

Ombudsman's Determination

Applicant	Mr Y
Scheme	Armed Forces Pension Scheme (AFPS)
Respondents	Equiniti Paymaster (Equiniti) Veterans UK, Armed Forces Pension Scheme (Veterans UK)

Outcome

1. Mr Y's complaint against Equiniti and Veterans UK is partly upheld, but there is a part of the complaint I do not agree with. To put matters right for the part that is upheld, Equiniti and Veterans UK shall write off that part of the overpayment the recovery of which is statute barred.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr Y says that Equiniti and Veterans UK made administrative errors which led to an overpayment of his pension. He complains about the decision taken to seek recovery of the amount paid in error.

Background information, including submissions from the parties

Background

4. Mr Y previously served with the Armed Forces and became a member of the AFPS on 1 August 1966.
5. The AFPS is administered by Veterans UK. Equiniti is contracted to provide payroll services in respect of benefits paid by the scheme.
6. On 5 June 1983, Mr Y was discharged from the Armed Forces on redundancy terms. He was awarded a service pension, a terminal grant, a special capital payment and a resettlement lump sum. Part of his service pension was commuted, or reduced, to provide the resettlement lump sum.
7. There is a lack of clarity over the actual value of the service pension, resettlement lump sum and the amount commuted in respect of the resettlement lump sum. A contemporaneous letter dated 16 May 1983, gives values of:-

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- service pension - £2,099.02 per annum
 - resettlement lump sum - £7,769.94
 - commutation deduction - £910.37
8. Whereas Equiniti has quoted the following values, as at 7 July 1983, but has provided no evidence:-
- service pension - £2,257.23 per annum
 - resettlement lump sum - £7,769.94
 - commutation deduction - £979.19
9. That said, there is further evidence, dated 24 May 1983, that the special capital payment was subsequently increased as it had been reassessed using the “1983 code”, having previously been assessed under the “1982 code”. The letter informing Mr Y of this said:-
- “The remaining terminal benefits awarded to you on leaving the Service may also be increased when the 1983 Pension Code is announced. This is expected to be in June or July and details will be forwarded to you at that time.”
10. In relation to the resettlement lump sum, contemporaneous paperwork, as an annex to the letter of 16 May 1983, said:-
- “Resettlement Commutation. Ratings/ORs discharged other than by invalidating, before their 55th birthday may opt to receive in addition to the terminal grant due for their reckonable service the difference between that and the terminal grant at the 37 year rate for the rank on which service pension was awarded. Service pension will be reduced according to the current table and will be restored, together with Pension Increases at their 55th birthday.”
11. Mr Y chose to take the resettlement lump sum and a reduced, or abated, service pension.
12. On 6 June 1983, the abated annual service pension of £1,278.04, calculated as being the full service pension of £2,257.23 less the commutation deduction of £979.19, was put into payment. The pension was paid in arrears, on the 20th day of each month.
13. The service pension continued to be paid until June 2005.
14. On 5 June 2005, when aged 55, Mr Y’s resettlement commutation was reinstated and all of the relevant pension increases were awarded.
15. Equiniti calculated that the total increased pension payable from June 2005, was £5,051.82. However, due to an error on Equiniti’s part, a pension of £7,309.05 was put into payment, this being the sum of the total increased pension of £5,051.82 and the original £2,257.23 on which the increase had been applied.

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16. Between 5 June 2005 and 20 May 2015, a net overpayment of £20,978.36 accrued as a result of Equiniti's error.
17. In June 2015, Equiniti reviewed Mr Y's pension as he had attained state pension age. At this point it identified the overpayment.
18. On 8 June 2015, Equiniti wrote to Mr Y seeking to recoup the overpayment. Equiniti's letter said:-

"Unfortunately this has resulted in an overpayment of pension for the period 5 June 2005 to 20 May 2015 of £20,978.36 gross, tax adjustment of £921.60 leaves a net overpayment of £20,978.36."
19. Unhappy with Equiniti's decision to recover the overpayment, Mr Y made a complaint which was dealt with under the AFPS's two stage internal dispute resolution procedure (**IDRP**).
20. On 29 September 2015, Equiniti issued the stage one IDRP decision. This was subsequently appealed by Mr Y.
21. On 20 October 2016, Veterans UK, in its role as the stage two IDRP decision maker, responded to Mr Y's appeal.

Summary of Equiniti's position

22. Pension advice notes were issued annually showing the correct pension entitlement. Mr Y ought reasonably to have identified a discrepancy between the values on the advice notes and the income he actually received. This would have alerted him to the error.
23. Although Equiniti accepts that the overpayment is as a result of its mistake, it is bound to seek restitution of the overpayment unless this would cause Mr Y hardship. Equiniti invited Mr Y to provide evidence of hardship by way of a 'Statement of Means, Income and Expenditure' form.

Summary of Veterans UK's position

24. In accordance with the provisions of the Limitation Act 1980 (**the Limitation Act**), Mr Y will not be pursued for the overpayment accrued between 5 June 2005 and 20 May 2009.
25. The onus is on the recipient of an overpayment to show that it would be unfair to repay the money. Mr Y has not provided any evidence to support his reliance on the change of position defence, therefore the Recovery and Write off Team still intend to recover the £12,250 which is not subject to a limitation defence.
26. Although maladministration has taken place, it would not be unreasonable to expect Mr Y to have identified the discrepancy between the annual rate of income detailed on the annual pension notification and the higher corresponding monthly rate he was actually receiving.

27. Veterans UK offered Mr Y £500 for the distress and inconvenience he has experienced.

Summary of Mr Y's position

28. Nothing was provided in 2005 to set out how the pension increase had been calculated, so Mr Y had no way of identifying the error. The annual pension advice notes did include the details of Mr Y's correct pension entitlement. However, they also included the incorrect value which was being paid. This information was set out more prominently than the correct figures, so it is not reasonable to expect Mr Y to have identified Equiniti's error.
29. Further, the annual pension notifications Equiniti has provided to this Office are different to the ones Mr Y actually received. On the version Mr Y received, the incorrect information is set out in bold text which is larger than the correct values. It is not reasonable to expect him to have interrogated the figures.
30. Mr Y and his wife have made financial commitments based on the pension income they expected to receive. To require repayment of the money paid in error will have a detrimental effect on their lives. Further, Mr Y made a number of purchases he would not otherwise have made, had it not been for the overpayment. In particular Mr Y said:-

“In 2005, as a direct result of receiving my increased AFPS pension, I decided to buy an 18-foot Seahawk boat to allow my wife and me the opportunity of getting some recreational time, as we hadn't taken any major holidays for a number of years. I also traded in my old Rover 600 car for a new Land Rover Freelander, specifically as we needed a car compatible with towing the boat. Had I known what my true entitlement in the AFPS was back then, I wouldn't have bought either. I would've simply bought a normal estate car; which would've cost about 50% of the Land Rover.”

31. Seeking recovery of the overpayment at a rate of £98 per month equates to 18% of Mr Y's pension income. This will result in a reduced standard of living.

Adjudicator's Opinion

32. Mr Y's complaint was considered by one of our Adjudicators who concluded that some further action was required by Equiniti and Veterans UK. The Adjudicator's findings are summarised briefly below:-
- Veterans UK has said, “there is no discretion within the scheme rules to consider the Limitation Act or Change of Position.” This is incorrect as the rules of the AFPS cannot supersede the provisions of the Limitation Act or impinge on any legal defence available to Mr Y against recovery of the overpayment.

- Under the Limitation Act the usual time limit for seeking recovery of an overpayment is six years from the date of the incorrect payment [section 5 of the Limitation Act]. There is, however, provision for the six year period to be extended where the overpayment is the consequence of a mistake. Under section 32 of the Limitation Act, the time would not start to run until the mistake was discovered or could “with reasonable diligence” have been discovered.
- In the recent High Court case of *Webber v Department for Education and another* [2016] EWHC 2519 (Ch) (**Webber**), the Judge hearing the appeal decided that the cut-off date for limitation purposes, in overpayment cases before the Ombudsman, was the date when Teachers’ Pensions brought its claim during the course of the Ombudsman’s complaints procedure. That date was identified as being the receipt by the Pensions Ombudsman of Teachers’ Pension’s response to Mr Webber’s complaint.
- In Mr Y’s case, Veteran UK’s formal response to the complaint, which clearly sets out the basis on which it disputes Mr Y’s objection to recovery of the overpayment, was received by the Ombudsman on 23 December 2016. For the purposes of the Limitation Act this is the date at which time ceased to run.
- Whether Veterans UK or Equiniti made a claim for repayment within the applicable limitation period will turn upon the date at which the limitation period started to run.
- Equiniti and Veterans UK have suggested that Mr Y was capable of identifying that he was in receipt of an overpayment. They have argued that both the correct and incorrect figures were provided on the pension advice notices sent to Mr Y annually. Equiniti and Veterans UK are responsible for paying benefits from and administering the AFPS, so arguably those entities possess a greater understanding of how the AFPS works and so have a greater burden, than does Mr Y, to identify the error resulting in the overpayment. Further, they are the parties seeking to rely on the longer period afforded by section 32 of the Limitation Act.
- By virtue of both incorrect and correct figures being provided to Mr Y, as Equiniti and Veterans UK themselves argue, they too had both sets of information. On this basis Equiniti and/or Veterans UK ought to have identified the error in the same way as they suggest Mr Y could have done. It is not the case that this was information known only to Mr Y, so it is not as if they could only have known about the overpayment if Mr Y told them.
- Reasonable diligence carries with it, “the notion of a desire to know, and, indeed, to investigate.” (*Law Society v Sephton* [2004] EWCA Civ, [2005] QB 1013). On this basis Equiniti and/or Veterans UK could, and indeed should, have identified the error sooner. Consequently section 32 of the Limitation Act does not apply to postpone the start date.

- Thus, Equiniti and Veterans UK had six years from 20 June 2005, when Mr Y first received the overpayment of benefits, and from the date of each overpayment thereafter, in order to make a claim for recovery.
- Following the decision in Webber, as Veterans UK did not make its claim until 23 December 2016, when this Office received Veterans UK's formal response, it is only able to recover those overpayments dating back 6 years from 23 December 2016, so only those overpayments which occurred from 23 December 2010.
- The overpayments made during the period June 2005 to December 2010 are, by virtue of the Limitation Act, statute barred so Equiniti and Veterans UK are unable to effect recovery for those.
- There may be further defences available to Mr Y in respect of the remainder of the overpayment. The most common of which is referred to as change of position, that is to say, the applicant has changed his position such that it would be unjust to require him to repay the overpayment either in whole or in part.
- To make out a change of position defence certain conditions must be satisfied. Broadly, the applicant must on the balance of probabilities show that because of the overpayment, which he received in good faith, he detrimentally changed his position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure was irreversible.
- Equiniti and Veterans UK have both suggested that Mr Y ought to have identified that he was in receipt of an overpayment. This knowledge, they say, would have come from the annual pension advice notices which detailed both the correct and incorrect figures. Whilst it is true that both figures were quoted, the pension notes Mr Y has provided, do, as he points out, have the incorrect figures in a more prominent typeface. On this basis it would not have been immediately apparent to Mr Y that he was in receipt of a higher pension than he was entitled to. Consequently, in spending the money overpaid in error, Mr Y was acting in good faith.
- In terms of the change of position defence, the burden is on Mr Y to prove that he has detrimentally changed his position and that it is now inequitable to require him to repay the overpayment.
- In support of his change of position defence Mr Y has referenced the purchase of a boat, trailer and car in 2005 at an estimated cost of £30,000. However, it is unlikely that the money Mr Y spent was on something he would not otherwise have bought.
- The overpayment only started to accrue in 2005, and only amounted to around £1,750 at that time. So it is difficult to say the purchase of Mr Y's boat, trailer and car can be directly attributed to the overpayment. In other words, the value of the overpayment, at the time of the purchase, was insufficient to support the value of

acquiring the boat, so Mr Y was evidently able to finance this acquisition with funds other than those from the overpaid pension.

- Further, it seems there were other motivations driving Mr Y's decision to purchase the boat. For example Mr Y has said that he and his wife bought the boat so that they could enjoy their leisure time as they, "hadn't taken any major holidays for a number of years." On this basis it seem more likely than not that Mr Y would have purchased a boat, trailer and car in any event. It is accepted however that if the true position had been known, Mr Y would, perhaps, have purchased a more modest boat or a less expensive model of car.
 - Similarly, Mr Y's decision to purchase the boat, trailer and car was not irreversible. There is a readily available second hand market for such items, so Mr Y could have sold these items, thus reversing his spending decision, with minimal effort or expense.
 - It is usual in overpayment cases for the scheme to allow time for the overpayment to be repaid, with the usual approach being that an overpayment can be recovered over the same period of time over which it accrued. Veterans UK has indicated its willingness to allow Mr Y some time to repay the overpayment, suggesting that the amount it calculated, which was not subject to limitation (which will be higher than the true amount which is not statute barred), can be repaid at a rate of around £98 per month.
 - Taking account of Mr Y's overall financial position, the remaining overpayment and the length of time over which this can be repaid, it would not be inequitable to require Mr Y to make repayment of that portion of the debt which is not statute barred.
 - Further, it is unlikely that Mr Y would need to sell any of the purchases he says he made as a consequence of the overpayment in order to make good the amount outstanding. So the issue of depreciation on the sale of these assets is not a consideration.
 - As it is not inequitable to require Mr Y to repay the overpayment, he cannot rely on a change of position defence.
 - The £500 compensation Veterans UK offered in the IDRPs response is reasonable in the circumstances.
33. Veterans UK accepted the Adjudicator's Opinion but commented that it is common practice to offset the £500 compensation against the outstanding overpayment, rather than pay this to Mr Y directly.
34. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y 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 Y for completeness.

Ombudsman's decision

35. The Adjudicator's conclusions in relation to the Limitation Act, and that portion of the overpayment which is statute barred, have not been disputed. So the matter remaining for me to determine is whether there is a valid defence available to Mr Y in respect of the remainder of the overpayment.
36. Mr Y has commented that it was Equiniti and Veterans UK that were responsible for the overpayment arising and suggests that the overpayment being written off should be, "proportionate of the responsibility."
37. However the starting point is that money paid in error can be recovered, irrespective of which party is to blame for the overpayment. This is considered to be justified because the recipient of the overpayment is not worse off by having to make repayment. In other words, the recipient received a benefit that ought not to have been paid and must do no more than return it, so this is not inherently unfair.
38. However, the change of position defence exists to ensure the recipient is not liable to make restitution to the extent that it would make him worse off than he would be had he not received the overpayment. An example of this would be a situation where the recipient of an overpayment permanently gifted the money to charity. If this was an act he would not otherwise have done, but for the receipt of the overpayment, then it would not now be equitable to ask him to repay this money. Thus his position is said to have irreversibly changed and to repay the monies would be to his detriment.
39. In relation to the change of position defence, Mr Y has pointed out that the purchase of his boat, trailer and car were financed by way of a loan. These were sold after a period of around three years, with the capital recovered from the sale being used, in conjunction with some of the overpaid pension, to provide luxury holidays for Mr Y and his family. This expense, Mr Y says, is irretrievable.
40. I do accept that it is likely that Mr Y may have been able to obtain a greater level of loan finance as a consequence of receiving the overpaid pension than without it. However I have not found anything to suggest that Mr Y would not have been able to finance his acquisition of the boat, trailer and car, but for, the overpayment. In this sense, I find that these are purchases Mr Y would likely have made in any event.
41. Consequently it follows that Mr Y's subsequent decision to sell these items, and use the money he had realised to pay for luxury holidays, would also have been taken irrespective of receipt of the overpayment. Here I do accept that some of the overpayment may have been used to provide slightly improved and more generous holidays than Mr Y would otherwise have had without the overpayment. I also accept that this spending cannot now be recovered. However the final 'test' for a change of position defence is whether it would be unjust, that is to say that it would be unconscionable, to require Mr Y to repay some or all of the overpayment.

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42. Having given careful consideration to his overall financial position, I do not find that it would be inequitable to require Mr Y to make repayment of that portion of the debt which is not statute barred.
43. Veterans UK has offered Mr Y £500 in recognition of the non-financial injustice he has suffered. I find this offer to be reasonable and I see no reason why it should not be offset against the overpayment Veterans UK and Equiniti are seeking to recover.
44. Finally, for completeness, Mr Y has said:-

“I sincerely hope that as a result of the error to my pensions payments, that Equiniti will have reviewed it’s [sic] administrative procedures to ensure that no other Armed Forces Veteran has to endure the terrible situation I find myself in...”
45. However my role is to determine individual disputes, I am tasked with deciding whether there has been any injustice to the applicant and, if so, how that can be put right. I am not a regulator so I cannot direct Equiniti to change its working practices generally, nor can I ‘fine’ or ‘punish’ Equiniti for its maladministration.
46. Therefore, I uphold Mr Y’s complaint in part and my directions are set out below.

Directions

47. Veterans UK and Equiniti shall write off the overpayment accrued in the period before 23 December 2010, since this is subject to limitation under the Limitation Act.
48. The £500 compensation Veterans UK has offered shall be offset against the remainder of the overpayment since 23 December 2010.
49. Veterans UK and/or Equiniti shall liaise directly with Mr Y to agree a reasonable period for the recovery of the overpayment which remains outstanding.

Anthony Arter

Pensions Ombudsman
13 February 2018