

**EXTRACTS FROM INITIAL ADVICE TO THE FORCES PENSION SOCIETY IN
RELATION TO OVERPAYMENT ISSUES THAT HAVE ARISEN
UNDER THE ARMED FORCES PENSION SCHEME**



A. INTRODUCTION

1. The below sets out extracts of advice that the FPS has received from Counsel which provides a very broad overview of the main defences available in pensions overpayments cases.
2. Counsel's advice was provided for the benefit of the Forces Pension Society ('FPS') only and should not be relied upon by, or construed as legal or professional advice to, any other person. Any person other than the FPS should take their own legal advice and Counsel disclaims liability for any loss caused to any person other than the FPS arising from reliance on this extract of her advice

B. GENERAL POINTS

B.1 Legal Defences

3. The primary legal defence to a claim for overpayment is limitation. Limitation is potentially a valid defence against claims for repayment, but not for recoupment from ongoing pension payments.
4. That is, to some extent, an illogical distinction to make in most pensions situations, as unless the overpaid person is no longer entitled to ongoing pension payments the scheme administrator will generally have a choice as to whether to seek repayment or recoupment.
5. If it does apply (so in a repayment case) the limitation period is six years prior to the date of claim unless the claim is for relief from the consequences of a mistake, in which case time does not start to run until the mistake either was discovered, or could have been discovered with reasonable diligence (see section 32(1) of the Limitation Act 1980).
6. There can also, occasionally, be defences based on contract or tort in relation to pension overpayments – for example, if a member could establish that the promised level of payment was part of a job offer made. However, it is unlikely that this would ever be the case in relation to armed forces pensions.

B.2 Equitable defences

7. In addition to the legal defences I have mentioned above, there are potential equitable defences, of which three tend to be relevant to pensions claims. These have the potential to apply to both repayment and recoupment claims, and I set out the very broad basis of each below.

B.2.1 Laches

8. Laches can be a defence to either repayment or recoupment of overpaid pension in circumstances in which the scheme manager has delayed pursuing their entitlement but there is no limitation defence. As put in *P&O Nedlloyd BV v Arab Metals Co* [2007] 1 WLR 2288 at paragraph 61, the question:

“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.”

9. The period of delay in a pensions case only begins to run from the point that the scheme manager has knowledge of the potential issue. Even then, delay is not sufficient of itself, there need to be circumstances which make it inequitable for the claim to be enforced (see Halsbury’s Laws as quoted in PO Determination CAS55100-G3W9).

B.2.2 Estoppel by representation

10. Estoppel by representation arises when there is an unambiguous representation that a member is entitled to a particular amount of pension, and they rely on that representation to their detriment.
11. In pensions overpayment cases, the challenges that arise in relation to estoppel by representation are generally:
 - a. establishing a clear representation of entitlement to the higher sum – in recent years scheme managers have started to include disclaimers in benefit statements and other documents to try to limit members’ ability to rely upon them;
 - b. showing that the member spent the money specifically in reliance upon the representation that they were entitled to the higher sum; and
 - c. establishing that the money is irrecoverable (so there is no asset to be sold, or investment that has increased in value as a result of the spending).

B.2.3 Change of position

12. A defence of change of position can be made against the whole or part of the claim for recovery/recoupment. It requires that the member shows that:
 - a. they did not know of the error/acted in good faith;
 - b. they have changed their position to their detriment acting in reliance on the payment; and
 - c. the money has been irreversibly spent.
13. The key challenge in pensions overpayment cases is generally showing that you have acted in reliance on the level of payment in circumstances in which that overpayment is a proportion of your monthly income. The courts and Pensions Ombudsman have generally adopted a fairly harsh approach to this question, and members need robust and clear links between overpayment and irrecoverable spending to succeed.

B.3 Establishing equitable defences

14. All of the defences have at their heart the fact that it would be unconscionable for the scheme manager to recover the money. In terms of the behaviour of the scheme manager that can be by reason of their delay (laches) or representations (estoppel), and in terms of the member there is a requirement for actual prejudice or detriment beyond disappointed expectations.
15. As can be seen from the brief descriptions above, these are highly fact specific and inevitably there is some degree of subjectivity in the court's assessment of whether the unconscionability hurdle is met.

B.4 Public sector schemes' discretion to waive recovery

16. Some public sector pension schemes contain express provisions by which the scheme manager has a discretion as to the recovery of overpayments. In relation to those schemes the Pensions Ombudsman has found that it is maladministration to fail to have a proper decision-making process in relation to the exercise of that discretion (see, in the context of the Teachers' Pension Scheme PO Determination CAS-20170-T9C1).
17. On the basis of keyword searching I have found no similar direction in any of the AFPS schemes, although I note that the 2015 Scheme has:
 - a. a provision at Regulation 124 which compels the scheme manager to recover overpayments in circumstances in which a person re-enters service; and
 - b. references in Regulations 86 and 87 reserving a right to recover overpayments from dependants/nominees "in any case where the scheme manager considers it appropriate to do so".

18. Taken together with general Treasury Guidance on overpayments¹ which says:

"In principle public sector organisations should always pursue recovery of overpayments, irrespective of how they came to be made. In practice, however, there will be both practical and legal limits to how cases should be handled. So each case should be dealt with on its merits."

It might be arguable that there is a discretion in the scheme manager as to overpayments, which should be exercised on the basis of a proper decision-making process, and that any failure to undertake that process would be maladministration.

C. PRACTICAL ISSUES

C.1 Requiring proof of the overpayment

Whilst this may sound obvious, I should note that the first step in any overpayments case is to check that the scheme manager is able to establish that there really has been an overpayment.

C.2 Tax/benefits

19. In some circumstances members will have suffered specific loss by reason of the overpayments. The most common examples are overpaid tax (arising from paying tax on the overpayment itself, and sometimes also because of tax bracket) and underpaid statutory benefits.
20. Where the loss has clearly been caused by the scheme manager's error, those should be identified and netted off from the overall repayment sought.

D. CONCLUSION

21. The recovery of pension overpayments is a complex area, with the equitable defences turning on their own facts and a wide discretion in the Court/Ombudsman.
22. In respect of the potential equitable defences it may be relevant for a member to consider whether they have robust evidence of detrimental reliance/change of position, across the whole period, and specifically during the laches delay period. That could, for example, be spending that can be linked directly to the overpayment, and which is genuinely irrecoverable.

¹ HM Treasury's guidance, *Managing Public Money* at Annex 4.11