

## Ombudsman's Determination

Applicant	Mr Y
Scheme	AECOM Group Pension Scheme ( <b>the Scheme</b> )
Respondent	AECOM Pension Trustee Limited ( <b>the Trustee</b> )

### Complaint Summary

1. Mr Y's complaint concerns his pension from the Scheme which the Trustee says was calculated incorrectly when he retired in July 2011. He is unhappy that his pension has now been reduced and that a plan has been put in place to recover the amount of pension that it claims was overpaid to him.

### Summary of the Ombudsman's Determination and reasons

2. The complaint should be partly upheld against the Trustee because it should not have commenced the recovery of the overpayment without an order of a competent court.

### Detailed Determination

#### Material facts

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were many other exchanges of information between all the parties.
4. Mr Y was employed by Knight Piesold Ltd which later became part of the Scott Wilson Group plc (**SW**). He was a member of the Knight Piesold (UK) Final Salary Pension Scheme (**the KP Scheme**).
5. In 1991, Mr Y transferred his benefits from the KP Scheme to the Knight Piesold COMP Pension Scheme with Equitable Life (**the COMP Scheme**).
6. On 27 February 1998, Mr Y was sent briefing notes (**the Notes**), extracts from which can be found in Appendix 1. The Notes related to:

- 6.1. a new benefit structure that was being introduced to the KP Scheme from 1 April 1998; and
  - 6.2. the options available to members of the COMP Scheme in light of these changes.
7. The Notes stated that no further contributions would be paid by the employer to the COMP Scheme from 1 April 1998. However, Mr Y would be able to re-join the KP Scheme for future benefit provision.
8. Mr Y had a one-off opportunity to transfer his COMP Scheme benefits back to the KP Scheme. If he chose this option, the benefits provided in the KP Scheme would be broadly in line with those he had earned previously in that scheme. However, there were two exceptions. One of these exceptions was that the transferred in benefits would be subject to a normal retirement age (**NRA**) of 65 rather than the NRA of 60 that had applied previously.
9. In April 1998, Mr Y applied to transfer his benefits from the COMP Scheme to the KP Scheme. At the time, he was acting as pensions administrator and, in this role, he was liaising with other members who had the option to make a similar transfer. He was also dealing with the paperwork in relation to the transfers.
10. On 31 July 2003, Mr Y left the employment of SW and became entitled to deferred benefits in the KP Scheme.
11. A letter dated 12 October 2004 was emailed to the Trustees of the KP Scheme. This letter purported to be from Mr Y, although it was not signed by him. In the letter it was asked whether Mr Y could be allowed to draw all of his benefits at age 60 without incurring a penalty (**the Enhancement Request**). The decision was documented in the minutes of their meeting on 21 March 2005, which stated:

“[Mr Y] has written to the Trustees to enquire whether he could be allowed to take pension benefits at age 60 without suffering the early retirement penalty. This request has been denied, and [Mr T] has formally responded to [Mr Y].”
12. The KP Scheme became part of the Scott Wilson Pension Scheme (**the SW Scheme**) and Mr Y’s deferred benefits became a liability of the SW Scheme.
13. In 2005, KPMG took over responsibility for the administration of the SW Scheme.
14. On 23 February 2011, KPMG sent Mr Y a retirement estimate based on his retirement at age 60 in July 2011. It stated that it was a normal retirement estimate. It quoted an annual pension of £9,957.36 or a lump sum of £45,112.63 together with an annual pension of £6,766.92.
15. On 4 March 2011, KPMG wrote to Mr Y following an earlier telephone call. It provided him with a breakdown of the calculation of his retirement pension at age 60. Indeed, the letter specifically set out Mr Y’s pension “... at [his] Normal Retirement Date (...July 2011)”, that date being Mr Y’s 60<sup>th</sup> birthday. The breakdown did not show an

early retirement factor being applied to any part of Mr Y's pension. A summary of the breakdown can be found in Appendix 2.

16. On 9 March 2011, Mr Y signed the SW Scheme retirement option form. He opted for the full pension.
17. On 4 July 2011, KPMG confirmed to Mr Y that his monthly gross pension would be £829.78 which equated to £9,957.36 per annum.
18. In early 2016, the Scheme was created as an umbrella scheme for a number of legacy defined benefit arrangements including the SW Scheme.
19. On 1 December 2016, Mr Y's benefits were transferred from the SW Scheme to the Scott Wilson section of the Scheme. There was no change to his benefits as a result of the transfer. The Scheme's administrator was PS Administration Limited (**PSAL**) which later became Xafinity Punter Southall Administration (**XPS**).
20. The Trustee undertook a benefit verification exercise during which it was identified that the incorrect pension was being paid to a number of members, including Mr Y. This was due to a miscalculation by KPMG.
21. On 4 June 2018, PSAL wrote to Mr Y concerning the discrepancy that had been identified in the calculation of his pension. It said:-
  - 21.1. Mr Y had received a higher pension than he was entitled to. This was due to the fact that an NRA of 60, rather than 65, had been used in the calculation of his benefits relating to the transfer from the COMP Scheme.
  - 21.2. His current annual pension was £11,829.48. However, his correct pension entitlement amounted to £9,463.08. PSAL had calculated that he had been overpaid by £16,901.83. The calculation took into account the pension instalment paid to him on 1 June 2018.
  - 21.3. Mr Y would be paid the correct pension from 1 July 2018. The Trustee was considering ways to make it easier for him to make repayment should he be unable to re-pay the full overpayment in one instalment. PSAL would write to him again to provide further information.
22. On 12 June 2018, Mr Y responded to PSAL. He said:-
  - 22.1. He was concerned about the impact that the reduced pension and requirement to re-pay the overpayment would have on his finances.
  - 22.2. In February 2011, he telephoned KPMG to establish what his pension options were. These were explained in detail to him, including the option to draw his pension at age 60. This was the option he chose. He would have continued in work if he had known that part of his pension was payable from age 65.

- 22.3. He disputed that the Trustee had a legal right to withhold the pension increase due to him on 1 May 2018 without providing an explanation. He also disputed that it could reduce his pension from 1 July 2018.
- 22.4. He did not have the available funds to make the repayment in instalments. Doing so would cause him and his wife considerable hardship.
- 22.5. He wanted further information and expected his pension not to be reduced in the meantime.
23. On 25 June 2018, the Trustee wrote to Mr Y. It said that his letter of 12 June 2018 had invoked the Scheme's Internal Dispute Resolution Procedure (**IDRP**). It confirmed that it would not reduce his pension from 1 July 2018.
24. On 15 October 2018, the Trustee responded to Mr Y's complaint. It enclosed a copy of the Notes that were sent to members of the COMP Scheme on 27 February 1998. It said:-
  - 24.1. Benefits had to be paid in accordance with the Scheme's Trust Deed and Rules (**the Rules**) and overpayments had to be recovered by the Trustee.
  - 24.2. KPMG had reviewed PSAL's calculation of Mr Y's benefits. It had come to light that a different early retirement factor was in place at the time of Mr Y's retirement. This meant that his revised annual pension was slightly higher at £9,735.48, which equated to a monthly pension of £811.29. His pension would be adjusted to the correct level from 1 November 2018.
  - 24.3. The Trustee obtained legal advice on the issues Mr Y had raised in connection with his complaint. The Trustee's lawyers confirmed that it had a duty to pay the correct benefits.
  - 24.4. The Trustee had decided to recover the overpayment by withholding future increases to Mr Y's pension. This meant that he would be paid a pension of £9,735.48 a year from 1 November 2018. Should he die before the overpayment had been fully recovered, any balance outstanding on his death would be written off. The spouse's pension would include any pension increases payable from the date of his retirement to the date of his death.
  - 24.5. If Mr Y believed that this arrangement would cause him financial hardship, he should provide supporting evidence of this.
  - 24.6. The Notes informed members who opted to re-join the KP Scheme that their transferred in benefits would be subject to an NRA of 65. Mr Y had ticked the option to transfer in his benefits. By doing so, he confirmed his agreement to the conditions in the Notes.
  - 24.7. The revised overpayment amounted to £15,924.73. The calculation took into account the instalment of Mr Y's pension that was paid on 1 October 2018.
25. On 5 November 2018, Mr Y responded to the Trustee. He said:-

- 25.1. He was entitled to the pension quoted by KPMG in the correspondence it sent him shortly before his retirement.
  - 25.2. He understood at the time that he was taking normal retirement and had not chosen to take early retirement. It had subsequently transpired that he had lost income by retiring at age 60.
  - 25.3. It was unclear to him what evidence the Trustee was expecting him to provide to demonstrate that the arrangement would cause him financial hardship.
26. On 6 December 2018, the Trustee wrote to Mr Y. It advised that while it had put in place measures to recover the overpayment, it was willing to reconsider its position if he could evidence that the measures would cause him financial hardship. The Trustee explained that appropriate evidence would be a summary of his household income and expenditure, details of any savings and investments with documentary evidence to support the summary. This should include bank statements covering the last three months.
27. On 15 March 2019, the Trustee sent an email to Mr Y in response to emails he had sent the Trustee. It provided a copy of correspondence it had received from KPMG confirming that it had agreed XPS' calculation of his benefits, subject to some minor differences in the way his pension had been split into tranches.
28. In 2019, the Trustee's legal advisers and lawyers representing KPMG entered into negotiations. The parties discussed the level of compensation KPMG should pay to the Scheme to remedy the mistakes that had been identified in KPMG's calculations.
29. On 2 December 2019, the Trustee communicated the results of these negotiations to Mr Y and enclosed a letter from KPMG confirming the details of its offer. The Trustee explained that:-
- 29.1. In full and final settlement of his complaint, KPMG had offered to pay Mr Y £1,000, in recognition of the distress its error had caused him.
  - 29.2. KPMG had also offered to make a payment to the Scheme. As a number of members of the Scheme were impacted, the Trustee had calculated how best to allocate this payment between them. It confirmed that £3,531.36 of the payment would be used to reduce the overpayment the Trustee was seeking to recover from Mr Y. However, KPMG said that it would only make the payment if all the affected members accepted the amount of compensation it had offered the Trustee.
30. On 16 December 2019, Mr Y wrote to the Trustee to ask that his complaint be formally considered under the IDR. P.
31. On 14 January 2020, the Trustee confirmed that it would revisit the matter under the IDR. P.

32. On 3 February 2020, the Trustee provided Mr Y with its response under stage one of the IDR. It did not uphold his complaint. The Trustee said:-
  - 32.1. The level of pension he was receiving from the Scheme was correct.
  - 32.2. It was under a legal duty to seek recovery of the overpayments made to him.
  - 32.3. The recovery plan it had put in place was proportionate and reasonable.
  - 32.4. It would reconsider the recovery plan if he could provide evidence that it was causing him financial hardship.
33. On 7 February 2020, Mr Y wrote to the Trustee. He confirmed that he did not accept KPMG's offer of compensation.
34. On 19 March 2020, Mr Y sent a further letter to the Trustee. He said he had a health problem, which had been exacerbated by the distress the errors had caused him. He was concerned that he had not been kept up to date on the negotiations that had taken place between the Trustee and KPMG. He would not accept anything short of KPMG meeting the full cost of the overpayment.
35. On 26 March 2020, Mr Y wrote to the Trustee and requested a distress and inconvenience award in recognition of the non-financial injustice this matter had caused him. Alternatively, the Trustee should compensate him for his alleged loss of earnings. He maintained that he had been misled into retiring at age 60, in the reasonable expectation that he could draw his pension without reduction for early payment.
36. The Trustee's legal advisers have confirmed that Mr Y is the only member of the Scheme who did not accept KPMG's offer. The payment has yet to be paid to the Scheme.
37. Mr Y made the following additional submissions:-
  - 37.1. He was not questioning the terms of the transfer from the COMP Scheme to the KP Scheme. It was the Trustee's and KPMG's stance concerning the outcome of the Enhancement Request that he was concerned about. The Trustee has not provided him with a copy of the letter notifying him that the Enhancement Request was declined.
  - 37.2. During a telephone call with KPMG, which prompted KPMG to send him the letter on 4 March 2011, he asked for confirmation that the retirement estimate it had sent him was correct. He also asked KPMG to review his preserved benefits statement. He was informed that the retirement estimate was based on the information KPMG held on its records. The figures indicated the Enhancement Request had been approved. So, he asked KPMG to obtain confirmation from the Trustee of the SW Scheme before sending him the breakdown of his pension.
  - 37.3. It was not clear to him what had caused the miscalculation of his benefits.

- 37.4. He was not initially made aware that the Trustee held negotiations with KPMG in 2019. The offer KPMG agreed with the Trustee would only reduce the amount due to be recovered from him by £3,531.36. This was inadequate given the impact the proposed recovery plan would have on his finances.
  - 37.5. Furthermore, the £1,000 distress and inconvenience payment KPMG has offered him does not adequately recognise how this issue has impacted him.
  - 37.6. He contacted the administrator at KPMG who calculated his pension. She is no longer employed by KPMG. However, she said there was no reason to believe that his pension had been calculated incorrectly. Furthermore, the paperwork to support the calculation was available to KPMG.
  - 37.7. He did not act negligently and “turn a blind eye”. He is not a pensions expert; he expected KPMG to undertake the necessary checks to satisfy itself that the figures were correct.
38. The Trustee made the following additional submissions:-
- 38.1. The Trustee did not have a copy of the notification that was sent to Mr Y informing him that the Enhancement Request had been rejected.
  - 38.2. When the Scheme was set up, the Trustee undertook a full competitive tender and appointed PSAL. As a result, Mr Y’s benefits have been administered by PSAL from the date he transferred his benefits.
39. The Trustee’s legal advisers made the following additional submissions on behalf of the Trustee:-
- 39.1. Section 91(6) of the Pensions Act 1995 (**s91(6)**) refers to the exercise of a “charge, lien or set-off”. The Trustee submits that this is intended to prevent a member’s pension benefits being affected by sources outside the pension scheme. The Trustee was relying on the equitable principle of recoupment as an internal tool to pay the correct level of pension as if it had always been in payment at that correct level.
  - 39.2. If s91(6) does apply in this case, the Trustee further contends that Mr Y is not disputing the “amount” being recouped. Rather, he is disputing his entitlement to a particular level of benefit relating to a transfer into the Scheme. So, the complaint concerns a dispute about his pension rights in the Scheme.
  - 39.3. For these reasons, the Trustee was legally entitled to begin recoupment and does not consider that it breached s91(6). Furthermore, the Trustee consulted its legal advisers and was advised unequivocally that it could begin the recoupment process. The Trustee submits that its actions in this case do not amount to maladministration.
  - 39.4. The Trustee obtained legal advice on how to deal with the overpayments that had arisen in this case. Specifically, in relation to the options open to the

Trustee. The legal advice was that it was permissible to use the equitable remedy of recoupment. The Trustee's legal advisers did not consider that it needed to obtain an order from a competent court in these circumstances.

39.5. The Trustee also obtained legal advice in connection with the letter it subsequently issued to the members setting out the recoupment plan. The letter was signed off by the Trustee's legal advisers.

40. I issued a Preliminary Decision on 1 August 2023. Mr Y made further representations in response to that Decision.

### **Mr Y's further representations**

41. Mr Y submits:-

41.1. A number of staff at KPMG would have been involved in the calculation and checking of his retirement benefits in 2011; and also the calculation of benefits over a six-year period for other members of the SW Scheme with similar benefits to his. It was not possible that they would have all calculated the benefits as they did without evidence to support an enhancement to his benefits. His view is that KPMG had calculated his pension correctly.

41.2. The Chairman of the Trustee of the SW Scheme at the time (**the Chairman**) was familiar with all the members of the SW Scheme who had similar benefits to Mr Y's. The Chairman would have known if anyone had retired at age 60 on an unreduced pension without an authorised enhancement. He would have raised a query in relation to Mr Y's pension had he not been entitled to an unreduced pension.

41.3. KPMG would have passed its administration records to PSAL, and these would have detailed how his pension had been calculated. It should be possible to ascertain the exact cause of any uncertainty about the calculations undertaken by KPMG. If the root cause of the alleged miscalculation was because there was supporting evidence of an enhancement to his benefits, then the original pension calculations were correct.

41.4. He had not been offered any compensation for the fact that his benefits had been recalculated and reduced due to the application of an early retirement factor to part of his pension. The Trustee was getting the alleged overpayment back and was having to pay him a lower pension, helping it to reduce the Scheme's funding deficit.

41.5. In relation to the Trustee reconsidering the recovery plan, if there was evidence of financial hardship, he was not willing to share his banking details or those of his wife.

41.6. He does not accept that "on the balance of probabilities" he received the letter the Trustee said it had sent him following its decision to decline the



Enhancement Request. If the Trustee sent this letter, then it should provide him with a copy. Furthermore, he had not made the Enhancement Request.

- 41.7. He had telephoned KPMG on at least three occasions to make further enquiries in relation to his pension. Each time he had been told by KPMG that his call would be returned, but this did not happen. He agreed that he was more familiar with the terms of the transfer than a layperson and this was the reason why he had been cautious about accepting his pension. He disagrees that he failed to make reasonable enquiries.
- 41.8. He agrees that he had sufficient knowledge to be aware that part of his pension had an NRA of 65. He had told KPMG this, but it had said that he was wrong. He had also asked it whether he could take part of his pension at 60 and part at 65. He had also asked at what point would the increase in his deferred pension with an NRA of 60 cover the penalty incurred for drawing his pension with an NRA of 65 early. These questions should have alerted it to the different NRAs that applied to his benefits.
- 41.9. KPMG made an offer to the Trustee which would result in the sum he was being requested to repay reducing by £3,531.36. As the Pensions Ombudsman (**the PO**) had not commented on this, he assumed that the PO agreed with it. He would like further details of the basis of this agreement.
- 41.10. If it can be proven that he is not entitled to an enhancement to his benefits and an error was made by KPMG, then he expects KPMG to repay the £16,901.83 to the Scheme. He also wants the amount taken from his pension between age 60 and 65 to be returned to him and his pension to be recalculated from age 65 on the correct basis.

**The Pensions Ombudsman's position on the reduction of future payments when overpayments are discovered and on the recovery of past overpayments**

42. Under general trust law, trustees of an occupational pension scheme have an obligation to pay the correct benefits provided for under the rules of the scheme and any overriding legislation. If an error is discovered, trustees will generally have a duty to reduce the pension to the correct level in respect of future payments. In some circumstances, the member may be able to demonstrate that:
  - 42.1. he/she has been given inaccurate statements as to his/her pension entitlement on which it was reasonable for the member to rely; and
  - 42.2. he/she has suffered a loss as a direct result of his/her reliance on those statements.
43. The member may have a claim for damages in negligent misstatement against the party that made the statement for any loss the member has sustained.
44. In relation to past overpayments, in general money paid in error can be recovered, even if the party responsible for the error has been careless. However, there are

circumstances where the recipient may not be required to repay some or all of the overpayment; those circumstances are where a defence against recovery applies. The PO will consider whether any defence applies, although it is expected that these potential defences will also have been explored and explained by trustees prior to a complaint reaching the PO.

45. Trustees of trust based occupational pension schemes generally have two methods of recovery. Namely:-
  - 45.1. Repayment - making a claim for repayment on the grounds of unjust enrichment.
  - 45.2. Recoupment - recovering the overpayments from future payments of pension under the principles of equitable recoupment, which the courts consider to be “a self-help remedy”.
46. In general terms, in relation to a claim for repayment of the overpayment on the grounds of unjust enrichment, the Trustee will have a right to recover the overpayments unless Mr Y can show that he has one of the following defences against recovery:
  - 46.1. change of position;
  - 46.2. estoppel;
  - 46.3. contract (that is a contractual right to keep or continue to receive the mistaken payment); or
  - 46.4. a limitation defence under the Limitation Act 1980 (**the Limitation Act**).
47. Broadly, under the principles of equitable recoupment, overpayments can only be recouped when it is equitable to do so (Re Musgrave [1916] 2 Ch 417) (**Re Musgrave**). There is limited direct caselaw on what is equitable in these circumstances. However, there is helpful guidance on what a court might consider equitable in relation to other equitable remedies. In the case of Burgess v BIC (Burgess v BIC UK [2018] 054 PBLR (040)) the court indicated that when considering whether trustees are able to exercise their power of equitable recoupment, they should also consider whether the member has any of the following defences:
  - 47.1. estoppel; or
  - 47.2. laches.
48. The change of position defence is not specifically mentioned in the Burgess v BIC case. However, I consider that a change of position defence is potentially applicable as a defence to an equitable recoupment claim. If it is not, similar issues to those I need to consider in relation to a change of position defence are relevant to the issue of whether it is equitable under general equitable principles for trustees to seek to recoup the overpayments.

49. The PO's position in relation to section 91 of the Pensions Act 1995 (**PA 95**) is that it does potentially apply when trustees seek to exercise a right of equitable recoupment. Accordingly, trustees should not commence recovery of any overpayments by exercising the right of equitable recoupment where there is a dispute as to the amount or timing of the recovery of the overpayment without an order of a "competent court".
50. I will comment further below on whether The Pensions Ombudsman (**TPO**) is a "competent court" for this purpose, following the Pensions Ombudsman v (1) CMG Pension Trustees Limited & (2) CGI IT UK Limited [2023] EWCA Civ 1258 decision (**CMG (CA)**).
51. The above sets out the PO's views in summary and very generally on the recovery of overpayments in relation to trust based schemes. It is for guidance only, but sets the context in which I approach the facts of this case. Each case will turn on its own facts.

## **Conclusions**

52. Mr Y's complaint concerns an administrative error which the Trustee said led to the overpayment of his pension. As a result, his pension has been reduced and a plan has been put in place to recover the pension that it said was overpaid to him.
53. The Trustee has explained that KPMG did not take into account that a portion of Mr Y's benefits had an NRA of 65, when calculating his pension.
54. Mr Y says that KPMG calculated his benefits correctly and that there must have been an agreed enhancement to his benefits to allow for the portion with an NRA of 65 to be paid from age 60 without a reduction being applied. He maintains that this is the case as the same error would not have been made by all the staff at KPMG who would have been involved in the calculation of his benefits, and those for other SW Scheme members with similar benefits to his.
55. I note that the root cause of the miscalculation of Mr Y's benefits, that the Trustee claims took place, has not been determined. However, I do not find that the involvement of a number of KPMG staff in the calculations for Mr Y and others is an indication that no error had been made. It is possible, for example, that the relevant member records did not correctly record that part of the pensions had an NRA of 65. In those circumstances, it was likely that anyone looking at the record would make the same error.
56. Mr Y has referred to the administration records that would have been passed to PSAL by KPMG. He has suggested that these would make it clear whether there was supporting evidence for an enhancement to his benefits being in place, in which case KPMG's calculations had been correct. However, I note that the Trustee has been unable to find any reference to an approved enhancement to Mr Y's benefits. As well as KPMG and the Trustee having such a record, I would have expected Mr Y to have been notified of any enhancement in writing and be able to provide evidence of it.

57. I do not agree with Mr Y's assertion that the Chairman would have known if Mr Y had retired with an unreduced pension at age 60 without an authorised enhancement being in place. There is no evidence to suggest that, at the time of Mr Y's retirement, KPMG shared details of the calculation of Mr Y's benefits with the Chairman.
58. I find that, as a matter of law, the Trustee acted correctly in seeking to recover the overpayment in this case. The Trustee is required to pay the correct benefits under the Rules. The starting point must be that it is equitable for the Trustee to seek recovery of the overpayment subject to any applicable defences in law. The Trustee is not in the current case seeking to recover the money by seeking repayment on grounds of unjust enrichment. Instead, it is seeking to recover the overpayment by exercising the "self-help" remedy of equitable recoupment by withholding future pension increases to Mr Y's pension until the overpayment is recovered in full.
59. So, I do not need to look at the position in relation to any repayment claim. However, I would note in passing that if a repayment claim is made in future against Mr Y or his estate, Mr Y, or his personal representative on behalf of his estate, may potentially have a limitation defence in relation to the recovery of part of the overpayment. This would need to be considered at the time of the claim.

*General Equitable Defence to Equitable Recoupment claim*

60. Equitable recoupment is an equitable remedy and as noted in *Re Musgrave* at [425] can only be exercised where it is equitable to do so.
61. I consider, for essentially the same reasons to the reasons discussed in relation to change of position and estoppel defences below, that it would be equitable for the Trustee to seek recovery of the overpayment over a reasonable period.

*Change of position*

62. Turning now to the more substantive defences available against the recovery of overpaid funds, the most common defence is referred to as "change of position". That is, the recipient has changed their position such that it would be unjust, or inequitable, to require them to repay the overpayment; either in whole or in part. The burden of proof in demonstrating a change of position defence is on Mr Y.<sup>1</sup> To make out a change of position defence, certain conditions must be satisfied. Briefly, the recipient must be able to show that, on the balance of probabilities:
- 62.1. their circumstances have changed detrimentally;
  - 62.2. the change of circumstances was caused by receipt of the overpayment; and
  - 62.3. they are not disqualified from relying on the defence.
63. With regard to the last point, a change of position defence is not available to an individual who did not act in 'good faith' when changing their position. It is important

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<sup>1</sup> *MGN v Horton* [2009] EWCHC 1690 at 33 – see also *Prudential Assurance Co Limited v HMRC* [2016] EWCA Civ 376 at [150] per Lewison LJ

to note that not acting in 'good faith' should not, necessarily, be equated with dishonesty – the conduct of an individual that falls short of dishonesty may also be sufficient to prevent the member meeting the good faith test.

64. A key issue in this case is whether Mr Y was acting in good faith. In particular, whether he had actual knowledge he was being overpaid or "Nelsonian Knowledge." (In other words, he was aware that he may not be entitled to the money but did not check the position). Mere carelessness, or negligence by the recipient of the overpayment is not sufficient to demonstrate bad faith. To reach a view on whether Mr Y had actual or Nelsonian knowledge, it is necessary to consider the detailed evidence on what Mr Y did or did not know about how his pension would be calculated on retirement. The burden of proof for demonstrating all the elements of a defence, including good faith, is on Mr Y.
65. In April 1998, Mr Y applied to transfer his benefits from the COMP Scheme to the KP Scheme. He liaised with other members who had the option to make a similar transfer and also dealt with the paperwork in his role as a pensions administrator. I am satisfied on reviewing the evidence that Mr Y would have read the paperwork relating to the transfer and would have been aware at the time that, if he applied to transfer, he would be granted benefits on the basis that his NRA would be 65.
66. Mr Y said that he did not make the Enhancement Request. However, a copy of a letter dated 12 October 2004 has been provided which purports to be from Mr Y. This letter was not signed. It had been sent by email to the Trustees of the KP Scheme, so I do not consider the lack of a signature as being unusual. On the balance of probabilities, I find that the letter had been sent by Mr Y. I am also satisfied that he had knowledge at the time he made the Enhancement Request that part of his benefits had an NRA of 65.
67. In March 2005, the Trustees of the KP Scheme considered the Enhancement Request at a Trustees meeting. The Enhancement Request shows that Mr Y understood that, in the normal course, he would not be able to draw his benefits at 60 without a reduction, as he asked the Trustees whether they "...would consider allowing me to draw all my pension benefits at 60 without incurring a penalty". The minutes of the meeting record that the request had been declined and that Mr Y had been informed of the decision in writing. Mr Y said that he did not receive confirmation of the decision. As I have conflicting evidence on whether Mr Y was aware of the position at the time, I have to form a view on the balance of probabilities whether he did in fact receive and read the letter.
68. Given that there is evidence that the letter was issued, I consider that on the balance of probabilities, Mr Y did receive and read the letter. I also consider it unlikely, having made the Enhancement Request, that Mr Y would not have followed this up with the Trustees of the KP Scheme in 2005 if he had not received a reply.
69. Prior to receiving KPMG's letter of 4 March 2011, Mr Y telephoned KPMG. He says that during the conversation, he asked KPMG to review his retirement figures and

provide a breakdown of the calculation. He maintains that he also asked KPMG to get confirmation that his benefits had been enhanced at some time in the past before sending him the breakdown.

70. KPMG's response on 4 March 2011, included a breakdown of the calculation that Mr Y had requested. It would have been apparent to Mr Y at the time that his entire pension had been calculated based on an NRA of 60. Mr Y asserts that this indicated that his benefits had been enhanced. So, he had no further reason to query the figures.
71. I do not agree that this is the case. KPMG made no reference to any enhancement to his benefits in its response. I consider that it was unreasonable for Mr Y to have assumed that his benefits had been enhanced, solely on the basis of the pension figures he had received from KPMG. In the circumstances, he should have continued to query the position with KPMG and made further enquiries.
72. I appreciate that Mr Y expected KPMG to have undertaken the necessary checks to ensure the figures were correct. However, I do not consider that detailed pensions expertise was required to understand that part of his pension had an NRA of 65 and that the breakdown of the calculation that was provided by KPMG did not reflect this. Furthermore, Mr Y was in the role of pensions administrator in April 1998. He was liaising with other members in relation to their transfers and dealing with the transfer paperwork. So, he would have been more familiar with the terms of the transfer than a layperson. In his response to my Preliminary Decision, Mr Y acknowledged that he was aware that part of his pension had an NRA of 65.
73. Mr Y has, subsequently, referred to at least three telephone calls that he had with KPMG in which he says he made further enquiries, but his calls were not returned as he had been promised. He says that he had told KPMG that part of his pension had an NRA of 65, but he had been told he was wrong. He also refers to other enquiries he made which would have alerted KPMG to the fact that not all of his pension had an NRA of 60. He did not agree that he had failed to make reasonable enquiries.
74. Unfortunately, there is no record of these telephone calls or of what was said by each party during the conversations. For this reason, I am unable to place much weight on them when considering whether Mr Y made reasonable enquiries.
75. In summary, I find that Mr Y had sufficient knowledge to appreciate that there may have been an issue with the retirement figures. He had the opportunity to question the figures at the time but failed to make reasonable enquiries. The good faith test has not been met as I find that Mr Y had Nelsonian knowledge of the possibility that his retirement benefits had been overstated.
76. Accordingly, he does not have a change of position defence to the recovery of the overpayment.

77. There are other defences to the recovery of an overpayment; for example, estoppel, contract and laches. These arise less often in pension cases but can be considered if the circumstances of the case suggest that it would be appropriate to do so.

### *Estoppel*

78. Estoppel is a legal principle which prevents (or “estops”) a party from departing from a statement or promise that it has previously made to another party. In this case it would prevent the Trustee going back on what it had informed Mr Y about his pension entitlement and recovering the overpayments. There are two types of estoppel which may be relevant here, which I will consider separately:

78.1. estoppel by representation - which can apply when one party has made a false statement or representation to the other; and

78.2. estoppel by convention - which can apply when both parties have been dealing with each other on an understanding of fact which turns out to be false.

79. The requirements for an estoppel by representation defence to succeed were set out in the case of *Steria v Hutchinson* [2006] 64 PBLR. Neuberger LJ stated:

“If one had to identify a single factor which a claimant in an estoppel case has to establish in order to obtain some relief from the court it would be **unconsonability** – see Robert LJ in *Gillett v Holt* [2000] Ch 198 especially at 225 and 232” [emphasis added in bold].

80. The above formulation is a useful general guiding principle. However, the question of “unconsonability” can in many cases be an issue which the views of reasonable people can differ on whether the complainant has a valid claim. Similarly, views can differ on how that claim should be satisfied. Neuberger LJ considered that it might be appropriate to have some more specific principles.

81. In the case of estoppel by representation, or promissory estoppel, Neuberger LJ considered that it was very unlikely that a complainant would be able to satisfy the test of unconsonability unless the complainant could satisfy the three classic requirements. Broadly:

81.1. a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the complainant will act;

81.2. an act on the part of the complainant which was reasonably taken in reliance on the representation or promise; and

81.3. after the act has been taken, the complainant is able to show that he will suffer detriment if the defendant is not held to the representation or promise.

82. In terms of causality, a strict “but for” test is not applied in estoppel by representation cases. However, a complainant must show that the representation was a significant factor which they took into account when acting in reliance on the representation. They do not necessarily have to show that they would not have acted as they did but

for the representation. It has been said that the representation needs to be the proximate cause of the action which caused the detriment.<sup>2</sup>

83. Generally, an overpayment of money on its own will not amount to a representation that the member is entitled to the money paid in error.<sup>3</sup> However, sometimes a representation may be implicit in the payment itself in the light of the surrounding circumstances. If the relationship between payer and payee is such that there is a legal obligation on the payer to ascertain the payee's entitlement correctly, payment may give rise to an implied representation that the money is due.<sup>4</sup> The trustees of an occupational pension scheme have a duty to pay the correct pension benefits and are responsible for deducting PAYE correctly from those pension payments.
84. For similar reasons to those discussed in relation to the change of position defence, I do not consider that an estoppel by representation defence can arise here. It was not reasonable for Mr Y to rely on statements his pension was calculated by reference to a normal retirement date of 60. Mr Y had the requisite knowledge to know that there may be an error in the figures.
85. Moving onto estoppel by convention, the legal requirements for demonstrating an estoppel by convention are different. Estoppel by convention arises out of a common assumption of the parties as a basis of their relationship. Broadly, where the parties have acted on the common assumption that a given statement of facts or law is true, and it would be unfair on one party for the other party to go back on the agreed assumption, then the complainant will be entitled to appropriate relief. The principles of estoppel by convention are broadly as follows<sup>5</sup>:
- 85.1. it is not enough that the common assumption on which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared by them. Something must be shown to have "crossed the line" sufficient to manifest an assent to the assumption, which may consist of either words or conduct from which the necessary sharing can be properly inferred;
- 85.2. the expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it;

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<sup>2</sup> See Phipson on evidence (20th Edition) at 5.29.

<sup>3</sup> National Westminster Bank Plc v Somer International (UK) Ltd [2002] 1 All ER 198. See also discussion of case law in Goff & Jones (the Law of Unjust Enrichment – 9th Edition) at 30-02

<sup>4</sup> See discussion of the relevant case law in Goff & Jones (the Law of Unjust Enrichment – 9th Edition) paragraphs 30-02 and 30-03. In particular RE Jones v Waring

<sup>5</sup> Briggs J in Revenue and Customs Commissioners v Benchdollar [2009] EWHC 1310 at [52] as subsequently modified by him in Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd [2010] EWHC 1805(Ch) PLR at [137] and by Hildyard J in Blindley Health Investments Ltd v Bass [2015] EWCA Civ 1023, [2017] – Ch 389 at [92]. These principles were approved by the Supreme Court in Tinkler v HMRC [2021] UKSC 39, [2021] 3 WLR 697 at [53].



- 85.3. the person alleging the estoppel must in fact have relied on the common assumption, to a sufficient extent, rather than merely upon their own independent view of the matter;
  - 85.4. reliance must have occurred in connection with some subsequent mutual dealings between the parties; and
  - 85.5. some detriment must therefore have been suffered by the person alleging the estoppel, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.
86. Because of the knowledge Mr Y had at the time that there might be an error in the figures, it cannot be said he relied on the inaccurate figures and also cannot be argued that there was a common assumption between the parties that Mr Y would receive the inflated level of pension benefits he was receiving in error. Consequently I do not consider that there was a valid estoppel by convention defence.

#### *Contract*

87. I have not been able to identify the necessary elements for a contract to exist; that is, offer, acceptance, consideration and an intention to enter into legal relations. In particular, I cannot see that there was any intention on the part of the Trustee to enter into a legal relationship with Mr Y outside of the Rules. In any event, a contract based on a mistake is unlikely to be enforceable.

#### *Laches*

88. It was confirmed in the *Burgess v BIC* case that, as equitable recoupment is a self-help remedy, involving adjustment of accounts, limitation does not apply (see *Re Robinson* [1911] Ch 502). In that case, Mr Justice Arnold also relied on section 36(1)(b) of the Limitation Act which excludes the contractual limitation period in respect of claims for specific performance of a contract or an injunction or for any equitable relief.
89. However, in *Burgess v BIC* Mr Justice Arnold did consider that laches might provide a defence to recovery of overpayments.
90. Caselaw indicates that laches generally requires:
- 90.1. knowledge of the relevant facts on the part of the claimant where there is a waiver of the claimant's rights. (However, see the paragraphs that follow for further consideration of whether this is always the case under the more modern formulation of laches); and
  - 90.2. either:
    - 90.2.1. acquiescence on his part; or
    - 90.2.2. prejudice or detriment on behalf of the defendant.

91. In deciding whether laches could be used as a defence, a court or the PO needs to consider the length of the delay and the nature of the acts done during the interval (such as change of position or loss of evidence by the trustee) which might affect either party and cause a balance of injustice in allowing or not allowing the remedy.<sup>6</sup> More recent cases have established that the court or the PO should not enquire whether the circumstances match previous decisions but ask whether the claimant's actions make it inequitable to grant the relief that is sought<sup>7</sup>.

92. The Court of Appeal<sup>8</sup> also endorsed the more modern approach, that laches does not:

“require an inquiry as to whether the circumstances can be fitted within the confines of a pre-conceived formula derived from old cases...[but instead requires] a broad approach directed to ascertaining whether it would in all the circumstances be unconscionable for the party to be permitted to assert his beneficial right. No doubt the circumstances which give rise to a particular result in decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach.”

93. Also, in later cases<sup>9</sup> it was said:

“The question for the court in each case is simply whether, having regard to the delay, its extent, the reasons for it and its consequences, it would be inequitable to grant the claimant the relief he seeks.”

94. Having regard to the above caselaw, and for essentially the same reasons as those I considered in relation to the change of position defence and estoppel defence, I do not consider it would be equitable to allow a defence of laches in the circumstances.

### *Negligent misstatement*

95. Mr Y maintains that he would have continued in work but for the incorrect information which he relied on to his detriment. In other words, he is making a claim in negligent misstatement.

96. I need to consider whether it was reasonable for Mr Y to have relied on the information as the basis for his decision to retire. For the same reasons as those I have given for change of position, I find that it cannot be argued that it was reasonable for Mr Y to rely on KPMG's representation of his benefit entitlement. I say

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<sup>6</sup> Lindsay Petroleum Oil & Co v Hurd (1974) LR PC 221 at [66] as approved in Erlanger v New Sombrero Phosphate Co (1878) 3 App Cases and applied in Re Sharpe [1982] 1 Ch 154 Ch

<sup>7</sup> See Frawley v Neill [2000] CP Reports 20 The Times April 5 1999 and Schulman v Hewson [2002] EWHC 855 (Ch) at [44]. See also J J Harrison (Properties) Ltd v Harrison [2001] 1 BCLC 158 which also adopted the more modern formulation in a systematic way looking at the various factors which may or may not make it equitable to allow a laches defence.

<sup>8</sup> Patel v Shah [2005] EWCA Civ 157

<sup>9</sup> PO Nedlloyd BV v Arab Metals Co [2006] EWCA Civ 1717 applied in Sheffield v Sheffield [2013] EWHC 3927 (Ch) at [100], [106], [119]

this as he had sufficient knowledge to be aware that part of his pension had an NRA of 65. Accordingly, a claim in negligent misstatement cannot be upheld in this case.

*Maladministration - Non-financial injustice*

97. The reason for the miscalculation of Mr Y's pension benefits is unclear. Understandably, this has caused him some frustration. With the passage of time, it is not always possible to identify why an issue occurred. Even if the root cause of the error was known, I do not consider that this would change the outcome of this complaint.
98. Mr Y maintains that the Trustee did not initially make him aware of the negotiations the Trustee had with KPMG in 2019. He considers the level of compensation and award for distress and inconvenience agreed by the parties to be inadequate.
99. I am conscious that the complaint TPO has accepted for investigation is against the Trustee; KPMG is not a party to that complaint. So, I make no finding of maladministration or breach of law against KPMG. I have considered whether Mr Y has a claim for maladministration against the Trustee at the time his pension came into payment, in relation to the error made by KPMG. I am satisfied that the offer of £1,000 is sufficient, given the facts of this case, to address any distress and inconvenience Mr Y has suffered in relation to this matter. The offer is also in line with what I would award for non-financial injustice in similar circumstances.
100. Mr Y said that he had not been offered any compensation for the fact that his benefits had been recalculated and reduced due to the application of an early retirement factor to part of his pension. The Trustee is required to pay the correct benefits under the Rules. I do not agree that any maladministration took place when it later adjusted Mr Y's pension to the correct level.
101. Mr Y has referred to the offer that KPMG made to the Trustee which would result in the sum he was being asked to repay being reduced by £3,531.36. My previous silence on this matter does not indicate my agreement with the amount being offered. My finding is that Mr Y does not have any defence to the repayment of all of the overpayment that was made to him. It is for Mr Y to decide if he wishes to accept this additional offer.

*Commencement of the recoupment plan*

102. I shall now consider whether the Trustee should have commenced the recovery of the overpayment without an order of a competent court given the requirements of s91(6).
103. I have had regard to the submissions of the Trustee's legal advisers in reaching my conclusions on whether there has been maladministration and breach of law by commencing recoupment of the overpayments without an order of a competent court as referred to in s91(6).
104. Under section 91(1) of the PA 95:

“(1) Where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme -

(a) the entitlement or right cannot be assigned, commuted or surrendered,

(b) the entitlement or right cannot be charged or a lien exercised in respect of it, and

(c) no set-off can be exercised in respect of it,

and an agreement to effect any of those things is unenforceable.”

105. However, section 91(5) goes on to provide:

“(5) In the case of a person (“a person in question”) who is entitled to a pension under an occupational pension scheme, or has a right to a future pension under such a scheme, subsection (1) does not apply to any of the following, or an agreement to effect any of the following:

[...]

(f) subject to subsection (6), a charge or lien on, or set-off against, the person in question’s entitlement, or right, for the purposes of discharging some monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension.”

106. Under section 91(6):

“(6) Where a charge, lien, or set-off is exercisable by virtue of subsection 5(d) (e) or (f) –

(a) its amount must not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person in question’s entitlement or accrued right; and

(b) the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme,

and 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 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.”

107. It was accepted in *Burgess v BIC* and the later *CMG* case at first instance (and without the court considering detailed arguments on the subject) that equitable recoupment was a form of set-off for the purposes of s91(6). In a case where the amount of overpayment is disputed, the trustees cannot commence recovery of the

overpayment under an occupational pension scheme without an order of a “competent court”. CMG also confirmed that a “dispute” for the purposes of s91(6) extends to both a dispute about whether the overpayment is recoverable and the amount of each deduction going forward. It was also accepted in CMG (CA) again that equitable recoupment was a form of set-off for the purposes of section 91 of the PA 95 (**Section 91**).

108. In the Burgess v BIC judgment, at first instance Mr Justice Arnold stated that TPO is not a “competent court” for the purposes of s91(6). Following the judgment, there was uncertainty about whether the observations of Mr Justice Arnold on the competent court issue formed part of the essential reasoning in the case necessary to decide the legal issues before him or whether they were only “obiter” (that is a passing remark). In other words, whether they were binding in future cases or whether they were only persuasive authority and non-binding.
109. In response, TPO produced a factsheet explaining, among other things, why it considered that the decision did not form part of the “ratio” of the case. However, the CMG (CA) decision has now confirmed, having considered TPO’s factsheet, that the finding in Burgess v BIC on the competent court issue did indeed form part of the ratio of the case.
110. Unless there is a change in legislation, the Burgess v BIC and CMG and CMG (CA) decisions represent the current law. Trustees or managers of a pension scheme will be acting in breach of law and could be found responsible for maladministration if they fail to comply with these decisions.
111. The Trustee’s legal advisers have questioned the view that, under section 91(5)(1)(f) and (6) of the PA 95, where there is a dispute as to the proposed arrangement to recover an overpayment, equitable recoupment cannot be exercised unless the obligation to repay has become enforceable under an order of a competent court.
112. In particular, the Trustee’s legal advisers have submitted that:-
  - 112.1. The legal advice received by the Trustee in relation to Mr Y’s case (which I have not seen) was that it could begin recoupment.
  - 112.2. This advice was given on the basis that s91(6) refers to the exercise of a “charge, lien or set-off”. Consequently, it is intended to prevent a member’s pension benefits being affected by external demands (meaning from sources outside the pension scheme). In this case, the Trustee is relying on the equitable principle of recoupment as an internal tool to pay the correct level of pension as if it had always been in payment at that correct level.
  - 112.3. If s91(6) does apply, the Trustee contends that Mr Y is disputing his entitlement to a particular level of benefit, relating to a transfer into the Scheme, rather than the “amount” being recouped.

113. For these reasons, the Trustee has submitted that it was legally entitled to begin recoupment without breaching s91(6), and was advised that it could begin the recoupment process. Consequently, the Trustee's conduct in this case does not amount to maladministration.
114. I recognise that in the past, the issue of whether equitable recoupment was a form of set-off for the purposes of Section 91 has been a subject of debate amongst pension lawyers and academic commentators. There were legitimate arguments on both sides of the debate. It was accepted by the parties in *Burgess v BIC* at [164] that an equitable right of recoupment was subject to Section 91. The court did not, having heard full legal argument on the subject, have to decide the issue of whether the mechanism of equitable recoupment amounts to a form of set-off. In *CMG* it was noted again at [146] that it was common ground that Section 91 applied to recoupment. So, strictly speaking, it might be argued that Leech J did not decide this specific legal issue. However, Leech J could not have decided the question of whether the claimant must obtain an order from a competent court before effecting recoupment where there is a dispute, (see [paragraphs 145-149]) without also deciding implicitly that Section 91 does apply to recoupment. In the *CMG (CA)* case much of the analysis was premised on the assumption that equitable recoupment is a form of set-off for the purposes of section 91(5) of PA 95. The legal position is therefore, in my view, reasonably well settled on this specific issue. My predecessor and a past Deputy Pensions Ombudsman have also taken this view in various Determinations from Clift PO-2066 3 June 2014 at [38] that Section 91 does apply in recoupment cases, and this also represents my view. I do not accept it is correct that there is no dispute about the amount of set-off for the purposes of s91(6) and that there is merely a dispute about Mr Y's entitlement to a particular level of benefit. The amount of any set-off would be linked to the level of the overpayment, which would be determined by reference to the individual's correct entitlement under the pension scheme in question. Where there is a dispute concerning whether all or any part of the alleged overpayment is recoverable, this would still be considered a dispute as to the amount of the overpayment.
115. It follows that there has been a breach of law in this case. The Trustee sought to recover the overpayments up to 1 November 2018 (by withholding pension increases on Mr Y's correct level of pension) while there is an ongoing dispute about the amount of the overpayment (if any) which is recoverable under section 117 of the PA 95. To the extent that any provision included in Part 1, which would include Section 91, conflicts with the provisions of an occupational pension scheme, the provisions of the scheme are overridden by Section 91. So, the Trustee should not have sought to recover the disputed overpayment using the mechanism of equitable recoupment without an order of a competent court.
116. It follows that the Trustee was in breach of Section 91 and in breach of trust (outside their powers) by seeking to recover the disputed overpayment without an order of a competent court (which, at present, cannot be provided by this Determination). So, the Trustee shall repay the money deducted up to the date of my Determination.

However, importantly, this does not preclude the Trustee from recovering the money (already recovered and which should now be repaid) from future payments of pension due to Mr Y under the doctrine of equitable recoupment as long as the approach adopted is not “inequitable” and is otherwise in accordance with the law (notably Section 91). The total amount of past overpayments will remain the same.

117. I acknowledge that the Trustee received unqualified advice from its legal advisers in connection with this matter. So, I do accept that there has been no maladministration by the Trustee in this respect. Various cases confirm that, while there is significant overlap between the concepts of maladministration and breach of law, the expressions are neither synonymous nor co-terminous. There can be a breach of law without there being maladministration (see for example *Glossop v Copnall* [2001] 53 PBLR). Proceeding on advice on the basis of a view of the law which is subsequently established to be wrong will not necessarily amount to maladministration.

118. So, to conclude, I find that the recovery of the overpayment while Mr Y was disputing the Trustee’s right of recovery and without an order of a competent court was in breach of Section 91. Based on the particular and unusual facts of this case, those actions do not amount to maladministration. However, I would observe that (post CMG) generally the deduction of overpayments by recouping them from future pension payments where the amount or period of recovery is disputed is likely to amount to breach of law and maladministration (in the absence of an order of a competent court).

*Period of recovery of overpayment*

119. As previously discussed, caselaw on equitable recoupment has established that equitable recoupment can only be used to recover overpayments to the extent it is not inequitable to do so (See *Re Musgrave* at [425]). In the CMG case at Court of Appeal Lady Asplin stated at paragraph [50] of her judgment that the Ombudsman is required to consider when determining whether an overpayment is recoverable “whether there are any defences to the equitable right of recoupment and what would be appropriate in relation to the rate of recoupment in all the circumstances.”

120. Following the issue of my Preliminary Decision in this case I invited comments from both parties about what would be an appropriate equitable rate of recoupment. I received representations from the Trustee about possible rates of recoupment but not from Mr Y who still maintains that none of the overpayment should be recoverable.

121. The Trustee also requested that, if Mr Y does not agree the approved recoupment, the £3,531.36 offered by KPMG should not be used to offset against his overpayments as it had earlier proposed. This would be on the basis of the time and cost the Trustee will be put to if it is “forced to obtain such an order” which the Trustee considers will significantly exceed this figure.

122. In relation to this comment on the costs of taking enforcement action, it was noted by Lady Asplin in paragraph [29] of her judgment that the detailed procedure and the way in which an application for enforcement of a PO Determination and directions are

set out in CPR Rule 70 and the Practice Direction. Where CPR Rule 70 applies, a copy of a decision to be enforced must be filed with the application and the matter will be dealt with by a court officer without a hearing (See CPR Rule 70.5(7)). Lady Asplin also confirmed again at paragraph [58] of her judgment in CMG (CA) that the enforcement in the County Court is an administrative matter and there is no requirement to commence an action in the County Court or for that Court to consider the merits of the matter. Moreover, Lady Asplin indicated at paragraphs [45] and [55] of her judgment that she envisaged that the County Court would enforce the Determination and directions by making an order specifying the amount of the overpayment and specifying the amounts to be recouped over a specified period at a specified rate.

123. I have concluded, having considered all the representations, that it would be appropriate, having restored Mr Y's pension to where it should have been if the Trustee had not ceased increasing his pension in breach of Section 91, that the total overpayment of £15,924.73 should then be recouped by reducing the pension by the amount of £306.25 a month until the overpayment is fully recouped. To the extent that any money is recovered by the Trustee from KPMG (who are not party to this dispute) Mr Y's share of the KPMG payment should also be applied towards reducing the overpayment.

#### *Options open to Mr Y in relation to recovery of the overpayment*

124. KPMG are not a party to this complaint. It is for Mr Y to decide whether to accept the offer made by KPMG in relation to the original errors if this offer is still on the table.

#### *Summary*

125. I uphold Mr Y's complaint in part. In the absence of a valid legal defence, the overpayments made by the Scheme are recoverable. However, the Trustee should not have commenced the recovery of the overpayments without an order of a competent court.

126. I would also draw both parties' attention to the implications of the decision in CMG (CA) for the commencement of the repayments. The Trustee will need to apply to the County Court for an order authorising it to commence recoupment. The judgment of Lady Asplin confirmed in CMG (CA) that in granting this order the County Court is not performing any judicial function (see above). I have attached a general factsheet I have prepared about the CMG (CA) case to this Determination.

#### **Determination and Directions**

127. I determine that:

127.1. Mr Y has been overpaid the sum of £15,924.73 (disregarding any part of the pension which has been recouped in breach of Section 91 by not granting Mr Y increases after 1 November 2018);



127.2. Mr Y does not have a general equitable defence, a change of position defence an estoppel defence or a laches defence to recovery of such overpayments by way of equitable recoupment, subject to Section 91; and

127.3. any monies recouped by not granting Mr Y increases on or after 1 November 2018 have been deducted from Mr Y's pension in breach of Section 91.

128. I direct that the Trustee shall, within 28 days of the date of this Determination:-

128.1. Repay to Mr Y an amount equal to the monies deducted in breach of Section 91 from the pension Mr Y would otherwise have been due if increases had been granted to his pension under the Rules from 1 November 2018 up to the date of this Determination.

128.2. Increase Mr Y's pension to the level it would have been had the overpayment not been recovered in breach of s91(6).

129. I further direct that, subject to satisfying s91(6), and as provided for below, the Trustee may recoup the overpayments amounting to £15,924.73 by reducing Mr Y's monthly pension payments at the rate of £306.25 per calendar month.

130. If Mr Y opts to make additional payments towards reducing the balance of the overpayments which are then still outstanding, the amount which may be recouped as above shall be reduced by the amount of these additional payments.

131. If Mr Y accepts the settlement offer from KPMG (if it is still available) £3,531.36 of any monies that are recovered from KPMG shall be applied by the Trustee towards reducing the outstanding balance of the overpayments owed by Mr Y to the Scheme.

**Dominic Harris**

Pensions Ombudsman  
19 December 2023

## Appendix 1

### Extracts from the briefing notes issued in February 1998

Knight Piesold Ltd Final Salary Pension Scheme (The WLP (UK) Pension & Assurance Scheme) briefing note - Equitable Life Scheme Members:

“This Briefing Note explains the effect that the changes occurring to the WLP (UK) Scheme from 1<sup>st</sup> April 1998 will have on benefits earned by a member contributing to the Equitable Life Scheme until then. It should be read in conjunction with the Briefing Note explaining the scheme’s new benefit structure.”

“Ex WLP (UK) Members

If you had previously been a member of the WLP (UK) scheme and had transferred your rights into the Equitable Life Scheme you will, totally at your own choice, have a one off opportunity to be reinstated for past service back to the date that you originally joined the WLP (UK) Scheme on the basis of the 6% Contribution Category under the new arrangements.”

Knight Piesold Ltd Final Salary Pension Scheme (The WLP (UK) Pension & Assurance Scheme) briefing note – New Benefit Structure:

“

Employee Contribution	Pension Accrual Rate	Normal Retirement Age
4.5%	1/80th	65
6.0%	1/60th	65
8.0%	1/60th	60

”

## Appendix 2

### Summary of the breakdown of the calculation of Mr Y's retirement pension provided by KPMG on 4 March 2011

"Final Pensionable Salary	£24,488.67
Pensionable Service	19 years and 91 days
Accrual Rate	1/60

Pension accrued at date of leaving (31 July 2003):

$$£24,488.67 \times 19 \frac{91}{365} \times 1/60 = £7,856.78 \text{ per annum}$$

The accrued pension contains an element of Guaranteed Minimum Pension (GMP) amounting to £1,930.24 per annum.

The accrued pension is then revalued to the date of retirement using a fixed rate of 4.5% each year for the GMP element (£1,930.24 per annum) and the remainder of the accrued pension (£5,926.54 per annum) is revalued in line with Section 52a orders, which are issued each year by the Government.

The pension at your Normal Retirement Date ([...] July 2011):

$$\begin{aligned} £5,926.54 \times 1.217 &= £7,212.57 \\ £1,930.24 \times 1.422 &= £2,744.80 \end{aligned}$$

Total at [...] July 2011 = £9,957.36 per annum (rounded)"

### **Appendix 3**

#### **Extract from the Pensions Ombudsman's Determination and directions relating to recoupment of the overpayment by the AECOM Group Pension Trustee as trustee of the AECOM Group Pension Scheme from Mr Y**

- (1) Subject to first obtaining an order of a competent court for the purposes of Pensions Act 1995, and as provided for below, the AECOM Group Pension Trustee may recoup the overpayments of £15,924.73 made in error to Mr Y from the Scheme by reducing Mr Y's monthly pension payments from the AECOM Group Pension Scheme by £306.25 per calendar month.
- (2) If Mr Y opts to make additional payments towards reducing the balance of the overpayments which are then still outstanding, the amount which may be recouped as above shall be reduced by the amount of these additional payments.
- (3) If Mr Y accepts the settlement offer from KPMG (if it is still available) £3,531.36 of any monies that are recovered by the AECOM Group Pension Scheme from KPMG shall be applied by the AECOM Group Pension Trustee towards reducing the outstanding balance of the overpayments owed by Mr Y to the AECOM Group Pension Scheme.