Enfield, which is the administering authority and holds the Scheme's funds as trustee, wished to withhold Mr Jossa's benefits. Both parties agree (and this appeal has proceeded on the basis) that Enfield is not entitled to an equitable or legal set-off its of its rights as a judgment creditor against its obligations as trustee. Enfield accepts that the only potential right of set-off is that provided by the rules of the Scheme, which are contained in the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 ("**the 2007 Regulations**")

and in the Local Government Pension Scheme (Administration) Regulations 2008 ("**the 2008 Regulations**"), both made by the Secretary of State pursuant to section 7 of the Superannuation Act 1972. The 2008 Regulations, with which this appeal is principally concerned, were signed by Minister of State Mr John Healey and for that reason I will use the masculine pronoun when referring to their draftsman.

5. Regulation 74 of the 2004 Regulations provides as follows:

Recovery or retention where former member has misconduct obligation

(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.

. . .

(4) The former employing authority must give the former employee—

(a) not less than three months' notice of the amount to be recovered or retained under paragraph (2); and

(b) a certificate showing the amount recovered or retained, how it is calculated, and the effect on his benefits or prospective benefits.

(5) If there is any dispute over the amount of the monetary obligation specified in paragraph (1)(b), the former employing authority may not recover or retain any

amount under paragraph (2) the obligation is enforceable under an order of a competent court or the award of arbitrator.

6. Enfield purported to invoke this regulation in October 2012. However the Ombudsman ruled that the statutory set-off is not available to Enfield because the words "in consequence of" import an unequivocal causative requirement, with the result that an employing authority cannot recover or retain benefits in satisfaction of a member's monetary obligation arising from a criminal, negligent or fraudulent act or omission in connection with the employment unless the employment came to an end in consequence of the act or omission ("**the causative requirement**"). Since it is common ground that Mr Jossa's employment was terminated for redundancy before his fraud was found out, the Ombudsman ruled that Regulation 74 did not apply.

7. That would not leave Enfield without other remedies. It is common ground that it can obtain an attachment of earnings order ("**AEO**"), under which it will be entitled to retain some of Mr Jossa's pension benefits. Such an order would be inferior to the statutory set-off from Enfield's perspective because Regulation 74 would permit the immediate transfer of most of the £476,300 from the Pension Scheme to the taxpayers' funds without a court order. I say "most" because Mr Jossa would remain entitled under regulation 75(1)(b) to receive a "guaranteed minimum pension". By contrast, an AEO would not permit transfer of a lump sum in partial satisfaction of the judgment debt, only payment by instalments as benefits become payable to Mr Jossa under the Scheme. Moreover an AEO would not permit Enfield to take all the benefits payable to Mr Jossa. The regime requires that the debtor be left with enough protected earnings to meet his basic living expenses.

The appellant's submissions

8. Mr Wayne Beglan, counsel for Enfield, relies on the important principle of law that a person may not benefit from his own wrong. He submits that it is well established that a statute should be construed to avoid that result. He referred to *R v Chief Insurance Commissioner, ex p Connor [1981] QB 758, R v Sec of State, ex p Puttick*

[1981] QB 767, Welwyn Hatfield BC v Sec of State [2011] 2 AC 304 and R (Hysaj) v Sec of State [2016] 1 WLR 673 as examples of that proposition.

9. Mr Beglan submits that regulation 74 should be construed so that a fraudster does not avoid the statutory set-off (and thereby obtain the benefit of a protected income under an AEO) by concealing the fraudulent payments until after his employment has ended. Concealment was integral to Mr Jossa's fraud. For example, after the final fraudulent payment he took the positive step of deleting his bank details from the computer system so as to decrease the chances of detection. Mr Beglan submits that to permit Mr Jossa to profit from the concealment of the fraud is to permit him to benefit from the fraud itself.

10. Mr Beglan pointed out that regulation 74 separately requires that the misconduct obligation must arise in connection with the employment. He says that the only reason for the introduction of a causative link between the wrongdoing and the *termination* of the employment is to ensure that only misconduct serious enough to warrant termination will give rise to the statutory set-off. He therefore submits that the regulation should be construed to include misconduct which was sufficiently serious to have caused termination of the employment even if it did not cause it.

11. Mr Beglan says that to insist on a causative link gives rise to an absurdity, namely that a fraudster who is caught and dismissed is in a worse position than a more sophisticated fraudster who avoids detection for longer. He cites the observation of Lord Diplock, with whom Lord Simon and Lord Edmund-Davies agreed, in *Devis & Sons v Atkins [1977] AC 931: I find it impossible to ascribe to Parliament an intention that the question as to whether a dismissed employee who had been guilty of gross misconduct was entitled to substantial compensation should depend upon whether or not he had been successful in concealing his own misdeeds until after his dismissal.*

12. Mr Beglan also cited Bennion on Statutory Interpretation, 6th ed, at pages 869:

(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very

wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief. (2) In rare cases there are overriding reasons for applying a construction that produces an absurd result, for example where it appears that Parliament really intended it or the literal meaning is too strong.

13. Mr Beglan accepts that if regulation 74 is read without regard to its purpose, the words of regulation 74 are plain and unambiguous, and would lead to the result which the Ombudsman found. However he says that the purpose of the regulation is correctly summarised in its heading, *Recovery or retention where former member has misconduct obligation*. Mr Beglan says that that purpose is not achieved by the Ombudsman's construction and urges me choose a construction which does achieve the purpose. Enfield's construction would require the addition of implied words at the end of paragraph 1(a) (which in written submissions to the Ombudsman were formulated as *or would have left his employment in consequence of . . . if his employer had known of the fraud at the time he left*).

The respondent's submissions

14. Mr Piers Feltham for the respondent relied on the plain meaning of the words of regulation 74. He says that since (as Enfield accepts) Mr Jossa's departure from his employment was not in consequence of his fraud, his case is not within the regulation. The task of the court is to find the meaning of the words which the Secretary of State chose to use. The words are plain and unambiguous and I cannot depart from them just because I may think I can improve the legislation or because I think it desirable to widen the ambit of the regulation.

15. Mr Feltham submits that although public policy does not permit a wrongdoer to profit from his wrong, that principle has no application to this case. He says that Mr Jossa has been prosecuted and punished for his crime, has had judgment entered against him and was made bankrupt. He is not to be allowed to retain any of the proceeds of his crime. All that he will retain is a small proportion of his own

pension calculated under the attachment of earnings regime as being the minimum necessary for his living expenses.

16. Mr Feltham further submits that there is no room for the principle that a person must not benefit from their own wrongdoing in the interpretation of regulation 74, because the very purpose of that provision is to lay down the circumstances in which fraud (and other misconduct) will give rise to a set-off. The claimants in the four cases cited by Mr Beglan were all claiming to have qualified for benefits as a result of their own misconduct, and all failed because Parliament did not intend such misconduct to give rise to the claimed qualification. Those cases do not assist with construing a different type of provision altogether, which does not confer a benefit on the assumption that there has not been misconduct, but which expressly addresses what the consequences of misconduct should be.

17. He says that the authorities cited by Mr Beglan do not give rise to a principle that all statutes must be construed so as to redress wrongdoing and avoid all anomalies. He cited *Saloman v Saloman [1897] ACc 22, Duport Steels v Sirs [1980] 1 WLR 142, ISC v Hinchy [1960] AC 748 and IRC v Ayrshire Employers Mutual [1946] 1 All ER 637* in support of his point that the courts do not re-write legislation and do sometimes accept that the right construction gives rise to what appears to be the wrong result.

18. Mr Feltham further submitted that regulation 74 draws a line which is principled, clear and easy to apply. If misconduct is the cause of termination of the employment, then the set-off is available. If not, not. He says that it is readily understandable that the Secretary of State decided to confine the set-off to clear cases where there is no room for doubt whether the misconduct was sufficiently serious to have caused termination, because it actually did so. Even if I may disagree that there was a real risk of uncertainty giving rise to disputes, and even if I think that the line should have been drawn somewhere else, that does not entitle me to construe the section as if that had occurred. There is an obvious nexus between the termination of the employment and the entitlement to pension benefits, so there is nothing at all irrational in the causal requirement which regulation 74 clearly imports. If the decision to draw the line at misconduct

causative of termination produces anomalies in some cases, that is the inevitable consequence of having to draw the line somewhere.

Discussion

Public policy

19. It is a fundamental principle that no one should be allowed to profit from their own wrong. In *Welwyn Hatfield BC v Secretary of State [2011] 2 AC 304*, Lord Mance, citing from Halsbury's Laws, at [45] stated the well-established basic principle of legal policy that law should serve the public interest and, *Where a literal construction would seriously damage the public interest, and no deserving person would be prejudiced by a strained construction to avoid this, the court will apply such a construction.*

20. *Welwyn Hatfield* and the cases cited in it concerned statutes which conferred advantages upon persons who qualified for them. The cases show that the courts will usually construe such statutes so that fraudulent or other seriously wrongful conduct will not achieve the requisite qualification because that cannot have been Parliament's intention. *Welwyn* itself provides a striking illustration of this. The benefit was immunity from enforcement of planning control and entitlement to a certificate of lawfulness. The qualification for this benefit was that the breach of planning control had subsisted for more than four years without enforcement action having been taken. Lord Mance said at [54]:

Whether conduct will on public policy grounds disentitle a person from relying on an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. Here, the four-year statutory periods must have been conceived as periods during which a planning authority would normally be expected to discover an unlawful building operation or use and after which the general interest in proper planning control should yield and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale.

21. In my view the nexus between Mr Jossa's fraud and his escape from the regulation 74 set-off is tenuous. I accept that the fraud included two important elements: taking money and covering up that he had taken it. The covering up was part of the crime. That same covering up enabled him to avoid detection until after he was dismissed for redundancy. In that sense, I accept that the Ombudsman's decision does have the consequence that Mr Jossa will, as a matter of factual causation, benefit from one component of his crime because the delay he achieved enables him to avoid the statutory set off. But it would be far-fetched to say that Mr Jossa's purpose in concealing his defalcations was to secure an immunity from set-off. It was his purpose to avoid the legal consequences of his crime, and the set-off might have been one of those consequences, but that is a tenuous nexus in my view.

22. The second reason the *Welwyn* line of cases does not really help is that it cannot be said in the present case that Mr Jossa's fraud takes him outside the rationale for conferring a statutory benefit. It may not stretch language too far to accept that the causative requirement confers a benefit on those who do not come within it, but when drafting this regulation, its draftsman was consciously and deliberately addressing the circumstances in which a remedy of set-off would be available against a person who had committed fraud or other misconduct. Since (as Mr Beglan submits) it is an integral feature of fraud that the defalcations are concealed, the draftsman must also have had in mind fraud which had been concealed for some time before it was detected. Fraud was expressly included as one of the types of misconduct dealt with by regulation 74 and the causative requirement was expressly applied to all misconduct within the regulation. So Mr Jossa's fraud did not take him outside the rationale for that benefit.

23. For these reasons the principle that a person must not benefit from their own wrong (in this case, concealment) has a limited role to play in interpreting a provision which was itself aimed at delineating which wrongdoers (including fraudulent concealers) should face set-off, and which should not.

The purpose of regulation 74

24. I agree that the purpose at which regulation 74 was aimed must be kept in mind. Mr Beglan said that the perceived mischief at which the regulation must have been aimed was the absence of a right of set-off available to a local authority against a pensioner with a misconduct obligation; the broad purpose of regulation 74 may be found in its heading, "Recovery or retention where former member has misconduct obligation".

25. I accept that that purpose, so broadly stated, would be better served by allowing a set-off than by refusing it. However, again, I must keep in mind that this provision aims to draw a line between obligations which do, and do not, attract a set-off. It was obviously not the purpose of regulation 74 simply to grant a right of set-off to a local authority against every former employee with a misconduct obligation. One of the purposes of the regulation was to set out which obligations would give rise to the set-off, and which would not. One cannot construe such a provision on the assumption that all misconduct obligations were intended to attract a set-off.

Absurdity

26. I must also keep in mind that the Ombudsman's construction of regulation 74 gives rise to the position in which Enfield now finds itself, of having to pay at least a partial pension to a man who defrauded it of more than the total value of the pension, and even though he has not repaid what he stole. That does not seem right.

27. It should be noted however that the first cause of the anomaly is the equitable rule that protects a beneficiary from set-off of a debt owed to the trustee in his personal capacity against the beneficiary's claim against the trust. Regulation 74 does not create that rule. The anomaly to be laid at the door of regulation 74, as construed by the Ombudsman, is only that it does not displace the equitable rule, but would have done so if only Mr Jossa had not successfully concealed his fraud for so long. It is that feature which enables Mr Beglan to invoke the dictum of Lord Diplock in *Devis v Atkins* cited in paragraph 11 above. Mr Beglan says it is absurd, and Mr Feltham accepts that it is at least anomalous.

28. However, the fact that the outcome in a particular case may appear absurd or anomalous or unjust is not of itself a reason to read implied words into a legislative

provision. I bear in mind the words of Lord Diplock in *Duport Steels v Sirs [1980] 1 WLR 142 at 158*:

Parliament does not legislate for individual cases. Public Acts of Parliament are general in their application; they govern all cases falling within categories of which the definitions are to be found in the wording of the statute. . . [F]or a judge (who is always dealing with an individual case) to pose himself the question: 'Can Parliament really have intended that the acts that were done in this particular case should have the benefit of the immunity?' is to risk straying beyond his constitutional role as interpreter of the enacted law and assuming a power to decide at his own discretion whether or not to apply the general law to a particular case.

29. Although that was a case about industrial action with strong political overtones, it is not difficult to see the significance of Lord Diplock's dicta for the present case. I must not stray beyond my role as an interpreter of the enacted law even if I think that a better outcome would have been achieved by different words. I can only read regulation 74 as subject to some implied words if I can conclude that those words must necessarily be read into it; that the provision necessarily means something other than the meaning conveyed by the express words alone.

30. I bear in mind in this regard the words of Lord Hobhouse in *R (Morgan Grenfell) v Special Commissioner [2003] 1 AC 563* at [45]:

A necessary implication is not the same as a reasonable implication . . . A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

31. This explains the outcome in *IRC v Hinchy [1960] AC 748*. A taxation statute provided for a penalty of three times the tax lawfully due if the taxpayer's return

was inaccurate. The question arose whether this meant three times the total tax due, or only three times the undeclared amount. Diplock J and the Court of Appeal found a construction which achieved the latter, more reasonable, result. The House of Lords overruled them. Lord Reid (at 767) said this:

Difficulties and extravagant results of this kind caused Diplock J and the Court of Appeal to search for an interpretation which would yield a more just result. What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellants' contention. But we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament.

Construction of regulation 74 in light of these considerations

32. Regulation 74 provides that misconduct obligations only give rise to a set-off against a person if at least four requirements are satisfied.

    i. The person must have "left an employment . . . in consequence of a criminal, negligent or fraudulent act or omission on his part".

    ii. The act or omission must have occurred "in connection with the employment".

    iii. The person must have been a member of the Scheme at some point during his/her employment by the authority seeking the set-off.

    iv. If it is disputed, the obligation must be embodied in the judgment of a court.

33. I agree with the Ombudsman that the wording of regulation 74 is clear and precise in its requirement that the person left the employment in consequence of the misconduct. Yet Enfield asks me to construe it to include the opposite scenario as well, where the person does not leave the employment in consequence of the misconduct. In effect, I am asked to conclude that in stipulating that the person

must have left in consequence of the misconduct, the author was intending to mean, and was impliedly saying, "or would have done so if the misconduct had been discovered in time". I agree with Mr Feltham that that is a very ambitious submission in light of the express wording of the regulation.

34. I have considered not only regulation 74 but other regulations dealing with the consequences of misconduct. These other provisions also contain the causative requirement. In regulation 72(2), dealing with forfeiture certificates, the requirement appears as an integral part of the definition of a "relevant offence". In regulation 76 (1), the requirement again appears as a prerequisite to the right to transfer funds from the Scheme where a member committed fraud or grave misconduct. It appears also in regulation 75(2). In my judgment, if the causative requirement in regulation 74 is to be interpreted as the appellant submits, the same interpretation would have to be adopted for the other three provisions in which it also features. That is not conclusive against Enfield's preferred construction, but the fact that the causative requirement appears, and is very clearly expressed, four times in different regulations reinforces my impression that its wording was quite deliberate.

35. I cannot accept Mr Beglan's submission that the best explanation for the causative requirement is to ensure that only conduct serious enough to end the employment will attract a set-off. I think it unlikely that the draftsman would have considered such a safeguard to be necessary. It is (just about) possible that an authority might pursue a former employee to judgment and seek a set-off for misconduct that did not warrant termination of the employment. But the same causative requirement occurs in regulation 75(2) which deals with treason and other very serious offences where such a safeguard would be otiose. Anyway, if the draftsman introduced the causative requirement to ensure that set-off only occurred in serious cases, he would surely have used seriousness, not causation, as the express criterion.

36. Mr Beglan submitted that the Minister cannot have intended to draw the line where the clear words suggest it to be drawn because a line drawn in that place makes no sense. There is no discernible reason why the Minister would have chosen to include only misconduct obligations which result in termination, and not those

discovered later even if serious enough to have resulted in termination. Mr Feltham responded that the line was drawn where it was to exclude hypothesis and uncertainty. The right of set-off is exercisable unilaterally and so must be available only in the clearest cases, and the Minister excluded cases where it would be necessary to speculate as to whether the misconduct was serious enough to terminate the employment, had it been discovered in time.

37. That may be right, though I think it unlikely that the Minister had in mind the very remote possibility that, if he included misconduct discovered after termination, over-enthusiastic authorities would pursue to judgment former employees for conduct which had not even merited dismissal. I therefore agree with Mr Beglan that it is difficult to discern, on the limited material available to me, why the Minister would have chosen to include only misconduct which results in termination, and not misconduct discovered later even if serious enough to have resulted in termination. I also agree with him that the words which he says should be implied into the regulation would not carry any obvious risk of creating anomalies of their own.

38. However none of this is sufficient for me to conclude that the Minister cannot have intended to draw the line where his express words leave it. The 2007 and 2008 Regulations together form a complex scheme of some sophistication. I would not lightly conclude that its language was not intended to bear its literal meaning, even if it gives rise to an anomaly.

39. Moreover termination of employment is of central importance to this sophisticated scheme because a member's right to benefits will usually not arise until termination and usually will arise on termination if the pensionable age has been reached. With these considerations in mind, it is impossible in my judgment to conclude that express language which clearly requires a causative link between misconduct and termination calls for the implication of words to alter that requirement.

40. Although one may speculate about whether the Minister considered all the potential consequences of drawing the line where the express language of the regulations draws it, such speculation does not lead to the conclusion that he did

not intend to draw it there but somewhere else. Even if I concluded that the causative requirement has no rational basis and is absurd, in my judgment it would still be wrong to conclude that I must therefore by necessary implication find words which reverse or curtail it. The causative requirement appears four times in regulations 72, 74, 75 and 76 although different wording is used across these provisions. I cannot conclude that the express language of those regulations, even bearing in mind that it gives rise to the situation in which Enfield finds itself in this case, shows that the regulation must necessarily have included the implied words contended for.

41. For these reasons this appeal must be dismissed.