Neutral Citation Number: [2016] EWHC 319 (Ch)

Case No: CH/2015/0377

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A1NLL

Date: 19/02/2016

Before :

MR JUSTICE MORGAN

- -

Between :

DONNA-MARIE HUGHES	**Appellant**
- and -	
THE ROYAL LONDON MUTUAL INSURANCE SOCIETY LIMITED	**Respondent**

- -
- -

Ms Frances Ratcliffe (instructed under the Public Access Scheme) for the **Appellant**
Mr Fenner Moeran QC (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing date: 18 January 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MORGAN

MR JUSTICE MORGAN:

Introduction

1. This is an appeal by Ms Hughes against the determination of the Pensions Ombudsman (Mr Anthony Arter) dated 30 June 2015, whereby he dismissed her complaint against The Royal London Mutual Insurance Society Ltd ("Royal London") (wrongly named as Royal London Group). The appeal is brought with the permission of Mann J, pursuant to section 151 of the Pension Schemes Act 1993 ("the 1993 Act"). Such an appeal may only be brought on a point of law: see section 151(4).

2. In brief summary, the question before the Ombudsman arose in this way. Ms Hughes was a member of a personal pension scheme ("PPS") within the meaning of the 1993 Act. Royal London was the scheme administrator in relation to that PPS. Ms Hughes was also a member of an occupational pension scheme ("OPS") within the meaning of the 1993 Act. Ms Hughes had acquired a right to the cash equivalent of the accrued benefits under her PPS. Ms Hughes applied in writing to Royal London requiring it to use the cash equivalent, to which she was entitled, for the purpose of acquiring transfer credits allowed under the rules of her OPS. The definition of "transfer credits" in section 181(1) of the 1993 Act refers to "rights allowed to an earner".

3. Royal London declined Ms Hughes' request. It expressed concerns about the possibility of pensions liberation. It also questioned whether Ms Hughes was an "earner" within the definition of "transfer credits" with the result that Ms Hughes could not acquire transfer credits under her OPS and could not therefore take the cash equivalent of her accrued rights under her PPS.

4. The principal question before the Ombudsman was whether Royal London was right to deny Ms Hughes the cash equivalent of her accrued rights.

5. Ms Hughes also complained to the Ombudsman that even if she did not have a statutory right to transfer credits, the rules of the PPS conferred on Royal London a discretionary power to transfer Ms Hughes' accrued rights under the PPS to her OPS and that Royal London had improperly exercised its discretion by refusing to transfer her accrued rights to her OPS.

6. The Ombudsman held that in order to be "an earner" within the definition of "transfer credits" Ms Hughes had to be an earner in relation to a scheme employer in relation to the OPS and that she was not such an earner. The Ombudsman therefore held that Ms Hughes did not have a statutory entitlement to a transfer of the cash equivalent of her accrued rights to her OPS. He also held that Royal London did not act improperly in deciding not to exercise its discretionary power to transfer Ms Hughes' accrued rights to her OPS. He therefore dismissed her complaint.

7. Ms Hughes' appeal to the High Court challenged both parts of the decision of the Ombudsman. She submitted that he wrongly construed the definition of "transfer credits" and that she was "an earner" within that definition, even though her earnings did not come from a scheme employer in relation to the OPS. In the alternative, she submitted that the Ombudsman ought to have held that Royal London had improperly exercised its discretion when considering whether to transfer her accrued rights to her OPS.

8. Royal London stated that it did not oppose the first ground of Ms Hughes' appeal but that it would argue, if necessary, in opposition to Ms Hughes' second ground of appeal.

9. In answer to a question from the court, counsel for Royal London indicated that Royal London would not formally consent to the appeal being allowed on the first ground but it would not present any argument in support of the interpretation of "transfer credits" adopted by the Ombudsman. I expressed concern that I was being asked to decide a question of statutory interpretation which could potentially be of general importance but without hearing both sides of the argument. Counsel for Royal London was then instructed to put forward such arguments as he could to support the interpretation of the Ombudsman.

The statutory provisions

10. The relevant statutory provisions are in the 1993 Act, which incorporates a definition of "earner" from the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"). I will refer to the relevant statutory provisions as they existed at the time relevant to this case; some of them have since been amended.

11. Section 1 of the 1993 Act defines "occupational pension scheme" and "personal pension scheme" as follows:

> "1. **Categories of pension schemes.**
>
> (1) In this Act, unless the context otherwise requires—
>
> "*occupational pension scheme*" means a pension scheme–
>
> (a) that–
>
> (i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or
>
> (ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,
>
> is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, and
>
> (b) that has its main administration in the United Kingdom or outside the EEA states,
>
> or a pension scheme that is prescribed or is of a prescribed description;
>
> *"personal pension scheme"* means a pension scheme that–
>
> (a) is not an occupational pension scheme, and

> (b) is established by a person within section 154(1) of the Finance Act 2004; ”

12. Chapter IV of Part IV of the 1993 Act contains provisions entitling certain members of certain pension schemes to the cash equivalent of rights which have accrued under such schemes. Chapter IV includes sections 93, 94 and 95. Section 93 provides:

> “93.— Scope of Chapter IV.
>
> (1) This Chapter applies—
>
> (a) to any member of an occupational pension scheme—
>
> (i) whose pensionable service has terminated at least one year before normal pension age, and
>
> (ii) who on the date on which his pensionable service terminated had accrued rights to benefit under the scheme,
>
> except a member of a salary related occupational pension scheme whose pensionable service terminated before 1st January 1986 and in respect of whom prescribed requirements are satisfied”.
>
> (b) to any member of a personal pension scheme (other than a scheme which is comprised in an annuity contract made before 4th January 1988) who has accrued rights to benefit under the scheme.”

13. Section 94 provides:

> “94.— Right to cash equivalent.
>
> (1) Subject to the following provisions of this Chapter—
>
> (a) a member of an occupational pension scheme other than a salary related scheme acquires a right, when his pensionable service terminates (whether before or after 1st January 1986), to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the applicable rules; and
>
> (aa) a member of a salary related occupational pension scheme who has received a statement of entitlement and has made a relevant application within three months beginning with the guarantee date in respect of that statement acquires a right to his guaranteed cash equivalent
>
> (b) a member of a personal pension scheme acquires a right to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the rules of the scheme.”

14. Section 95 provides:

> "95.— Ways of taking right to cash equivalent.
>
> (1) A member of an occupational pension scheme or a personal pension scheme who acquires a right to a cash equivalent under paragraph (a), (aa) or (b) of section 94(1) may only take it by making an application in writing to the trustees or managers of the scheme requiring them to use the cash equivalent to which he has acquired a right in whichever of the ways specified in subsection (2) or, as the case may be, subsection (3) he chooses.
>
> (2) [Deals with a member of an occupational pension scheme]
>
> (3) In the case of a member of a personal pension scheme, the ways referred to in subsection (1) are—
>
> (a) for acquiring transfer credits allowed under the rules of an occupational pension scheme—
>
> (i) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights, and
>
> (ii) which satisfies prescribed requirements;
>
> (b) for acquiring rights allowed under the rules of another personal pension scheme—
>
> (i) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights, and
>
> (ii) which satisfies prescribed requirements;
>
> (c) for subscribing to other pension arrangements which satisfy prescribed requirements."

15. Section 95(3)(a) refers to "transfer credits" which are defined by section 181 as follows:

> "transfer credits" means rights allowed to an earner under the rules of an occupational pension scheme by reference to:
>
> (a) a transfer to the scheme of, or transfer payment to the trustees or managers of the scheme in respect of, any of his rights (including transfer credits allowed) under another occupational pension scheme or a personal pension scheme, other than rights attributable (directly or indirectly) to a pension credit, or
>
> (b) a cash transfer sum paid under Chapter 5 of Part 4 in respect of him, to the trustees or managers of the scheme".

16. The definition of "transfer credits" refers to an "earner" and to "rights" which are defined by section 181 as follows:

> " "earner" and "earnings" shall be construed in accordance with sections 3, 4 and 112 of the Social Security Contributions and Benefits Act 1992;
>
> "rights", in relation to accrued rights (within the meaning of section 73, 136 or 179) or transfer credits, includes rights to benefit and also options to have benefits paid in a particular form or at a particular time; "

17. Section 3 of the 1992 Act contains a definition of "earnings" and "earner" as follows:

> "3.— "Earnings" and "earner".
>
> (1) In this Part of this Act and Parts II to V below—
>
> (a) "earnings" includes any remuneration or profit derived from an employment; and
>
> (b) "earner" shall be construed accordingly."

18. The definition of "earnings" refers to an "employment" which is defined by section 122 of the 1992 Act to include:

> "any trade, business, profession, office or vocation".

19. Section 4 of the 1992 Act provides for certain payments to be treated as remuneration and earnings. Section 112 provides for certain sums to be earnings. It is not necessary for present purposes to refer further to sections 4 and 112 of the 1992 Act.

The Ombudsman's determination

20. The Ombudsman considered whether the scheme to which Ms Hughes wished to transfer her cash equivalent was an "occupational pension scheme" within the meaning of section 1 of the 1993 Act. He directed himself by reference to the decision in Pi Consulting (Trustee Services) Ltd v The Pensions Regulator [2013] Pens LR 433 ("Pi Consulting") and held that it was. He then held that Ms Hughes was apparently employed by the principal employer for the purposes of that OPS but that she had not received remuneration from that employer. He did not go on to make an express finding as to whether she was an "earner" on the basis that she had earnings from another source. However, at the hearing before me, Royal London accepted that although Ms Hughes did not have earnings derived from a scheme employer, she did have earnings from another source.

21. The Ombudsman then held that Ms Hughes did not have a statutory right to a cash equivalent transfer value because she could not show that she enjoyed the status of an earner in relation to a scheme employer. His reasoning on this point was contained in paragraph 79 of his determination where he said:

> "Although there is nothing in the legislation that expressly states that Miss Hughes' status as an earner had to be in relation to a scheme employer, I find that it did. It would be a very strange result if people not in "employments of a description" who were

> earners in some other context (with earnings, however small or irregular, from some completely unconnected enterprise) could require a transfer value to be paid to the scheme, when other people not in "employments of a description" could not. It would give the reference to "earner" arbitrary consequences if it just means a person with any earnings from any source."

The submissions

22. Counsel for Ms Hughes submitted that the Ombudsman was right to hold that the pension scheme to which she wished to transfer her rights accrued under her PPS was an "occupational pension scheme" within the meaning of section 1 of the 1993 Act and that, in particular, he was right to apply the decision in Pi Consulting for that purpose.

23. Her counsel accepted that in order for Ms Hughes to be entitled to acquire transfer credits for the purpose of section 95(3) of the 1993 Act, she had to be an "earner": see the definition of "transfer credits". However, it was submitted that there was no requirement in the legislation for her to be an earner in receipt of remuneration or profit from employment with an employer under the OPS.

24. It was further submitted that there were a number of reasons why the definition of "earner" should not be construed in a way which restricted an "earner" to one who was in receipt of remuneration or profit from employment with an employer under the OPS. These included:

    (1) the definition of "occupational pension scheme" allows such a scheme to be established for providing benefits to or in respect of people with service in employments of a description and "other people"; see section 1(1)(a)(ii) of the 1993 Act and Pi Consulting;

    (2) an OPS can include arrangements for providing pensions for self-employed individuals: see PNPF Trust Company Ltd v Taylor [2010] Pens LR 261 at [333];

    (3) in so far as the definition of an "occupational pension scheme" requires the founder of such a scheme to employ a person of a relevant description when the scheme was founded, any such requirement is satisfied by the founder being a company with an unremunerated director and such a director may be a member of the scheme by virtue of his directorship: see section 1(1) and (2) of the 1993 Act and Pi Consulting;

    (4) there was therefore no justification for denying transfers to members of an OPS who were not employees under the OPS, in particular, to persons who were self-employed or who were not remunerated by the scheme employer.

25. Counsel for Royal London agreed that Ms Hughes had to be an "earner" to be able to take the cash equivalent of accrued rights by way of transfer credits. He sought to support the Ombudsman's view that the legislation required Ms Hughes to be an earner in relation to a scheme employer and there was discussion about former employees of a scheme employer who retired and the dependants of a former employee of a scheme employer.

Discussion

26. At the hearing I raised with counsel for both parties whether it was indeed necessary for Ms Hughes to establish that she was an earner of some kind in order to be able to take her cash equivalent by way of transfer credits. It occurred to me that it might be possible to read the definition of "transfer credits" so that it referred to rights which had the character of rights which were allowed to persons who were earners but without requiring the individual applicant for a transfer of the cash equivalent to be himself or herself an earner. Neither counsel supported this interpretation of the definition and I say no more about it.

27. The definition of "transfer credits" refers to "rights allowed to an earner under the rules". It was not suggested that the relevant person had to be "an earner under the rules" and I accept that the phrase "under the rules" governs the word "rights" rather than the word "earner".

28. Accordingly the choice for the court is between the Ombudsman's interpretation and Ms Hughes' interpretation. The interpretation adopted by the Ombudsman involves reading words into the definition of transfer credits, which words were not expressed in the definition.

29. It is sometimes possible for a court to supply missing words in a statutory provision. The circumstances in which such a course might be appropriate were considered in Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586. In that case, the House of Lords had to construe section 18(1)(g) of the Arbitration Act 1996 and it was held that wording in section 18(1)(g) was to be construed as having the meaning which would be accurately expressed using more words than actually appeared in the paragraph. Lord Nicholls explained the position as follows:

> "I freely acknowledge that this interpretation of section 18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation* , 3rd ed. (1995), pp. 93–105. He comments, at p. 103:
>
> "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the

> courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see *per* Lord Diplock in Jones v Wrotham Park Settled Estates [1980] AC 74, 105–106. In the present case these three conditions are fulfilled.
>
> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In Western Bank Ltd v Schindler [1977] Ch 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature."

30. This passage has been applied in many later cases. I referred to some of the later cases in Industry-Wide Coal Staff Superannuation Scheme Coordinator Ltd v Industry-Wide Coal Staff Superannuation Scheme Trustees Ltd [2013] Pens LR 55.

31. For the purpose of applying the test laid down in Inco Europe to the present case, I have considered the scheme of the 1993 Act as it existed at the time which is relevant in this case. I have also considered the scheme of the 1993 Act as originally enacted; section 1 of the 1993 Act as originally enacted contained quite different definitions of "occupational pension scheme" and "personal pension scheme". I have also considered the scheme of the 1992 Act. Having carried out that exercise, I am not satisfied in relation to any one of the three matters identified in Inco Europe as to which I am required to be "abundantly sure". I am therefore not satisfied that it is open to me to read words into the definition of "transfer credits". Accordingly, I am not able to accept the Ombudsman's interpretation of that definition. In the absence of any other identified meaning for the word "earner" I will give it its general meaning in accordance with sections 3, 4 and 112 of the 1992 Act.

32. As it is agreed that Ms Hughes was an earner by reason of her earnings from another source or sources, it follows that she was entitled to require Royal London to transfer the cash equivalent of her accrued rights under her PPS so that she would be awarded transfer credits in relation to her OPS.

33. I will therefore allow Ms Hughes' appeal on this first ground.

34. This decision makes it unnecessary to consider Ms Hughes' second ground of appeal. In view of the fact that Ms Hughes has achieved the result she wished to achieve and that Royal London did not oppose that result, I consider that it is neither necessary nor appropriate to consider the arguments in relation to her second ground of appeal. Equally, it is neither necessary nor appropriate to consider Royal London's application to adduce fresh evidence in support of its opposition to her second ground of appeal.