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AFPS Overpayments: a Guide

1. **General.** This article is written to help FPS members understand the law, policy and processes relating to the recovery of AFPS overpayments. It is not personal legal advice, but it may help members choose the best way forward. The sequence and steps are described first, followed by the law and policy, and finishing with detail on legal defences and evidence. Members should admit nothing until they have read this guide.

2. **Sequence and steps for members in receipt of a repayment demand**.

a. **Common to all.** Once Veterans UK (or its agents Sopra Steria or Equiniti) has identified an overpayment it will regularise future pension payments. Assuming their calculation is accurate, this is just and should not be contested**.** Unless a member voluntarily choses to repay, it is important members dispute the alleged overpayment from the start and do not agree, however reluctantly, to any repayments or recoupments until all other options have been exhausted. The appeals process can take considerable time, which helps reduce the real value and the duration of any eventually agreed repayment.

b. **Initial engagement.** This is a fact finding opportunity. On receipt of an overpayment letter a member who does not wish to repay should submit a complaint not amounting to an IDRP that challenges the calculations, the timelines and the processes. Members may also wish to submit a Subject Access Request under UK GDPR / the Data Protection Act 2018 to obtain copies of their personal data and how it has been processed. Letters to MPs won't help the individual case but they do help raise the level of awareness in Parliament.

c. **Veterans UK Debt Recovery Team**. Members who wish to repay either with or without using the appeals process can contact the Debt Recovery Team and negotiate the amount they can repay and the time period. The same team can also be accessed after engaging with IDRP or the Pension Ombudsman. The longest repayment period proposed that we are aware of so far is 13.7 years. If members chose to go down the repayment route they should seek the lowest acceptable offer over the longest possible period: interest is not charged.

d. **Appeal to IDRP**. This allows members to assert and evidence defence against recovery to a non-legally qualified deciding officer that might result in recovery being ceased. It is an opportunity to assert maladministration and distress which can result in compensation. Experience suggests the most likely legal defence is 'change of position'[1]. We recommend legal advice in compiling IDRP submissions in order to ensure the right type and level of detail is presented. At the conclusion of an

[1] For explanations of the defences change of position, estoppel, limitation and laches see paras 7-10.

unsuccessful or partially successful IDRP, a member can then turn to the Debt Recovery Team or to the Pension Ombudsman.

e. **Appeal to the Pension Ombudsman**. This must be lodged within 3 years of becoming aware of the overpayment. It allows members to assert a defence to a legally qualified office that might result in the debt being no longer owed, but also might result in a final and binding determination. Such determinations still require a County Court order to enforce. At this stage a member can also turn to the Debt Recovery Team.

f. **Await court enforcement**. In the event of an unsatisfactory outcome with the Pension Ombudsman, members can choose not to pay until the MOD obtains a County Court enforcement order. Individuals will make their own judgements about if and how the MOD might trade off the costs and negative publicity of taking veterans to court with maintaining the principle of recovering public money. But If the MOD were to pursue an enforcement order, costs to the member could rise considerably.

3. **The law and policy**

a. **Definitions**. 'Regularisation' is when a pension in payment is dropped from its overpaid level to its correct level. 'Repayment' is where the scheme administrator asks for the return of the overpaid amount and the member agrees. 'Recoupment' is the act of getting back money that was previously paid to the member without the member's agreement.

b. **Recoupment and Repayment**. The 1995 Pensions Act prohibits recoupment at section 96 (1). The MOD is unable or unwilling to refer to a specific legal power to recoup AFPS overpayments. It appears to rely on members' inclination to conform and their innate trust in the system. The MOD is keen for members to engage with the IDRP process and the Pension Ombudsman and to ultimately agree to repayment. But the Pension Ombudsman is not competent to issue an enforcement order. It is Counsel's view that the MOD would have to take each case to a County Court, which would take time and effort.

4. **Recovery policy.** The Treasury guide at https://www.gov.uk/government/publications/managing-public-money deals with recovering overpaid public money at page 178. The MOD and its contractors are obliged to follow this. The key points to take from it are that:

a. If you can, you must assert that you acted in good faith and dispute the claim.

b. You should not agree, however reluctantly, that you are liable to repay a debt until you have secured the best deal you can.

c. You must assert and evidence in as much detail as possible a relevant legal defence, such as change of position or estoppel.

d. Where it is cost effective to recover the debt through legal action, policy says the MOD and its contractors should consider doing so.

5. **Legal claims. T**he MoD has two types of claim: a claim at law for repayment and a claim for recoupment by deduction from pension due.

a. **Repayment.** Where the MoD has overpaid pension by mistake, it can recover it from the member of the scheme by repayment unless the member can establish a valid defence.

b. **Recoupment.** Recoupment is prohibited by section 91 (1) of the Pensions Act 1995 where a claim is disputed. Generally, members should not agree to recoupment unless they know they have no defence.

6. **Legal defences**. The main defences which may be available are change or alteration of position, estoppel and limitation. They are correctly dealt with in Pensions Ombudsman's Factsheet and should be deployed in the IDRP.

7. **Change of position**. The defence of change of position can be raised against the whole or part of the claim. It requires the member to show that:

- They did not know they were being paid too much and acted in good faith;
- Acting in reliance on the overpayment they have changed their position to their detriment;
- The detriment is irreversible; and
- It would be unfair to make them repay the overpaid amount or part of it.

a. **Cause**. The change of position may result from the irretrievable expenditure of the overpayment e.g. on holidays which would not otherwise have been taken, or from financial decisions made in reliance on a belief that future income would be larger than it actually would be e.g. early retirement or entering into commitments unaffordable on the member's true income.

b. **Beginning.** it is useful to start with a general description of the member's position, age, family, where they live, whether owned or rented, employments during the overpayment period, and possibly an account of what was going on in their life during the overpayment period.

c. **Burden of proof.** It is for the MoD to prove the overpayment. If the member is in any doubt about this, they can raise the doubt and ask the case officer to require proper evidence. It is for the member to prove the facts relating to their defence, such as the change of position.

d. **Standard of proof**. The standard of proof is the balance of probabilities, which means more likely than not. This does not give the person deciding the case a discretion. They must consider whether the fact in issue has been proved to be more likely to have existed than not. Members may wish to deploy a variation on the implications of the standard of proof, such as: 'The deciding officer is invited to consider whether they have grounds to believe: that I did not act in good faith; that the spent or otherwise relied on money can realistically be recovered; and that my spending would have been the same had I not been overpaid.'

e. **Belief and assertion**. In all change of position cases, the member must explain that they believed the pension was correctly calculated and paid. This may entail no more than asserting that they received advices of the amounts to be paid, and that it did not occur to them that Equiniti had got it wrong. In other cases there may be a more elaborate explanation, e.g. that they expected a large increase, or that they queried the amount but received reassurance that it was correct.

f. **Detailed evidence**. Next the member must explain in as much granular detail as possible what expenditure was incurred because of the overpayments which would not otherwise have been spent, giving amounts with supporting documents where possible. The more convincing the detail, the more likely the defence will succeed.

g. **Absence of evidence**. In some cases, especially where the overpayments have continued over many years, it may not be possible to give full details. For example, the member may only be able to say that they were accustomed to living within their means and that if they had received x% less they would have spent that much less, and perhaps indicate the areas in which less would have been spent such as meals out, pub evenings or holidays. This difficulty is recognised in court decisions.

"... one has to postulate a situation in which the defendant was perfectly entitled to conduct his business affairs on the assumption that the relevant representations (as to what was due to him) were true...Meanwhile (the) defendant may... have either altered his general mode of living or undertaken commitments or incurred expenditure or entered into other transactions which it may be very difficult for him subsequently to recall and identify retrospectively in complete detail; he may even have done so while leaving the particular moneys paid to him by the plaintiffs untouched. If the pecuniary amount of his prejudice has to be precisely quantified, he may be faced with obvious difficulties of proof ..."[2]

In such cases, the member should provide as much detail as possible, explain why they cannot give more, and possibly include the dicta[3] above.

h. **Capital**. The member should then either state that their capital assets have not increased as a result of the overpayments or deal with any that have, e.g. investments, higher bank balances, cars. This may be quite intricate, especially where capital assets have been acquired from another source such as the sale of a property, which may need explanation.

i. **Income and retirement**. Expenditure is not the only kind of change of position. Retirement from paid employment when, if the member had known of the lower income and/or the MoD's claim for repayment they would not have retired is common. Another is where too much tax has been paid and it cannot be recovered.

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[2] Avon CC v Howlett [1983] 1 WLR 605 at 62–2 per Slade LJ. See also Philip Collins Ltd. v. Davis [2000] 3 All ER 808 at 827; Derby v. Scottish Equitable Plc [2001] 163

[3] Dicta are comments, observations, or opinions made by a judge that are not essential to the decision of the case. Although dicta are not usually binding, they can be a persuasive authority, particularly when they come from senior courts.

j. **Unfairness**. Finally, the member should give the reasons why it would be unfair to make them repay. This is often a rehash of the earlier points, but emotional issues can be referred to.

8. **Estoppel**. Estoppel is a defence where:

- The pension administrator did something to make the member believe the correct amount was being paid. E.g. an advice setting out the amount of next year's pension;
- the member has made irreversible decisions believing the amount was correct;
- the member would suffer detriment if made to repay; and
- it would be unfair to require them to do so

In practice this defence is the same as change of position, except that it requires proof of the administrator's action; usually some form of incorrect written statement of the amount due, amounting to a representation that the money to be paid belongs to the member.

9. **Limitation**. This is not adequately dealt with in the Pensions Ombudsman's Factsheet.

a. **Rule**. The basic rule is that claims more than 6 years old, starting from the date of the overpayment, are time-barred. The legal position is not settled, but time probably continues to run until the MoD answers a claim before the Pensions Ombudsman.[4]

b. **Extension**. However, the time is extended to 6 years after the MoD discovered the mistake, provided it can show that it could not with reasonable diligence have discovered it earlier. It is difficult to know whether the MoD will be able to show this, but it may defeat attempts to rely on limitation.

10. **Laches**. Laches - delay in informing the member of the overpayment when discovered - can deprive the paying party of this remedy. But it is not a defence to a claim for repayment[5].

[4] See Webber v. Dept. of Education [2017] Pensions LR 1.
[5] See Fisher v. Brooker [2019] 1 WLR 1764 at [79].