

Ombudsman's Determination

Applicant	Mr G
Scheme	Emerson UK Pension Plan (the Plan)
Respondents	Buck Consultants Limited (Buck) Emerson UK Trustees Limited (the Trustees)

Outcome

1. I do not uphold Mr G's complaint against the Trustees or Buck, as although there has been maladministration by the Trustees and Buck in making the overpayments, Mr G has not sustained injustice. This is because the injustice (which otherwise would have been sustained) has been sufficiently addressed by the Trustees making an unconditional offer before the matter was referred to the Pensions Ombudsman.
2. The overpaid lump sum and overpaid pension amounting to £33,820.95 is recoverable.
3. My reasons for reaching this decision are explained in more detail below.

Complaint summary

4. Mr G's complaint concerns the overpayment of his pension benefits amounting to £33,820.95 over a period of eight months, which the Trustees are seeking to recover through recoupment from future pension payments.

Background information, including submissions from the parties

5. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
6. On 1 July 1998, Mr G joined the Meggitt Group 1990 Pension Plan (**the Meggitt Plan**), a final salary occupational arrangement.
7. On 30 September 2000, Mr G left the Meggitt Plan, and his benefits were preserved.
8. On 30 March 2001, Mercer (the former administrator for the Meggitt Plan) sent Mr G a preserved benefit statement. At the date of leaving the Meggitt Plan his annual

pension was £926.54. This was based on a final pensionable salary of £24,707.71 with 2 years and 3 months of pensionable service.

9. In 2001, Meggitt Ltd (the Meggitt Plan's sponsoring employer) was taken over by another company. Following that, Mr G opted to transfer his accrued benefits into the Solartron Mobrey Pension Scheme (**the Mobrey Scheme**) which was eventually merged with the Plan. The transfer of Mr G's Meggitt Plan benefits, into the Mobrey Scheme, resulted in him being granted a pension credit of 2 years and 3 months of additional service.
10. On 10 May 2022, Mr G informed Buck, the administrator for the Plan, that he wished to claim his Plan benefits.
11. On 17 May 2022, Buck wrote to Mr G and advised him that, effective from 10 May 2022, he would start to receive a monthly pension of £1,293.97. His annual pension entitlement was £15,520.43, with a tax-free lump sum of £103,469.52.
12. On 30 January 2023, Buck wrote to Mr G and informed him that his pension was incorrectly calculated and therefore overpaid. It said that:-
 - The pensions data it had inherited from Mercer did not accurately reflect the transfer in of the Meggitt Plan. Consequently, this element of his pension was overstated by more than double his entitlement.
 - It reviewed all of the members affected by this error and amended their benefits accordingly. His actual entitlement under the Plan, as at 10 May 2022, was a lump sum of £72,973.80 (£30,495.72 overpaid) and an annual pension of £10,946.07 (overstated by £4,574.36).
 - From 10 May 2022 to 31 January 2023, he received overpaid monthly pension payments totalling to £3,325.23. This was in addition to the overpaid lump sum of £30,495.72, both of which needed to be reclaimed.
 - It appreciated that the error in calculating his pension was not his fault. However, the Trustees were obliged to consider the interests of the Plan membership. So, it was required to reclaim all overpaid benefits.
 - To reclaim the overpaid pension, it proposed that his monthly pension could be reduced by £225.78 (gross) from £912.18 to £686.40. If it did not hear back from him by 28 February 2023 it would proceed with reducing his pension to recoup the overpaid sum, effective from 1 April 2023.
 - He should make arrangements to repay the overpaid lump sum of £30,495.72 as soon as possible.
13. On 5 February 2023, Mr G informed Buck that reducing his pension payments would have a detrimental effect on his quality of life. He would be unable to afford his and his wife's basic living expenses. As he understood it, his pension was a final salary arrangement based on his final pensionable salary and his length of service. Buck

should provide him with the methodology of how his pension was calculated before and after the overpayment was identified. Buck should also pay for him to seek legal counsel.

14. On 12 February 2023, Mr G made a complaint under stage one of the Plan's internal dispute resolution procedure (**IDRP**) and said, in summary, that:-
 - He was not in a position to repay the overpaid pension amount, nor was he able to accept a further reduction in his pension.
 - He planned his retirement based on the value of his final salary pension, another external pension benefit, and ISA share investments. His Plan pension was his primary source of income.
 - His pension was paid as "a bonded contract started in May 2022 protected by UK law." Buck could not reduced the value of his pension without his agreement.
 - It was through no fault of his own that Buck incorrectly overstated the value of his pension.
 - The overpayment of his pension had "caused mental depression and stress in [his] daily life and sleepless nights".
15. On 11 April 2023, the Trustees issued their stage one IDRP complaint response to Mr G and said:-
 - It was sorry that his pension was incorrectly calculated which had resulted in a substantial overpayment. The service he received had unfortunately fallen short of what it would normally expect.
 - The overriding UK law provided that no one should benefit from an error/mistake. Consequently, it was duty bound to ensure that the overpaid pension and lump sum was repaid.
 - He was only entitled to receive a pension benefit calculated in accordance with the Plan's Trust Deed and Rules.
 - It provided the website address for MoneyHelper who could provide him with information relating to the repayment of an overpaid benefits. It would not pay for him to seek legal counsel as this was not a service offered under the Plan.
 - Buck was unable to provide the calculations used for his benefits. The Trustees reviewed the calculation of his benefits, and it was clear that the error was the result of incorrect data held by the previous administrator.
 - In recognition of the error in calculating his pension it was prepared to offer him £500 as a gesture of goodwill.
16. On 15 May 2023, Mr G asked for his complaint to be investigated under stage two of the IDRP, he said:-

- When he claimed his pension in 2022 he did so in good faith and believed that the figures were correct and reflected his entitlement. He could not accept that his reduced pension entitlement was correct unless he was provided with copies of the calculations undertaken.
- He reviewed any pensions documentation he retained, as well as reviewing information related to defined benefit pensions that was available online. He undertook his own calculations which he expected the Trustees to cross check.
- He believed that the accrual rate for his pension was 1/60. Based on this accrual rate, and his annual salary as at April 2016, his accrued pension was £14,727.49, which should be increased by the consumer price index (**CPI**) capped at 2.5% between 2017 and 2022. This provided a pension of £16,551.17.
- Based on the accrued pension of £16,551.17, he calculated that his lump sum entitlement was £85,343.15 with a reduced annual pension of £12,801.47. Consequently, he believed that his lump sum entitlement was overstated by £18,126.37, and his annual pension was overstated by £2,718.96. These figures varied greatly to Bucks overpayment figures.
- The overpayment of his pension had caused him significant distress, and he now had to reconsider his retirement plans. He delayed claiming his state pension and he would now have to delay his retirement by one or more years. His retirement was originally planned for May 2023.
- He provided an overview of his and his wife's ISA and shares account, which was significantly down since the UK and the US raised interest rates. While the loss of investment value in his ISA was not caused by Buck, the amount of money he invested in the ISA was based on the value of the overstated lump sum he received.
- The Trustees should also consider the level of income tax he paid on his pension, which was 40%. If he was required to repay the overpaid pension payments he should only repay the net income he received.
- The goodwill payment of £500 did not suitably recognise the distress and inconvenience he suffered due to the error and the damage done to his retirement plans. A more appropriate payment would be £20,000.

17. On 25 July 2023, the Trustees issued its stage two IDR response and said:-

- The Trustees were legally required to calculate and pay his benefits in accordance with the Trust Deed and Rules. To not do so would mean that the Trustees were in breach of trust.
- It was prepared to increase the distress and inconvenience sum of £500 to £1,000. This was in recognition of the error in calculating his pension entitlement.

- It provided him with a detailed breakdown of how his pension was calculated which supported the figures provided to him in Buck's letter of 30 January 2023. It reiterated that his corrected lump sum entitlement was £72,973.80, with a reduced annual pension of £10,946.07.
- The PO's view on overpayments was that the recovery period of the overpayment should not be less than the period over which the overpayment occurred in. It believed that a repayment period of 13 months was reasonable given that the overpayment period was over 9 months.
- It apologised for the tone of Buck's letter of 30 January 2023 regarding the repayment of the overpaid lump sum amount of £30,495.72. In practice, it would expect that larger overpaid sums would be recovered over a period of 3 years and it was open to discussing a longer repayment period.
- The Trustees and Buck were unable to recover any income tax overpayments from HM Revenue and Customs (**HMRC**). However, Buck could possibly assist Mr G in contacting HMRC to reclaim any overpaid tax.
- It understood that if it were not for the overstated lump sum he might not have invested as much as he did in his ISA shares investments. However, this was not sufficient to constitute as an irreversible change of position such that he was unable to repay the overpayment.
- Examples of irreversible changes of position were:
 - giving up work and living off a pension income;
 - reducing working hours; monetary gifts to family that were used to purchase a property;
 - adopting a higher standard of living;
 - taking out loans; charitable donations;
 - and upgrading holidays.

The Trustees would consider any further information about expenditure that he committed to or made based on the overpayments.

Mr G's position

18. He took early retirement in November 2020 after his employer, Emerson, shut down the site he worked at. He received a substantial redundancy payment due to his 22 years of service. He claimed a defined contribution pension in January 2022, and his Plan benefits in May 2022. After Buck informed him that his pension had been incorrectly calculated, his pension was subsequently reduced in February 2023.
19. Based on his own calculations, the transferred in element of his pension should have received yearly 5% compound increases from October 2020 to May 2022. So, the

revalued transferred in element of his pension should be £2,645.05; however, the Trustees calculation was £1,597.01. It was unclear why the transferred in element of his pension was calculated separately.

20. The overpayment meant that he had to change his lifestyle significantly by delaying claiming his state pension and continuing to work fulltime beyond age 66. This was in addition to the mental distress he had suffered.
21. He received pension statements in December 2021 for his DC and DB Plan benefits. If the lump sum was calculated correctly, and reflected his actual entitlement, he would have claimed a smaller lump sum to ensure he had a greater level of pension income.
22. He made the decision to invest the lump sum into his and his wife's ISA shares. However, the shares had suffered a loss due to raised interest rates in the US and UK. He also bought a new car for £26,500, in August 2020, which was based on his anticipated pension income outlined in pension statements and based on his redundancy payment.
23. He would like the Trustees to reduce the overpayment amount from £33,820.95 to £16,270. The remainder could be paid back over a five-year recovery period. He submitted the following reasons for reducing the overpayment:
 - £2,000 for mental distress;
 - £500 for him having to delay claiming his state pension by one year, causing a loss of income for 52 weeks;
 - £3,000 for having to remain in fulltime work beyond age 66 which could have health implications;
 - £1,000 for him claiming a maximum lump sum from his DC and DB benefits as opposed to taking a higher pension income;
 - £5,825 which accounted for a 15% loss, out of a total loss of £38,835.50, due to a decline in the returns on his and his wife's ISA shares; and
 - £3,945 which amounted to 15% of the value of his car that he bought for £26,500, which from the day he bought it, had devalued.

The Trustees' position

24. The transfer of Mr G's Meggitt Plan into the Mobrey Scheme was paid by way of a service credit which bought Mr G an additional 2 years and 92 days of pensionable service. A Mobrey Scheme statement issued to Mr G on 6 April 2013 said that his date of joining the Mobrey Scheme was 1 July 1998, which was the date he joined the Meggitt Plan.
25. Buck's letter of 30 January 2023 clearly set out how the overpayment of Mr G's benefits occurred. Data held by the Plan's previous administrator about the Meggitt

Plan transfer in was incorrect. The data incorrectly said that he had 116 months of service transferred in from the Meggitt Plan, when in fact the transferred in service only amounted to 2 years and 92 days.

26. It was understood that Mr G believed that the Meggitt element of his Mobrey Scheme pension was £925.54 with a yearly 5% compound increase. he believed this was from October 2000 to May 2022. This was incorrect. Mr G was not a deferred member of the Meggitt Plan as the transfer credit bought him additional service in the Mobrey Scheme. This tranche of his pension was only revalued from May 2022, when he became a deferred member of the Plan.
27. Mr G was seeking for the overpayment amount to be reduced to £16,270 on the basis of a change of position defence and was claiming a reduction of:
- £2,000 for “mental distress”, which was not a change of position defence.
 - He also claimed that he would have to defer taking his state pension by one year. the Trustees’ understood that Gov.uk’s website said: “Your State Pension increases by the equivalent of 1% for every 9 weeks you defer. This works out as just under 5.8% for every 52 weeks”. This was, again, not a change of position as there was no financial loss to consider.
 - £3,000 on the basis that he would now have to continue to work beyond age 66. The Trustees noted previous determinations by the Pensions Ombudsman (**the PO**) where an individual had given up work and taken a retirement income (PO-408¹) or reduced their working hours (PO-2567²) and the job function no longer exists or has been fulfilled by another employee (PO-2451³). Mr G was continuing in his full-time role and so had not made an irreversible decision akin to retiring/reducing his hours.
 - £1,000 as he choose to claim the maximum tax-free lump sum from his defined benefit and defined contribution Plan benefits. This was on the understanding that he thought he was entitled to of £103,469.52. the decision to commute benefits under the Plan was on an actuarially neutral basis and the lump sum was tax-free. The Trustees’ did not agree that this was an example of detriment.
 - £5,825 on the basis investment losses he suffered associated with ISA shares. Mr G made his own investments and acknowledged the Trustees could not be held responsible for this. Their view was that the losses suffered were too remote, and they were not irreversible as they could increase as well.
 - £3,945 as he bought a new car for £26,500, in August 2020, based on his expected pension income and a redundancy payment. The £3,945 represented 15% of the value of the car at the time of purchase. The Trustees did not believe

¹ [McNicolas Construction \(Holdings\) Pension Scheme \(PO-408\) | The Pensions Ombudsman](#)

² [Capita \(PO-2567\) | The Pensions Ombudsman](#)

³ [Principal Civil Service Pension Scheme \(PO-2451\) | The Pensions Ombudsman](#)

that it was inequitable or unjust to pursue the repayment of the lump sum or pension payments due to the purchase of a car. The car could be sold and was not therefore an irreversible course of action. The purchase of a car was significantly more reversible than other activities such as purchasing a property or upgrading a holiday. As this purchase was not irreversible there was not a valid change of position argument.

28. It did not agree to increase the distress and inconvenience sum. Mr G's benefits were incorrectly calculated in May 2022, and he was informed of the correct position in January 2023. The error was identified, and steps were taken to correct the error and inform Mr G about the overpayment.
29. The Trustees' were more than happy to assist Mr G with corresponding with HMRC to recover any overpaid income tax. It was willing to agree to a repayment period of up to 5 years for the repayment of the lump sum and pension payments.

Adjudicator's Opinion

30. Mr G's complaint was considered by one of our Adjudicators who concluded that while there was maladministration on the part of Buck and the Trustees in overpaying Mr G's benefits, Mr G had not suffered any financial detriment. The unconditional offer made by the Trustees sufficiently recognised any distress and inconvenience Mr G suffered. The Adjudicator's view was that the overpayment was recoverable. The Adjudicator's findings are summarised in paragraphs 31 and 84.

Legal issues arising in this particular case

31. In this particular overpayment case:
 - Mr G accepted that his pension should be reduced to the correct level provided under the Plan Trust Deed and Rules going forward;
 - Mr G disputed whether the past overpayments should be recovered, and, to the extent that he had to repay the overpayments, he believed that a longer period of recovery was appropriate;
 - Mr G argued that, as a consequence of the negligent misstatement by the Trustees and Buck on which he has relied, he has sustained a financial loss; and
 - Mr G argued that he sustained non-financial injustice (distress and inconvenience) as a consequence of maladministration by the Trustees and Buck in allowing the overpayments to occur.
32. In this particular case, the Trustees had originally sought repayment of the lump sum overpayment, while separately recouping the smaller pension overpayment (i.e. offsetting against future payments made to Mr G). Over the course of the complaint this position had changed, and the Trustees were now content to spread the recovery of the whole overpayment, including both the lump sum and overpaid pension, over a

period of 5 years, offset against future pension payments. Therefore, the Trustees have confirmed that they are not seeking repayment of the overpayments directly from Mr G on grounds of unjust enrichment. Rather, they are seeking to recover the overpayments by deducting them from Mr G's future pension payments under general equitable principles of equitable recoupment.

33. Given that the Trustees have indicated that it is not seeking to recover the overpayments by way of repayment directly from Mr G on grounds of unjust enrichment, it is only necessary to consider the Trustee's' right of recovery on grounds of equitable recoupment.
34. Mr G has not set out any particular legal defences to recovery by way of recoupment. However, my view is that the following defences need to be considered to form an opinion on the complaint:
 - a general equitable defence; and
 - laches.
35. Limitation is not available as a defence in relation to an equitable recoupment claim⁴ but laches may apply in some circumstances.

Future pension payments

36. Mr G accepted that the Trustees were obliged to correct the level of pension going forward to the level provided for in Plan Trust Deed and Rules on discovery of the overpayments, so there was no dispute about this issue.

Past overpayments

37. Mr G was overpaid his pension since his it came into payment on 10 May 2022.

The Pension Ombudsman's position on equitable recoupment in trust-based schemes

38. 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.
39. Trustees also may have power to compromise claims in certain circumstances where there is uncertainty on whether the defences may apply. In some cases, in practice, trustees may be advised that they are not required to seek recovery of all or part of past overpayments.

⁴ *Burgess v BIC* [2018] 054 PBLR (040) at paragraph [172] and [178] and *Re Robinson* [1911] Ch 502.

40. In this case, the Trustees are seeking recovery of the overpayments via “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”.
41. Equitable recoupment is not available if it is “inequitable” to rely on it as a remedy.⁵ The PO is comfortable that, when carrying out any “inequity” enquiry, he can have regard to the underlying principles applied by the courts in determining whether to deny an unjust enrichment claim. These include those relating to the availability of a change of position defence or, if it adds anything in the circumstances of the case (which usually it does not), an estoppel defence.
42. The courts have confirmed⁶ that a limitation defence cannot apply to recovery of monies under principles of equitable recoupment. The defence of laches may, however, be available as a specific defence to recovery of an overpayment under principles of equitable recoupment.
43. The PO’s position is that section 91 of the Pensions Act 1995 (the **1995 Act**) does 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”. The PO is not a competent court for the purposes of section 91 of the 1995 Act at present. It follows that, if the PO determines the overpayments are recoverable, the Trustees will still need an order of a competent court before starting to recover the overpayments from future pension payments under any right of recoupment. Obtaining an order of a competent court is purely administrative and the County Court (as competent court) does not exercise any judicial function at that stage in the process, so the merits of the case will not be reconsidered.
44. The PO’s view is that generally a period of recovery at least equal to the period over which the overpayment arose is appropriate. There may be circumstances where a shorter period is appropriate, for example where the applicant has invested a lump sum or paid it into a bank account. But there may also be circumstances where a longer period of recovery is appropriate, for example where the proposed period of recovery will cause a member hardship. The PO will generally, where the complaint cannot be resolved without the PO issuing a Determination, specify the rate and amount of recovery in the PO’s directions so that the competent court can authorise the commencement of the recovery process by the trustees of the scheme at this rate.
45. In cases where the PO determines that there has been maladministration in making the overpayments, the PO has power to make a reasonable award for any non-financial injustice (distress and inconvenience) sustained in consequence of the maladministration.

⁵ *Re Musgrave* [1916] 2 Ch 417

⁶ *Burgess v BIC UK* [2018] 054 PBLR (040), paragraphs [169] to [172].

46. The above sets out the PO's views very generally on the recovery of overpayments by way of recoupment in relation to trust based schemes, by reference to the PO's understanding of the current law. It is for guidance only, but sets the context in which the PO approaches trust based overpayment cases of this type. Each case will turn on its own facts.⁷

General equitable defence to an equitable recoupment claim

47. Equitable recoupment is an equitable remedy and can only be exercised where it is equitable to do so (see section on "The Pensions Ombudsman's position on equitable recoupment in trust-based schemes" above).
48. There is little case law setting out when it may be equitable to deny recoupment. However, the PO is comfortable that it is open to him, when carrying out any "inequity enquiry", to have regard to the underlying principles applied by the courts in determining whether to deny an unjust enrichment claim.⁸ This includes those relating to the availability of a change of position or, if it adds anything in the circumstances of the case, an estoppel defence. I will consider how a court would approach an unjust enrichment, and an estoppel claim below.

Unjust enrichment

49. The starting point in this type of case is that when someone is overpaid generally it is fair or equitable that they should repay the overpayments otherwise they will be unjustly enriched. However, there can be circumstances when it is equitable that the money should not be repaid in whole or in part. These include, in particular, those relating to the availability of a change of position and, if relevant, an estoppel defence.⁹

The underlying principles of change of position by analogy

50. To succeed in a change in position defence, it is generally considered necessary to show:-
- good faith - the recipient of the overpayment must be acting in good faith;
 - detriment - their circumstances must have changed detrimentally as a result of the overpayment or in anticipation of receiving it. Generally, this means that the money must have been spent, and the expenditure cannot be legally or practically reversed, or any asset bought with the overpayment cannot be easily sold; and

⁷ There is a more comprehensive analysis by the PO of the law relating to the recovery of overpayments in trust based occupational pension schemes in the TPO Determination BIC UK Pension Scheme (CAS-55100-G3W9) – 19 April 2024, on which this Determination relies.

⁸ For a detailed explanation of the legal basis by which the PO takes into account the principles underlying the defences to repayment claims, when deciding whether recoupment is equitable for the purposes of *Re Musgrave*, see the Mr E Determination (CAS-55100-G3W9 – 19 April 2024).

⁹ *Lipkin Gorman (a firm) v Karpale* [1991] 2 AC 548 as per Lord Goff at paragraph [580C]. Lord Goff set out this principle in general terms and the courts have subsequently developed principles about where such a defence applies.

- causation - there must be a causal link between the change of position and receipt of the overpayment (as a minimum it is necessary to show at least that “but for” the mistake the applicant would not have acted as they did).

51. If the above tests are met, it will generally be inequitable for the trustees or administrators of the scheme to recover the money. The burden of proof to demonstrate all aspects of a change of position defence is on the person seeking to rely on the defence
52. Unlike the position in relation to an estoppel defence, it is not necessary for the member to receive an unequivocal representation of entitlement to the overstated benefit for a change of position defence to be available. It is easier to demonstrate a change of position defence than an estoppel defence.

Good faith

53. For the recipient of the overpayment to show that they have acted in good faith, it is generally necessary for them to demonstrate that they did not have actual or “Nelsonian knowledge” that they were being overpaid. If the recipient had good reason to believe that they were being overpaid but did not check the position with the trustees this would amount to bad faith.¹⁰ However, just because a reasonable person might have realised that they were being overpaid, does not mean that the recipient of the overpayment was acting in bad faith if they did not realise.¹¹ Mere carelessness or negligence is not enough to establish bad faith.
54. Bad faith is not synonymous with dishonesty. It can simply mean that, if the recipient knew or had grounds for believing that the payment had been made in error, but could not be sure and failed to make reasonable enquiries, the defence would not be open to them. In making a judgment as to the recipient’s knowledge of the circumstances, it is not a question of deciding what they should have known; rather, it is a question of what they did know.

Detriment

55. Detriment can normally be demonstrated by the fact that the recipient has spent the money on items they would not otherwise have bought but for the overpayment. However, it is also possible to demonstrate detriment in other ways. For example, by making gifts in some circumstances.
56. It is not always necessary to show on the balance of probabilities that the overpayment has been spent on particular items which the member would not otherwise have bought, or to precisely match the expenditure to particular items.

¹⁰ See *Webber v Department for Education, Teacher's Pensions* [2012] EWHC 4225 (Ch) and *Webber v Department of Education* which applied the earlier test in *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC 1425 (Comm) in a pensions context.

¹¹ See for example *Abouh Ramah v Abacha* [2006] EWHC Civ 1492 *Armstrong DLW GmbH v Winningham Networks Ltd* [2012] EWHC 10 (Ch) at [110].

57. The courts have established in a number of cases that a rise in a defendant's general standard of living can demonstrate detriment in a change of position or estoppel defence. It has also been confirmed that general household expenditure could give rise to an estoppel where the overpayment enabled the defendant to improve the lifestyle of their family in very modest ways.¹² This is the case even if the defendant was not able to point to a particular item of expenditure which they bought as a result of the overpayments.¹³ However, the defendant was able to demonstrate that their general pattern of expenditure was higher than it would otherwise have been but for the expenditure.
58. As a change of position defence is not limited to cases where funds have been spent on specific identifiable items of expenditure, it may not be right for the court (or for that matter the PO) to apply too demanding a standard of proof when an honest defendant says they have spent an overpayment on improving their lifestyle but cannot produce too detailed accounting.¹⁴

Causation

59. There also needs to be a causal link between the overpayment and the change of position relied on. The member generally needs to at least show that "but for" the overpayment they would not have spent the money, or increased their standard of living or their circumstances would not have changed in some other way.¹⁵
60. With regard to the overpaid lump sum and overpayments of the pension, it was the Adjudicator's opinion that Mr G acted in good faith as he did not, on the balance of probabilities, have actual or Nelsonian knowledge of the fact he was being overpaid.
61. It was more likely than not that Mr G would have been unaware of the error relating to his doubled pensionable service from the Meggitt Plan transfer in. It was unclear when this error occurred, but it would be reasonable to suggest that it occurred shortly after the transfer in was completed. Consequently, any subsequent annual benefit statements that Mr G received were likely overstated for a substantial period of time. Overall, the Adjudicator believed that Mr G acted in good faith as he would have been unaware of the error which led to the overpayments.
62. However, the Adjudicator did not agree that Mr G sustained detriment in relation to the overpayment of the monthly pension or lump sum. Mr G submitted a number of reasons why the amount he is required to repay should be reduced. See Paragraphs 23 and 27 for an overview of Mr G's arguments/actions he took upon receipt of the overpaid lump.
63. While the overpayment of Mr G's retirement benefits will of course be distressing, this is not a valid defence for a change of position argument. Mr G submitted that due to

¹² See *Scottish Equitable v Derby* [2000] PLR 1 (CA) at [33].

¹³ *Philip Collins Ltd v Davis* [2000] 3 All ER case (cited with approval in *Scottish Equitable v Derby*).

¹⁴ *National Westminster Bank plc v Somer International UK Limited* [2002].

¹⁵ *Scottish Equitable v Derby* [2001] 3 All ER 818, Harrison J at paragraphs [37]-[41].

the overpayment he delayed claiming his state pension by one year, and he has remained in fulltime employment beyond his normal retirement age. A delay in claiming the state pension is not a valid for a change of position argument as Mr G will not suffer any form of detriment as a result. Mr G reached his state pension age after 6 April 2016, so for every 52 weeks that Mr G delays claiming his state pension an increase of 5.8% is applied. Furthermore, while it is disappointing for Mr G that he had had to delay his retirement, remaining in fulltime employment does not result in detriment. This is a loss of expectation, not a financial loss. Detriment will only have been sustained if Mr G left employment, on receipt of his pension, or if he reduced his hours, but he did not.

64. Mr G submitted that if the lump sum was correctly calculated, he might not have claimed the maximum lump sum under the Plan. He has suggested that he might have opted to receive a reduced lump sum and a higher annual pension. On this position the Adjudicator's view was that this argument was presented with the benefit of hindsight. There was nothing to suggest that Mr D would not still have elected to receive the maximum lump sum of his benefits even if they were correctly calculated. In any event, the decision between taking a lump sum or income is intended to be actuarially neutral and tax would have been payable on an increased annual pension. Opting to claim a larger lump sum did not cause Mr D a financial loss.
65. Based on the value of the lump sum, Mr G choose to invest a significant amount of it in his and his wife's ISA shares. He has provided evidence to confirm that due to an increase in US and UK interest rates, the ISAs have seen substantial losses. The very nature of an investment is that it can increase as well as reduce in value. This is the inherent risk of investments. It is unclear, and there is no evidence of, how the value of the incorrectly calculated lump sum influenced Mr G's decision to invest more than he would have if it was calculated correctly. Overall, the loss associated from an investment that, as Mr G has said, he would have made anyway, cannot be claimed as a financial loss. It is also arguable that the loss is not irreversible as it could increase in value over a period of time going forward. In any event, it is to be noted that Mr G is now not being called upon to crystallise any loss at this time, in order to repay the overpayment – rather the overpayment will be recouped from future pension payments.
66. Mr G bought a car for £26,500, in August 2020, based on an expected redundancy payment and his expected retirement income from the Plan. Mr G has explained that he chose not to sell the car, once the learned of the overpayment, as it would have depreciated in value from the day he bought it resulting in a financial loss.
67. For a change of position argument to be successful in this capacity, Mr G would need to demonstrate that he would not have bought the car, or instead bought a cheaper car, if he knew his correct entitlement. It was not unreasonable to say that Mr G would have bought a car in any event as it was, in part, based on an anticipated redundancy payment after 22 years of service with his former employer Emerson. Furthermore, the purchase of the car is a reversible purchase as it can be sold, albeit

at a lower value. Mr G has not re-sold the car, so any actual financial detriment has not been proven.

68. The Adjudicator did not agree that Mr G held a change of position defence in relation to the recovery of the lump sum or the overpayment of pension for the reasons listed above.

Estoppel

69. Broadly, an estoppel defence legally 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 Trustees from going back on what it informed Mr G regarding his benefit entitlement and recovering the overpayments. There are two types of estoppel that may be relevant here, namely:
- estoppel by representation which can apply where one party has made a false statement or representation to the other; and
 - estoppel by convention, which can apply where both parties have been dealing with each other on a common understanding of fact which turns out to be false.
70. The Adjudicator found that Mr G has sustained no detriment in relation to the change of position defence. It is also a requirement that there is detriment to uphold an estoppel by representation or convention defence. So, neither of the estoppel defences would be successful.

Conclusions on equitable recoupment

71. After considering the above issues, the Adjudicator was in a position to reach a conclusion on whether there was a general equitable defence to the recoupment of the overpayments.
72. In the Adjudicator’s opinion, for essentially the same reasons to the reasons discussed in relation to change of position and estoppel defences above and the laches defence below, it would be equitable for the Trustees to seek recovery of the overpayments by reducing Mr G’s pension over a period of five years.

Laches

73. For completeness, the Adjudicator covered the defence of laches. It has been confirmed by the courts that laches may be available as a specific defence to equitable recoupment, although a limitation defence under the Limitation Act cannot apply.¹⁶
74. Laches generally requires:
- knowledge of the relevant facts on the part of the claimant seeking recovery of the overpayment where there is a waiver of the claimant’s rights. However, see the

¹⁶ *Burgess v BIC UK* [2018] 054 PBLR (040) at [173] to [176] and [178].

paragraphs that follow for further consideration of whether this is always the case under the more modern formulation of laches; and either:

- acquiescence on the part of the claimant; or
- prejudice or detriment on behalf of the person from whom the overpayment is being recovered.

75. 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.¹⁷ 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.¹⁸

76. The Court of Appeal also said:¹⁹

“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.”

77. The laches defence is not applicable in Mr G's case as once the Trustees were made aware of the error that led to the overpaid pension they took swift and appropriate steps to inform Mr G and reduce his pension accordingly.

Contract

78. The Adjudicator was unable to identify the necessary elements for a contract to exist, that is offer, acceptance, consideration and an intention to create legal relations (of a contractual nature) and certainty of terms. In particular, he could not see that there was an intention on the part of the Trustee to enter into a legal relationship outside of the Scheme rules which was designed to give an entitlement to benefits otherwise than in accordance with the rules.

Commencement of recoupment plan

79. As the Plan is a trust-based pension scheme, the Trustees cannot commence recovery of overpayments by way of recoupment without an order of a competent

¹⁷ *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.

¹⁸ 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. See also *Patel v Shah* [2005] EWCA Civ 157 where the Court of Appeal endorsed the more modern approach that laches does not require an enquiry about whether the circumstances can be fitted into a preconceived formula derived from old cases, but a broad approach should be taken to ascertain on whether it is unconscionable for the party to be permitted to assert his beneficial rights.

¹⁹ *PO Nedlloyd BV v Arab Metals Co* [2006] EWCA Civ 1717 applied in *Sheffield v Sheffield* [2013] EWHC 3927 (Ch) at [100], [106], [119]

court, and the PO is not a competent court for this purpose. Please also see the PO's factsheet on this issue which is available on TPO's website.

80. However, this does not preclude the PO from determining whether an overpayment is recoverable in full or part, and the appropriate period of recovery. The PO's policy is to direct the period of recovery in his Determination.
81. It is then necessary for the Trustees to apply to the County Court or the Sheriff's Court in Scotland for an order authorising commencement of the recovery of the overpayments. However, this is an administrative paper-based step and does not involve the competent court revisiting the merits of the Determination.

Period of recovery of overpayments

82. Generally, the PO considers that a period of recovery at least equal to the period the overpayment arose is appropriate. In some circumstances, it may be appropriate to depart from this period if, for example, the applicant has invested the overpayment or still holds a significant part of the overpayment in a bank account, or the period of recovery proposed will cause real hardship.
83. The Adjudicator did not have enough information to form a view on what an appropriate period of recovery would be for the overpayment. He invited Mr G to provide details of his financial resources, and subsequently, both parties to make representations about an appropriate period of recovery. It was noted that the Trustees had agreed to a generous five-year recovery period for Mr G to repay the overpaid lump sum and pension payments. The Adjudicator's view was that, given the value of the overpayment, and the fact it occurred over an eight-month period, a recovery period of five years was more than sufficient and reasonable.

Distress and inconvenience award

84. The overpayments arose as a consequence of maladministration by the Trustees. This was caused when the additional pensionable service bought by way of a transfer credit from the Meggitt Plan, was overstated by more than double Mr G's actual entitlement. The non-financial injustice which has been sustained by Mr G has already been sufficiently addressed by the Trustees' unconditional offer to pay Mr G £1,000. This offer was made before the dispute was referred to TPO.
85. Mr G did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mr G provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, and I will therefore only respond to the key points made by Mr G for completeness. Mr G's comments are summarised below.

Mrs G's further submissions

86. Based on information Mr G found online about "retirement living standards" a modest retirement income was £31,700 a year. His reduced pension was £22,000 a year. Prior to claiming his pension, he based his retirement plans around the value of the lump sum and pension he was due from the Plan against his monthly spending for his

lifestyle. Due to the overpayment, he missed the opportunity to elect for a higher level of annual pension, which would receive index linked increases.

87. He was lucky that he was able to remain in employment at his age after the overpayment was discovered. This was why he was able to afford to delay claiming his state pension. However, remaining in employment at his age caused him “significant harm mentally in both health and mental conditions”.
88. He did not agree that he would have elected to claim the maximum lump sum under the Plan even if he was aware of his correct entitlement. He did not require a large lump sum as he had no plans to go on holiday as his wife suffered from a condition that meant she was unable to fly. He held a separated defined contribution pension that he could have taken a larger lump sum out of as opposed to the Plan. His main retirement objective was to receive the highest inflation linked pension. He had two other small pensions that would provide an annual income of £720 (inflation linked) and £2,160 (non-increasing).
89. He choose not to sell the new car he purchased, and he did not want to incur a financial loss due to the depreciation that occurs as soon as a new car is bought. If he knew what his actual Plan entitlement was, he would have elected to buy a cheaper car as opposed the one he did buy, as he though he could afford it at the time.
90. The offer of £1,000 made by the Trustees did not sufficiently address the distress and inconvenience he suffered. The Trustees should consider increasing their offer to £5,000.

Ombudsman’s decision

91. Mr G’s complaint relates to the overpayment of his pension and lump sum of £33,820.95 that occurred between May 2022 and January 2023. The Trustees are seeking recovery by way of recoupment and so I need to decide whether it would be inequitable to allow the Trustees to recover some or all of that amount. Although, as the Adjudicator sets out, there are no freestanding ‘defences’ to recoupment, for the reasons given in my Mr E Determination (BIC UK Pension Scheme (CAS-55100-G3W9) – 19 April 2024) the defences that are available for repayment claims are still of assistance to me in determining that ‘inequity’ enquiry.
92. As Mr G has sought to rely on the change of position ‘defence’, this is what I will focus on. I note the Adjudicator’s comments in relation to the following ‘defences’ not being applicable in Mr G’s case; estoppel; limitation; laches; and hardship. I agree with his analysis..
93. I agree that Mr L likely did not have Nelsonian knowledge that his Plan benefits were overstated, and therefore overpaid, from the time they were paid. His pensionable service was likely overstated due to the Meggitt transfer in. Given the length of time since the transfer in, and in Mr G’s benefits being put into payment, it is unlikely that

he would have been in a position to question his entitlement. Therefore, Mr G acted in good faith when he applied for and received his benefits in May 2022.

94. I note Mr G's comments in defence of his use of the change of position argument and how he believes he has suffered financial detriment as a result.
95. However, I am unable to agree that Mr G has sufficiently demonstrated evidence of financial detriment. When he was informed of the overpayment he made the decision to remain in full time employment, while contributing to his occupational pension. He also delayed claiming his state pension. These actions do not demonstrate financial detriment. If he reduced his hours, or left employment all together while unable to seek reemployment, he might have had a claim, but he did not.
96. Mr G has inferred that if he was aware of his correct entitlement he would have elected for a higher annual pension as opposed to claiming his maximum tax-free lump sum entitlement. As the Adjudicator has explained, the decision to claim a lump sum or pension income was actuarially neutral in this case. Additionally, Mr G's investment within ISAs for him and his wife is not an example of detriment, as he has said that the investment would have been undertaken in any event. It is unfortunate that due to a change in global conditions the value of the ISAs have declined, but this is the nature of an investment.
97. I note Mr G's reasoning for not electing to sell the car he purchased with his redundancy and lump sum payments. When an individual claims to suffer detriment, they are required to demonstrate that they took steps to mitigate any perceived detriment. In Mr G's case this would require him to sell the car even if there is a loss in value due to depreciation. If he had taken such a step, then he may be able to claim a loss of the difference between the car he bought, and the value it was re-sold at. Mr G did not re-sell the car, and there is no detriment to consider.
98. Overall, there is insufficient evidence to demonstrate that Mr G has met the "but for" criteria under a change of position defence as he has not sufficiently made clear that he would have acted any differently if not for the overpayment.

The period of recovery

99. In regard to the potential adverse impact the recovery of the overpayments will have on Mr G's household income, Mr G has not provided any information in this regard, despite the Adjudicator inviting him to do so. So, the Adjudicator and I have been unable to assess whether the recovery action proposed would cause Mr G undue hardship.
100. The Trustees have proposed a repayment period of five years to allow Mr G to repay the overpayment of £33,820.95. This would be achieved by reducing Mr G's monthly pension for 60 months. Given that the period in which the overpayment occurred was over eight months, a recovery period of five years is more than reasonable. Though, as I have said, given the lack of financial information from Mr G, I am unable to accurately assess whether this is entirely appropriate. I would encourage Mr G to

approach the Trustees to discuss his financial expenditure/household income if the rate of recovery I have specified in my directions would cause him financial hardship.

Non-financial injustice

101. I acknowledge that the Trustees have offered Mr G £1,000 in recognition of the distress and inconvenience he suffered due to the identified maladministration and resultant overpayment. Having taken the facts of the complaint into consideration, I find that the offer is sufficient. The overpayment occurred over a relatively small period of time and as soon as the error was identified immediate steps were taken to amend Mr G's benefits and inform him to prevent any further overpayments. The Trustees should contact Mr G directly to either pay the £1,000 to him, or to see if he wishes to use it to reduce the overpayment from £33,820.95 to £32,820.95.

102. I do not uphold Mr G's complaint.

Directions

103. The Trustees shall:

- Obtain an order from the County Court before recovering the net overpayments of £33,820.95 at a rate of £563.68 per month over a period of 60 months; and
- Within 28 days of the date of this Determination, correspond with Mr G to establish if he wishes for the £1,000 to be paid to him directly, or for it to be used to reduce the overpayment amount. If the latter option is undertaken then the order obtained from the County Court will be for recovering the net overpayment of £32,820.95 at a rate of £547.02 per month over a period of 60 months.

104. If at a future date Mr G can demonstrate to the reasonable satisfaction of the Trustees that his financial circumstances have deteriorated, and recovery of the overpayments at the rate I specified in this Determination will cause hardship, the Trustees shall consider whether it is still appropriate to recover the overpayments at that rate.

Dominic Harris

Pensions Ombudsman

10 November 2025