

Ombudsman's Determination

Applicant	Mrs D
Scheme	Armed Forces Pension Scheme (the Scheme)
Respondents	Equiniti Paymaster (Equiniti) Veterans UK (VetsUK)

Outcome

1. Mrs D's complaint against Equiniti and VetsUK is partly upheld. To put matters right Equiniti and Veterans UK shall pay £250 each (a total of £500) to Mrs D for the non-financial injustice caused to her.

Complaint summary

2. Mrs D's complaint against Equiniti and VetsUK is that both parties caused an overpayment of pension benefits amounting to £12,488.01.

Background information, including submissions from the parties

3. Equiniti is the provider of pensioner payroll services to VetsUK, the Scheme administrator.
4. Following the death of Mrs D's partner who was a member of the Scheme, Mrs D became eligible to receive pension benefits from the Scheme on behalf of her children.
5. In September 2008, VetsUK instructed Equiniti to revise the benefits paid in respect of two of Mrs D's children, as a third child was no longer claiming benefits. The new benefits amounted to £2,295.95 a year for each child, backdated to 23 June 2008.
6. On 15 September 2008, VetsUK sent a letter to Mrs D informing her of the revised awards to be paid to the two children: Child A and Child B.
7. However, Equiniti made a mistake when revising and paying the benefits. It multiplied the individual pension of £2,295.95 by three, as if all three children were still claiming benefits. It then divided the total of £6,887.85 between Child A and Child B. This

resulted in an incorrect pension of £3,443.93 being paid to each child from June 2008.

8. In September 2009, Child B's pension ceased as he had left full time education.
9. On 19 March 2018, Equiniti notified Mrs D that the pension in respect of Child A and Child B had been overpaid by £12,488.01 from 2 September 2008 to 25 March 2018. Equiniti said that it was seeking recovery of this amount.
10. On 16 April 2018, Mrs D complained to Equiniti under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).
11. In the first stage IDRPs response dated 15 May 2018, Equiniti explained that the overpayment arose due to an incorrect pension being paid from 23 June 2008 to 25 March 2018 in respect of Child A and Child B. Equiniti apologised for the error, but insisted that it was entitled to seek recovery. However, Equiniti said it was prepared to consider any reasonable proposal for repayment. Equiniti advised that Mrs D could appeal to VetsUK.
12. On 30 May 2018, Mrs D appealed to Equiniti under the second stage of the IDRPs. Mrs D said that Equiniti and VetsUK should have noticed the error and corrected it before the overpayment arose. Mrs D claimed that an agent of the Scheme [the **Agent**], informed her over the telephone that the pension to Child A and Child B would increase when the third child stopped claiming benefits. She assumed the payment advice letters she had been receiving were correct and had no reason to question them.
13. VetsUK and Equiniti failed to respond to Mrs D's appeal. VetsUK says that it did not receive a copy of Mrs D's letter.
14. Mrs D said that she was unaware of the overpayment until March 2018, when Equiniti informed her of the mistake. She received annual payment advice notifications but did not receive any correspondence which indicated that she was being overpaid. Based on what she was told [by the Agent], she thought the benefits for Child A and B would increase in 2008 when the third child had stopped claiming benefits. However, she does not have details of the telephone call. She did not realise at the time that she was receiving more than she was entitled to. She was pre-occupied raising three children on her own and did not follow things closely. She spent all the overpayment on day-to-day spending.
15. Mrs D said that VetsUK is withholding an amount of arrears relating to Child A's pension benefits and is planning to offset these against the overpayment.
16. Equiniti initially failed to respond to our request for a response to Mrs D's complaint. VetsUK subsequently provided its formal response on 25 October 2019. VetsUK said that Mrs D was informed of the correct amount of benefits on 15 September 2008, but she did not query the incorrect amount paid to her. VetsUK is prepared to accept repayment in instalments and will consider a suitable repayment plan.

Adjudicator's Opinion

17. Mrs D's complaint was considered by one of our Adjudicators who concluded that further action was required by Equiniti and Veterans UK. The Adjudicator's findings are summarised below:-

- The Adjudicator identified maladministration by Equiniti and VetsUK and considered whether Mrs D had a defence against recovery of the overpayment. The common defences against recovery are: change of position; estoppel and contract. The Adjudicator considered whether any of these arose in Mrs D's case.
- The most common defence against recovery of an overpayment is referred to as "change of position"; that is, 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. If these elements are satisfied the Ombudsman may direct that some or all of the overpayment may be kept by the applicant.
- The Adjudicator was satisfied that Mrs D received the overpaid funds in good faith. Mrs D was unaware of the mistake as she did not pay close attention to the notification from VetsUK. She assumed any increase was due to the recalculation of benefits after her third child stopped claiming benefits. Mrs D was also preoccupied raising three children and did not follow things closely. The Adjudicator found her account plausible.
- It was not reasonable to expect Mrs D, considering her circumstances, to have carried out her own exact calculations. Mrs D relied on the notification from VetsUK that she was receiving the correct amount of benefits.
- Mrs D spent the overpayment on general living expenses, and her spending was not what can be considered as exceptional. The Adjudicator was not persuaded that all the elements of the change of position defence had been satisfied.
- Mrs D does have a defence under the Limitation Act 1980 (**the Act**) against some of the amount that can be recovered. The Act provides timescales by which an action must have commenced where a breach of the law has occurred. Ordinary breaches of contract are actionable for six years after the cause of action accrued or from when the claimant could, with reasonable due diligence, have discovered the error.
- In the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch), the High Court held that the applicable cut-off date for the purposes of the Act

was the date when Teachers' Pensions brought its claim during the course of the Pension Ombudsman's complaints procedure. That date was identified as being the receipt by the Pension Ombudsman of Teachers' Pensions' response to Mr Webber's complaint.

- In Mrs D's case, the claim was made on 25 October 2019, the date the Pensions Ombudsman received VetsUK's Pensions' response to her complaint. Accordingly, time started running from the date that the overpayment first occurred in 2008 and subsequently upon each further overpayment occurring (section 5 of the Act) from 2008 to 2018. However, the limitation period can be postponed where there has been fraud, concealment, or mistake (section 32 of the Act).
- In such cases, the limitation period is six years from the date VetsUK discovered the fraud, concealment, or mistake, or could have done so with reasonable diligence. In Mrs D's case, the error went unnoticed for several years but, with reasonable diligence, it would likely to have been identified in September 2008, when the overpayment commenced. This is because VetsUK was aware that only Child A and Child B were eligible to receive benefits at the time and knew the correct amount of benefits to be paid. It was an error by Equiniti that caused the overpayment in the first place.
- So, Mrs D has a limitation defence in respect of any overpayments made prior to October 2013. VetsUK is unable to recover any overpayment that occurred during the period 2008 to 24 October 2013, because it occurred more than six years before the relevant cut-off date. However, any overpayment from 25 October 2013 onwards is recoverable, unless any other defence to recovery applies. In effect, this means that any portion of the overpayment relating to Child B would not be recoverable as it occurred before 24 October 2013.
- The Adjudicator considered that no other defences to recovery applied in Mrs D's case.
- The Adjudicator commented on the arrears of Child A's benefits which Mrs D said was being withheld. VetsUK would be aware that the Pensions Ombudsman does not expect schemes to withhold benefits or unilaterally decide to apply any arrears towards the repayment of an overpayment, especially when the overpayment is under review and disputed. Any arrears due to Mrs D should be dealt with in the usual manner without taking the overpayment into account.
- The overpayment error by Equiniti and the subsequent request for repayment would have caused Mrs D significant distress and inconvenience. Equiniti and VetsUK also failed to complete the Scheme's complaint process.
- The Adjudicator partly upheld Mrs D's complaint and said Equiniti and VetsUK should each pay £250 to Mrs D in respect of the significant non-financial

injustice caused to her by a combination of the overpayment error and the lack of response to her second stage IDR request.

18. Mrs D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs D said that:-
 - The overpayment should be calculated and claimed separately, meaning that she had a defence under the Act against the recovery of any overpayment relating to Child B.
 - She changed her position as she was in a better financial position which caused her to develop a non-cautious financial attitude. She spent the overpayment in good faith on a variety of expenditure such as second holidays, the education of Child C, a guitar for Child B, and a hot tub for Child A.
 - These expenses are not general living expenses and would not have been incurred but for the error by Equiniti and VetsUK.
 - VetsUK were still withholding arrears of Child A's benefits.
19. Equiniti responded to Mrs D's comments. It said that the overpayment was calculated on each award. In accordance with the Adjudicator's Opinion, the overpayment had been recalculated as £6,110.25. Equiniti had also arranged for the arrears of £2,910.79 to be paid to Mrs D.
20. Mrs D subsequently confirmed receipt of the arrears from Equiniti.
21. VetsUK did not make any additional comment.
22. The complaint was passed to me to consider. I note the additional points made by Mrs D, but I agree with the Adjudicator's Opinion.

Ombudsman's decision

23. Generally, unless Mrs D has a valid defence, VetsUK is entitled to seek recovery of the overpayment. VetsUK has said that the overpayment was based on the incorrect award paid to Mrs D. It has recalculated the overpayment in the light of the Adjudicator's Opinion and Mrs D has confirmed receipt of the arrears.
24. Mrs D's defence is that she has changed her position. Mrs D says she received the payment in good faith and has changed her position in reliance on it by being less financially prudent and spending on other things such as taking additional holidays, spending on courses for Child C, a guitar for Child B and a hot tub for Child A.
25. To successfully argue a "change of position", Mrs D has to demonstrate: (1) that she had received the overpayment in good faith; (2) that she had relied on the overpayment when making relevant financial decisions; and (3) that she changed her lifestyle in a manner that was irreversible. If the above criteria is met, then it would be

inequitable for the party owed (in this case VetsUK) to seek recovery of the overpayment.

26. With regard to the first test, I accept that Mrs D had good faith. I do not find she knew there was a possibility of an overpayment but did nothing about it. In other words, there is no sign that she turned a “blind eye” to a potential overpayment in the hope that it would go unnoticed. However, I do not find that the second test is met. I do not find Mrs D can show that, but for the mistake in overpaying her, she would not have incurred the expenses highlighted.
27. VetsUK overpaid the award by approximately £1,140 a year which means £95 a month. I do not consider that this is such a significant amount as to make Mrs D less financially prudent. Also the number of awards made to Mrs D in 2008 was decreasing from three to two, and then to one in 2009. As Mrs D’s income was decreasing in real terms, I am not persuaded that would have led to a less cautious financial attitude notwithstanding the error.
28. The spending on Child B and C are hardly relevant as Child C did not receive any incorrect benefits while Child B only received incorrect benefits for one year. In any event, any overpayment in respect of Child B is not recoverable under the Act.
29. I am not satisfied that Mrs D can establish a change of position defence in respect of the overpayment.
30. I note that the overpayment has been recalculated as £6,110.25, a reduction of £6,377.76. However, I agree with the Adjudicator that the actions of Equiniti and VetsUK have caused significant distress and inconvenience to Mrs R and an award is warranted in these circumstances.
31. I partly uphold Mrs D’s complaint.

Directions

32. Within 14 days of the date of this Determination, Equiniti and VetsUK shall pay £500 to Mrs D. Equiniti and VetsUK shall meet the cost equally. VetsUK shall give Mrs D the option of having this amount paid directly to her or to be offset against the overpayment.
33. If Mrs D chooses to have the award offset against the overpayment, VetsUK and Equiniti shall then recalculate the overpayment owed and notify Mrs D of the new amount.

Anthony Arter

Pensions Ombudsman
8 October 2020