# RECTIFICATION AND THE PENSIONS OMBUDSMAN

*National Union of Rail, Maritime and Transport Workers v Tyne and Wear Passenger Transport Executive* [2024] UKSC 37

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In an important decision principally concerned with the scope of the remedy of rectification, the UK Supreme Court in *National Union of Rail, Maritime and Transport Workers v Tyne and Wear Passenger Transport Executive*[1] ("*RMT*") has clarified that although the employment tribunal has no power to order rectification as such[2] – the relief it can grant in a case of unlawful deductions from wages being narrowly prescribed by statute[3] – it can nevertheless treat a document relevant to the issue before it *as if* it had been rectified, where rectification would be available in the High Court.[4]

The reader may be forgiven at this point for objecting that this is all very well, but seemingly has nothing to do with the Pensions Ombudsman. That is true, in the sense that the Supreme Court was not at all concerned with the Pensions Ombudsman or the scope of his powers. But this decision may prompt pensions lawyers to ask whether what is sauce for

[1] [2024] UKSC 37.

[2] At [71]-[74].

[3] Employment Rights Act 1996, s24

[4] At [82].

the goose is not also sauce for the gander: if the employment tribunal can decide cases based on finding a putative entitlement to rectification (albeit that rectification has not actually been granted, and could not be granted by the employment tribunal), can the Pensions Ombudsman do the same? And does he need to?

Taking a step back, there has been some interest in recent years in the role and powers of the Pensions Ombudsman. The most notable example is *Pensions Ombudsman v CMG Pension Trustees Ltd*,[5] where the Court of Appeal had to decide whether the Pensions Ombudsman was a "competent court" for the purposes of section 91(6) of the Pensions Act 1995. The issue was whether, if mistaken overpayments were made to a member, the trustees sought to recover the overpayments by recoupment, and the member complained to the Pensions Ombudsman, the trustees could rely on the Ombudsman's determination that they were entitled to recoup the overpayments to authorise them to do so, in the face of a statutory provision providing that "*where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court*" (emphasis added). The Court of Appeal said "no": although the Ombudsman undoubtedly has the power to resolve disputes of fact and law so as to bind the parties to his determination[6] (subject to any appeal to the High Court[7]), he is not as a matter of statutory construction a "competent court", and the trustees of a scheme will need a County Court order to authorise the deductions under section 91(6) (albeit that the Court of Appeal envisaged that the County Court would make such an order administratively following receipt of the Pensions Ombudsman's determination, rather than requiring fresh proceedings[8]).

[5] [2023] EWCA Civ 1258; [2024] Pens LR 3. The author appeared as junior counsel for the Pensions Ombudsman, with Paul Newman KC.

[6] Pension Schemes Act 1993, ss146(1)(c), 151(3); see Asplin LJ at [27], [54].

[7] Pension Schemes Act 1993, s 151(4).

[8] At [55]-[57].

This set-back apart, it is clear that the Pensions Ombudsman's remedial powers are broad, if somewhat opaque. Section 146(1) sets out his functions in wide terms which make clear that the Pensions Ombudsman will principally resolve member complaints, either of maladministration (pursuant to section 146(1)(a)), or relating to a "*dispute of fact or law*" referred by the member (pursuant to section 146(1)(c)). It is notable, though, that the Pensions Ombudsman does *not* have any statutory jurisdiction to resolve disputes of fact or law at the request of the trustees or employer: they must make use of the ordinary courts and (typically) the procedure under rule 64 of the Civil Procedure Rules.

Section 151(2) of the Pension Schemes Act 1993 deals with the relief that follows on a determination of the Pensions Ombudsman, and provides that when making a determination, the Pensions Ombudsman "*may direct any person responsible for the management of the scheme to which the complaint or reference relates to take, or refrain from taking, such steps as he may specify…"* The power to direct "*such steps as he may specify*" is obviously broad, and such a direction can be enforced "*in the county court as if it were a judgment or order of that court*".[9] It is not, though, wholly untrammelled: in *Arjo Wiggins v Ralph*[10] Lewison J confirmed that where the Pensions Ombudsman determines a complaint that a member's legal or equitable rights have been infringed (i.e. not a complaint of pure maladministration[11]), he must "*decide disputes in accordance with established legal principles*",[12] and "*does not have power to make an order that the court could not make*".[13] In other words, it should not matter whether such a dispute is determined by the Pensions Ombudsman or by the ordinary courts: the outcome should be the same in either case (or, at least, within the same range of permissible outcomes).

[9] Pension Schemes Act 1993, s 151(5).

[10] [2009] EWHC 3198 (Ch).

[11] See [15].

[12] At [13].

[13] At [14]. See also *Henderson v Stephenson Harwood* [2005] Pens LR 209 at [46].

This then gives rise to the question which logically must come first: is rectification a remedy which the Pensions Ombudsman can himself order? Where there is a dispute between a member and the trustees or employer about a document which it is said should be rectified to reflect what was actually agreed (or, in the case of a unilateral document, intended by its maker), and that document does not affect any other person not party to the complaint or referral to the Pensions Ombudsman, it is not obvious that the Pensions Ombudsman cannot order rectification as a matter of determining the "*dispute of fact or law*" and ordering the trustees or employer (or others responsible for the management of the scheme) to administer the scheme accordingly. In this respect, the Pensions Ombudsman is in a quite different position from the employment tribunal in a case of unlawful deductions from wages. As Lord Leggatt and Lady Simler JJSC explained in *RMT*, the statutory relief[14] in such a case is a declaration that unlawful deductions have been made, and an order for repayment of unlawful deductions.[15] The Pensions Ombudsman is not so limited.

However, there are three objections to this approach. The first is that the Pensions Ombudsman process is not well suited to rectification of pension scheme documents, since that would usually affect more than just the complainant and the trustees or employer. Indeed, it is easy to imagine a rectification claim (e.g. in relation to generally applicable scheme rules) which would affect *all* members (at least in principle). Under section 151(3), the Pensions Ombudsman's determination is binding on the complainant and on those responsible for the management of the scheme in question, but not on anyone else.[16] That alone is likely to render the Pensions Ombudsman entirely unsuitable as a venue for rectification in the great majority of cases:[17] in *Edge v Pensions Ombudsman*[18] Sir Richard Scott

[14] Employment Rights Act 1996, s 24.

[15] At [71].

[16] See *Edge v Pensions Ombudsman* [1998] Ch 512 at 518B-E.

[17] In *Alexander Forbes Trustee Services Ltd v Halliwell* [2003] Pens LR 269, Hart J accepted (at [24]) that where the Pensions Ombudsman's determination was detrimental to the scheme employers, the employers should have been joined as respondents and giving the opportunity to make representations. But that procedural option would not be available where the person affected by a decision of the Pensions Ombudsman is another member (or class of members).

[18] [1998] Ch 512.

V-C held that it followed that "*Parliament cannot have intended to give him power to determine disputes which involve the rights of others or to direct steps to be taken which adversely affect anyone else.*"[19]

The second objection is that the Pensions Ombudsman's processes are not well suited to carrying out the kind of fact-finding exercise that the court would in a rectification claim, and in particular do not entail the kind of sceptical scrutiny that the court demands in cases where the parties before it assert that the document they have created or agreed does not accord with their true intentions. There is not usually an oral hearing, and cross-examination is not typical.

The third objection applies even in the unusual case where rectification is in principle possible between member and trustees only, such as rectification of a legally binding nomination made by a member, and there are no difficulties of fact-finding. Here the objection is one of principle, namely that section 151(2) envisages the trustees or employer being made to do – or not to do - something, such as to pay money. It might be said that this does not readily encompass the idea of a document being altered for all purposes.

If, therefore, actual rectification is likely not to be available as relief ordered by the Pensions Ombudsman consequent on the determination of a member complaint, there nevertheless remains the possibility of what is referred to here as "as if" rectification, as endorsed in *RMT* in relation to the employment tribunal. This has a long pedigree in the tax tribunals. In *Lobler v HMRC*,[20] Proudman J decided that although the First Tier Tribunal ("FTT") had no power to order rectification, it was open to the FTT to find that the taxpayer would be entitled to rectification in a claim before the High Court,[21] and that "*his tax position*

[19] At 519E-F. See also *Pensions Ombudsman v EMC Europe Ltd* [2013] Pens LR 45, where Briggs J held that the Pensions Ombudsman could not entertain a complaint aimed at setting aside a compromise agreement entered into by the scheme trustees with a third party, the latter not being subject to the jurisdiction of the Pensions Ombudsman.

[20] [2015] UKUT 0152 (TCC).

[21] At [45]-[50].

*is to be determined as if that remedy had been granted*."[22] In *Hymanson v HMRC* [2018] UKFTT 667 (TC), Judge Philip Gillett, sitting in the FTT, held that the same applied to rescission for mistake, declining HMRC's invitation to find that *Lobler* was wrongly decided, or distinguishable (on the basis that rescission is different from rectification).[23]

Does this approach fall foul of the objections already set out? The third objection can be met on the basis that, on the "as if" approach, the Pension Ombudsman would not actually make an order for rectification, and so the question of whether he has the power to do so does not arise. The appropriate relief would arise only between the member and the trustees or employer, and would be concerned not with rectification, but with the member's rights on the footing that the relevant document has been, or would be, rectified. The first and second objections remain more difficult: even on an "*as if*" basis, the Pensions Ombudsman would still have to decide whether a rectification claim is meritorious, in order to consider whether it would succeed before the High Court, and consequently whether it should be treated as having succeeded. In view of the difficulties with rectifying documents which potentially affect persons other than the complaining member, the trustees and the employer already discussed, it is likely that even this "as if" rectification would have to be strictly limited to the narrow class of documents which do not even potentially affect anyone not party to the complaint.

It therefore seems likely that the Supreme Court's decision in *RMT* will not lead to "as if" rectification becoming commonplace in the determination of member complaints by the Pensions Ombudsman - but the possibility of a narrowly-tailored "as if" rectification claim cannot be ruled out.

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[22] At [74].

[23] At [76]. HMRC has continued to press its arguments against *Lobler* and *Hymanson*, and succeeded in *Lefort v HMRC* [2024] UKFTT 00926 (TCC) in persuading the FTT not to follow *Hymanson*. Paul Newman KC, "Mistaken Payments and Fixed Protection: the Saga Continues" at https://www.pensionsbarrister.com/post/mistaken-payments-and-fixed-protection argues that the treatment of *Hymanson* in *Lefort* is both unnecessary to the FTT's decision, and inconsistent with *Lobler*, which was binding on it as a matter of precedent.

**Published January 2025**