

# A new approach to the defences to recoupment of overpayments

➤ **Matthew Swynnerton and Megan Sumpster consider a recent Pensions Ombudsman (PO) determination concerning the recoupment of overpaid pension benefits from future pension payments**

**T**he overpayment that is the subject of the determination arose as a result of the *Burgess v Bic* decision in 2019. The key issue was whether increases in respect of pensionable service before April 1997 had been validly granted under scheme rules. The High Court held in 2018 that the pre-1997 increases were validly granted but that decision was reversed at the Court of Appeal in 2019 (*Burgess CA*).

## Facts

Mr E retired in 1995 and his pension came into payment. In 2013, the trustees wrote to scheme pensioners advising them there was some uncertainty over the validity of the pension increases and that future payments of pre-1997 increases would be suspended (2013 announcement). The suspension remained in force until the *Burgess CA* decision, which concluded that increases had been improperly paid. However, between 2013 and 2019, overpayments continued to build up relating to past increases (as the pension being paid continued to include pension that resulted from increases applied prior to the suspension). In March 2020, the trustees notified Mr E that they would be reducing the amount of his pension to the correct level from July 2020 and recouping the overpaid pension of £90,934 (2020 announcement).

## PO's decision

The usual starting point is that it is the trustees' duty to seek to recover the overpayments. However, it may be

inequitable for trustees to do so if there is a defence available. The PO accepted that change of position and estoppel are not usually available as standalone defences to a claim to recover overpayments through equitable recoupment. However, here the PO adopted a novel approach, noting that change of position and estoppel are based on principles of equity and he would take them into account when considering whether it would be equitable to permit recoupment.

## Change of position as a defence to equitable recoupment

There are three key tests to demonstrate a change of position defence: (i) good faith; (ii) detriment (the overpayment must have been spent and the expenditure cannot be reversed); and (iii) causation.

The PO was of the view that Mr E met these tests and, therefore, it would be inequitable to recoup the majority of the overpayments. The PO came to this conclusion even after the 2013 announcement and the suspension of future payments of pre-1997 increases, the reason being that the 2013 announcement did not make it clear that there may have been overpayments and that they may be continuing to accrue. Once the 2020 announcement was made, which was clear on these issues, a change of position defence could no longer apply.

## Estoppel by representation as a defence to equitable recoupment

For an estoppel by representation defence to be met, there must be: (i) a clear representation made by the

defendant upon which it is foreseeable that the complainant will act; (ii) an act by the complainant taken in reliance on the representation; and (iii) detriment if the defendant is not held to the representation. The PO was satisfied that Mr E met these tests. However, he made a distinction, post-2013 announcement, between estoppel by representation and change of defence. In his analysis of change of position, the PO was satisfied that the defence would apply post 2013 announcement based on the poor drafting of the 2013 announcement. However, the test for estoppel by representation requires a clear representation regarding the pension to which Mr E was entitled. Once the 2013 announcement had been made, which explained that there was uncertainty over the validity of the pre-1997 increases, it could not be said that this representation remained clear. Therefore, the PO held that the defence of estoppel by representation was available only up to the date of the 2013 announcement.

## Laches

The PO noted that the trustees had failed to act promptly after identifying the potential overpayments. Consequently, the right of recoupment would be barred by the equitable defence of laches for the period of the delay.

## Conclusion

The PO concluded that it would be inequitable to allow recoupment in respect of the period up to the 2020 announcement. From that point on, the trustees would be able to recoup overpayments. The PO ordered that the trustees may recoup just £6,554 of the total overpayments of £90,934.



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