

## Ombudsman's Determination

Applicant	Mr S
Scheme	Principal Civil Service Pension Scheme (Northern Ireland) ( <b>the Scheme</b> )
Respondent	Department of Finance ( <b>the Department</b> )

## Outcome

1. I do not uphold Mr S' complaint and no further action is required by the Department.

## Complaint summary

2. Mr S has complained that the Department miscalculated his voluntary early redundancy (**VER**) benefits, leading to an overpayment. It is now seeking to reclaim the overpaid funds.

## Background information, including submissions from the parties

3. Mr S worked for the Prison Service.
4. In February 1995, he received a letter from the Prison Service Headquarters (**PSH**) saying that, as he had achieved 20 years' service, he would be given the option to increase the rate of Widow's and Dependants' contributions he paid to cover additional service. Mr S was given two specific options on how this could be done.
5. In April 1995, PSH received a form completed by Mr S indicating that he wished to increase his contributions into the Widows' Pension Scheme from 1% to 3%.
6. On 12 November 1997, PSH wrote to Mr S saying he was due to cease double contributions on 1 December 1997.
7. In February 2009, Central Pay Branch, Belfast, wrote to Mr S saying that as he had stopped doubling his Widow's and Dependants' contribution rate, and not re-commenced, there may be a shortfall in contributions. It said a deduction would be taken from his lump sum at the point of leaving or retirement, to cover this.
8. In March 2009, Mr S requested that these contributions be re-started.

9. In 2012, Mr S applied for his retirement benefits on a VER basis.
10. In March 2012, Mr S was sent a statement confirming the pension he would receive from 1 April 2012. The main details were:

Net pension payable – £17,703.85

Lump sum payable – £107,770.90

Additional Service Payment - £10,254.75
11. On 4 October 2016, Mr S wrote to the Department in relation to the contributions he had made, asking whether a refund was due to him where he had over 45 years' service.
12. On 13 October 2016, the Department replied saying that the part of his award he had queried had been calculated correctly and provided further details. It then said:

“As part of the review of your case I must also advise you that errors have been identified in the original calculation of your ‘Formal Retirement.’ As a result of this revision your annual pension has been reduced from £17,703.96 pa to £17,156.68 pa with effect from 01 April 2012. I can advise that the pension value with effect from 6<sup>th</sup> April 2015 is £18,223.64 pa. This change will take effect from 1st October 2016. Unfortunately this has meant that you have experienced an overpayment of pension in the amount of £2,550.76 gross (£2,039.76 net after overpayment of tax has been deducted).

A further overpayment in your lump sum has also been incurred due to an error in the payment of Additional Service Payment (ASP) lump sum. The initial lump sum paid has been reduced from £118,025.65 to £114,377.89 resulting in a net Lump Sum overpayment of £3,647.76. I can therefore advise that the total overpayment in respect of your pension benefits totals £5,687.52.”
13. The letter went on to say that the overpaid monies would have to be recovered and this could be paid by cheque for the net amount, or through an agreed repayment plan involving manageable monthly instalments.
14. In January 2017, Mr S formally complained about the overpayment through the Scheme's Internal Dispute Resolution Procedure (**IDRP**). He requested a full breakdown of his Widow's and Dependants' contributions and said he had never requested to stop doubling up. He also queried why his retirement figures were not checked at the time.
15. On 22 May 2017, the Department responded under stage one of the IDRP. This initially addressed Mr S' query into his Widow's and Dependants' contributions and the refund he believed he would be due. In terms of the overpayment, it said all awards were checked prior to issue and apologised that the error in question was not noticed. It said all awards under the VER scheme, along with the additional

calculation where members have “Reserved Rights”, were complex and required manual intervention but it could confirm his award was now being correctly paid.

16. Mr S subsequently made further queries then appealed the matter.
17. On 12 December 2018, the Department responded under stage two of the IDRPs. It replied to the specific points made by Mr S about the error but then reiterated that it must recover the overpayment. However, it added that it wished to offer Mr S an award of £1,000 in recognition of the distress and inconvenience caused by its error, which it said was unconditional and would be offset against the overpayment. It requested Mr S to contact it to arrange repayment of the outstanding amount or discuss a repayment schedule.
18. Mr S’ position is as follows:-
  - When he left the Prison Service under the VER scheme, he was given clear information prior to retirement to allow him to make an informed decision about whether to accept the terms of this scheme. He had now been informed that there was an overpayment.
  - He would like the overpayment to be written off; these events had occurred through no fault of his own but due to the incompetence of the Department.
  - As there had been numerous complaints made in relation to the VER scheme, he wished for someone to be held accountable for the failures in implementing this scheme properly.
19. On 16 April 2019, the Department provided its response to the complaint saying:-
  - Mr S wrote to it on 4 October 2016 as he believed he was due a refund of his Widow’s and Dependants’ contributions. It reviewed the award and found an administrative error made in calculating his pension.
  - It had written to Mr S explaining that although his pension was calculated on 45 years’ service, he had only paid contributions for 43 years and 41 days. This meant he had been paid too much pension and lump sum. An apology had been made in its letters of 4 January 2017 and 22 May 2017.
  - The error stemmed from the ASP being incorrectly calculated using 7 years 64 days instead of just 11 days (number of days over age 55). This in turn affected the amount of maximum lump sum available.
  - It had acknowledged the error and offered an award of £1,000 at stage two of the IDRPs. It considered this award was in line with what the Pensions Ombudsman would award.
  - There was no provision under its guidance to write off the overpayment because of a departmental mistake. However, it had the authority under the Pensions (Northern Ireland) Order 1996 [sic – 1995], Article 89 – Section 5(f) and as

amended by way of article 243 in the Pensions (Northern Ireland) Order 2005, to recover the overpayment from Mr S' ongoing pension benefits.

20. The above response was received by the Pensions Ombudsman's Office (**TPO's Office**) on 23 April 2019.

21. As part of her investigation, the Adjudicator asked Mr S' representative (**the Representative**) how Mr S spent or saved the overpaid funds.

22. He replied saying:

"I can now confirm with you that he spent the overpayment on the following:

1) On 31/08/2012 - £2889 on a motorbike for himself.

2) 26 & 27/10/2012 - he paid £1000 & £1200 respectively as deposits for daughters [sic] cars.

3) 05/11/2012 he paid £2250 - balance payment for daughters [sic] car."

23. He then further clarified the following:

"[Mr S] has informed me that on the 13th October 2016 he was informed that he had received an overpayment in his lump sum of £3647.76 pence when he retired on 31st March 2012. Also he was informed by CSPS. In that letter he had been overpaid on his pension by £2038.70 pence, a total overpayment of £5,687.52 pence.

As CSPS made these payments and Mr S received these in good faith and understood the money he received in his pension every month was correct upon retirement and he proceeded to gift payments to his daughters, had renovations done to his house & also cleared his mortgage in the timeframe from 31st March 2012 until 13th October 2016.

...

As reference to the overpayment of his pension made on a monthly basis by CSPS, which [Mr S] lives/depends on since his retirement on 31st March 2012, he had no idea that his pension payments were wrong until he received the letter from CSPS dated 13th October 2016...So therefore upon Mr S [sic] retirement he proceeded with his daily life presuming all was in order!"

24. The Adjudicator subsequently enquired about how the lump sum itself was spent. The representative said:

"Having spoken to [Mr S] today I can now inform you that he spent his money as outlined in previous email along with buying himself a new car, motorcycle, renovations to his house and at least two family holidays a year since retirement (2012) as well as paying off his mortgage."

25. Also as part of the Adjudicator's investigation, she asked the Department to confirm whether it intended to recover the overpaid funds with an agreed repayment plan involving Mr S' own funds or if it proposed to do so through his future pension. It replied saying the following:

"Civil Services preferred option would be to come to an agreement with a repayment plan and then recover it from a members [sic] monthly pension benefit, however we would also accept a standing order from a members [sic] nominated bank account if need be."

## Adjudicator's Opinion

26. Mr S' complaint was considered by one of our Adjudicators who concluded that a partial defence to the recovery of the funds applied to one of the recovery options. The Adjudicator's findings are summarised below:-

- The Department's primary recovery plan involved recovering the overpayment from Mr S by reducing his future pension benefits to recover past overpayments. It was therefore seeking to remedy the overpayment by way of equitable set-off.
- Equitable set-off operates in a similar way to equitable recoupment. Equitable recoupment is a principle that applies to trustees and the Scheme is a statutory unfunded scheme with no trustees and no trust. Hence, recoupment was not available to the Department.
- Where there was an overpayment in a statutory scheme, it could be said that there are two cross-claims between the member and manager of the scheme which can be offset. Mr S' pension entitlement was a statutory debt owed to him by the Scheme and was liable to be offset against the overpayment, which is a debt owed to the Scheme by Mr S. Therefore, subject to any defences to the claim which Mr S may have, it was inequitable that he could insist on his full entitlement under the Scheme without allowing the claim for the overpayment to be satisfied. It followed that the Department could rely on equitable set-off as the basis for recovery.
- In the case of *Burgess & Ors v BIC UK Limited* [2018] EWHC 785 (Ch), Mr Justice Arnold held that equitable recoupment was not a restitutionary claim for unjust enrichment (unlike the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch)). Rather it was an equitable self-help remedy which did not involve any claim for repayment of the monies paid in the past but an adjustment of accounts in the future. Therefore, equitable set-off, like equitable recoupment, was not subject to a six-year limitation period under section 5 of the Limitation Act 1980 (**the Limitation Act**).
- However, if the Department agreed a repayment plan which did not involve reducing Mr S' ongoing pension, the Limitation Act, which provided timescales by which an action must have commenced where a breach of the law had occurred,

would apply. Ordinary breaches of contract were actionable for six years after the cause of action accrued.

- 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 Limitation Act was the date when Teachers' Pensions brought its claim during the course of TPO's Office's complaints procedure. That date was identified as being the receipt by TPO's Office of Teachers' Pensions' response to Mr Webber's complaint.
- In order for the Department to be able to recover the whole overpayment (in Mr S' case) from 2012 onwards, its claim would have had to have been made within six years of 2012 (applying section 32(1) of the Act), which is when the first cause of action (this being the overpayment) took place. The Department's claim was made on 23 April 2019, when TPO's Office received the Department's response to Mr S' complaint.
- Through the repayment method of recovery, the Department would only be able to recover payments which dated back to 23 April 2013. Mr S' pension benefits were put into payment on 1 April 2012, which is when he received his pension and lump sum. The Department therefore could not, in such circumstances, recover the overpayments which occurred from 1 April 2012 to (and including) 23 April 2013 if repayment was the route chosen. The Limitation Act would provide Mr S with a partial defence where this recovery method is used.
- In respect of other defences to recovery, the most common defence against the recovery of an overpayment was 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 needed to 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.
- There were other defences to the recovery of an overpayment; for example, estoppel and contract. These arose less often in pension cases but would be considered if the circumstances of the case suggested this was appropriate.
- As the overpayment stemmed from the incorrect calculation of Mr S' benefits, Mr S could not have been aware of the error. The Department had noted that the calculation it performed was complex. Also, Mr S could not have been aware of all the records held for him (which formed part of the calculation). Therefore, it would be considered that Mr S had received the overpaid funds in good faith.

- In respect to the amount of the overpayment specifically, this was made up of £2,039.76 in pension and £3,647.76 in lump sum. In regard to the pension element of the overpayment, the Department had said that Mr S' annual pension was paid at a level of £17,703.96, when the correct figure should have been £17,156.68 (with effect from 1 April 2012). Therefore, Mr S was overpaid by around £550 a year for the years between 2012 and 2016, so the overpayment amounted to approximately 3% of the overall pension Mr S was paid annually. Despite the arguments the Representative had put forward, the annual overpayment pertaining to Mr S' pension was too small a proportion of the overall pension he received to materially affect his spending decisions. It did not appear that Mr S had changed his position because of the overpaid pension funds.
- Similarly, Mr S was paid a lump sum of £107,770.90, or £118,025.65 including the ASP. The overpayment within this of £3,647.76 was around a 3% proportion of the overall lump sum. Applying the same analysis, it was difficult to argue that the presence of the excess funds had a material impact on Mr S' expenditure. Further, taking into account the statements provided by the Representative, there did not appear to be a causative link between Mr S' expenditure and the excess funds. It was not evident that Mr S embarked upon spending decisions which he would otherwise not have done had the overpaid funds not been available to him.
- With regard to the Representative's specific submissions, Mr S had spent £2,889.00 on a motorbike for himself and £4,450.00 in total towards his daughters' cars. Given that he had been paid a lump sum of over £115,000 and that these payments amounted to a figure less than £10,000 (and that it could be argued these payments were necessary/functional expenditure), it was likely that Mr S would have made these purchases regardless of the overpayment. The same argument applied in respect of the family holidays which Mr S went on.
- The Representative had also stated that Mr S used the funds from the overpayment towards home renovation works and paying off his mortgage. As Mr S' mortgage was a debt that he would need to pay off anyway, such a payment would not be considered a change of position. Instead, he was able to bring this payment forward, so pay off his mortgage sooner. Therefore, it could not be agreed that Mr S had detrimentally changed his position because of any overpayment that was spent on this.
- Mr S had also spent some of the pension funds on renovation works for his home. Mr S would potentially benefit from these home improvements. Therefore, he did not appear to have been disadvantaged and this could not be considered a detrimental change in circumstance.
- Nonetheless, the overpayment had occurred through no fault of Mr S' and it was understandable that learning about it after a chance enquiry he made years after retiring would have undoubtedly caused him distress and inconvenience. The award of £1,000 put forward by the Department in recognition of its error was an appropriate offer.

27. The Department accepted the Adjudicator's Opinion. The Representative did not accept the Opinion and made the following points:-

- Incorrect figures were produced by the Department which it alleged had been checked three or four times.
- In respect of ASP being miscalculated, how and why did the Department still not get this right given that it held all of Mr S' information?
- The Department had reduced Mr S' pension without consulting him and with no regard for his financial position. At no point did the Department request evidence prior to doing so.
- The Department should have considered how Mr S spent the overpayment and whether it was equitable for it to ask for this back.
- In regard to change of position, as Mr S had changed his position in good faith, it would be unjust to require him to repay the overpayment. Mr S' expenditure was irreversible and he detrimentally changed his position.
- The Adjudicator had said that the payments in question were necessary/functional expenditure, this was not the case. She had also said that Mr S' mortgage was a debt that he would need to pay off anyway. This was not so, as upon retirement he could have kept paying his monthly payments from his monthly pension.
- Had Mr S known his figures were incorrect, he would have corrected the overpayment prior to any expenditure and gifts to the family.
- In regard to an estoppel defence, Mr S had reasonably relied in good faith to his detriment.

28. The Adjudicator replied to the above comments. In summary, she said:-

- There was no dispute that the figures were incorrect.
- She agreed that the Department should have calculated Mr S' award correctly in the first place. However, this did not negate its right to repayment.
- In reducing Mr S' pension, the Department had adjusted it to the correct level and it was entitled to do so. If the Department had not done this, it could be criticised for allowing the liability to further accrue.
- She had considered whether it was equitable for the Department to ask for the overpayment to be paid back. In her view, Mr S did not have a change of position defence.
- Further to this, she had already said that Mr S had acted in good faith. However, this did not automatically mean it would be unjust for him to repay the overpayment. Rather it meant that he satisfied the first criterion of the change of position defence. In her view, Mr S had not satisfied the other elements of this



defence; he had not detrimentally changed his position. In respect of the change of position arguments made in regard to Mr S' expenditure, her view remained as per her Opinion letter.

- In regard to estoppel, for similar reasons to that applying to the change of position defence, she was not satisfied that the element of detriment had been established.

29. The Representative replied saying that Mr S had done nothing wrong and that this was a clear case of maladministration by the Department. He also said that more compensation should be offered to Mr S given the length of time the case had been outstanding. Lastly, he asked for clarity on the remaining overpayment liability; the Department had suggested to Mr S that the only reduction available was the £1,000 distress and inconvenience award.
30. The Department subsequently confirmed that it intended to recover the full overpayment, minus the £1,000 award offered for distress and inconvenience, by reducing Mr S' future pension.
31. The Representative did not accept the Department's position and questioned whether it had the right to withdraw the repayment option, which was subject to the Limitation Act, at this late stage.
32. The Adjudicator explained her view, which was that the Department could pursue the recovery method of its choosing given that no agreement had been reached to date. The Adjudicator added that the change in stance appeared to arise from the Department's failure to realise, until recently, that the repayment option would mean that the Limitation Act would apply.
33. The complaint was then passed to me to consider. The Representative made the following comment on behalf of Mr S when requesting that the complaint be referred for Ombudsman review:

"After having sought advice he is of the opinion that what you are proposing to allow CSPA to have this overpayment repaid monthly from his pension is unlawful and unjustified in the circumstances! After all [Mr S] has done nothing wrong and it is the administrators [sic] error!

He feels so strongly about this matter that he is prepared to take this matter to court if necessary! (original emphasis)

In his opinion he is being penalised twice by allowing CSPA to recoup this overpayment in this manner without the Limitation Act being applied!"

34. I agree with the Adjudicator's Opinion and I will therefore only respond to the additional points made by Mr S and his Representative.

## **Ombudsman's decision**

35. The Department is seeking to recover the overpayment from Mr S by reducing his future pension benefits. I understand that the Department is relying on equitable set-off as the legal basis for recovering the overpayments.
36. Where there has been an overpayment in a statutory scheme, it can be said that there are two cross-claims between the member and manager of the scheme which can be offset. Specifically, Mr S' pension entitlement is a statutory debt owed to him by the Scheme and is liable to be offset against the overpayment, which is a debt owed to the Scheme by Mr S. Therefore, subject to any defences to the claim which Mr S may have, it is inequitable that he can insist on his full entitlement under the Scheme without allowing the claim for the overpayment to be satisfied. It follows that the Department can rely on equitable set-off as the basis for recovery.
37. The Representative favours the recovery method of Mr S repaying the overpayment through funds separate to his pension, through which the Limitation Act defence applies. However, the Department has now confirmed that equitable set-off is the only recovery method it is proposing. Although this is not Mr S' preference and is less financially favourable to him, it is a decision for the Department to make and I find that there is no wrongdoing.
38. Mr S feels it cannot be acceptable that the Department has withdrawn one of the repayment methods it previously offered. However, as no agreement has been reached between the parties on recovery, the Department remains free to amend these options and pursue recovery through the method of equitable set-off.
39. In respect of whether Mr S has a change of position defence available to him, given the amounts for the expenses highlighted by the Representative and the nature of these, I do not find that any of these constitute exceptional/detrimental expenditure.
40. Lastly, I agree that the Department's offer to Mr S of £1,000 for the distress and inconvenience caused to him by its actions, is an appropriate offer. I do not direct that any further award be made.
41. I do not uphold Mr S' complaint.

**Anthony Arter**

Pensions Ombudsman  
11 October 2021

## **Appendix**

Pensions (Northern Ireland) Order 1995

Article 89 – Section 5(f)

(5) In the case of a person (“the 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, paragraph (1) does not apply to any of the following, or any agreement to effect any of the following—

(f)subject to paragraph (6), a charge or lien on, or set-off against, the person in question's entitlement, or right, for the purpose 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.