

Ombudsman's Determination

Applicant	Mrs S
Scheme	Teachers' Pension Scheme (TPS)
Respondent	Teachers' Pensions

Complaint Summary

1. Mrs S has complained that Teachers' Pensions is seeking to recover £47,727.84 (net) which it says has been overpaid to her.

Summary of the Ombudsman's Determination and reasons

2. The complaint is only partially upheld because Mrs S has not established that she has a legal defence against the recovery of the overpayment. Teachers' Pensions has discretion whether to seek recovery of the overpayment under the principles of unjust enrichment and/or Regulation 114 of The Teachers' Pensions Regulations 2010. Teachers' Pensions cannot fetter its discretion as to whether to seek recovery. Teachers' Pensions shall consider afresh whether to seek recovery of the overpayment. If it reaches the same conclusion as before, it shall consider what is an appropriate period of recovery having regard, among other things, to any evidence provided by Mrs S on the hardship this will cause her.

Detailed Determination

Material facts

3. Mrs S' late husband, Mr S, was a member of the TPS. He died in 1995. Mrs S was awarded a widow's pension at the annual rate of £13,221.05 for the first three months and £3,939.00 thereafter. Mrs S remarried in 2004.
4. The regulations in force at the time of Mr S' death were The Teachers' Superannuation (Consolidation) Regulations 1988 (SI1988/1652) (as amended). Regulation E28(3) provided:

"Unless the Secretary of State determines otherwise in the particular case, and subject always to regulation E1(3)(c) and (d) (guaranteed minimum pensions for surviving spouse), an adult [surviving spouse's] pension is not

payable during or after any marriage or period of cohabitation outside marriage.”

5. These regulations were revoked by The Teachers’ Pensions Regulations 1997 (SI1997/3001) (**the 1997 Regulations**), which were themselves revoked by The Teachers’ Pensions Regulations 2010 (SI2010/990) (as amended) (**the 2010 Regulations**). Part 2, Schedule 13 to the 2010 Regulations provides:

“Anything done or having effect as if done under or for the purposes of a provision of the revoked instruments has effect, if it could have been done under or for the purposes of the corresponding provision of these Regulations, as if done under or for the purposes of that corresponding provision.”

6. Regulation 94 of the 2010 Regulations provides:

“(1) This regulation applies on the death of a person (D) if –

- (a) D was in pensionable employment after 31st March 1972, and
- (b) D had adult pension qualification service of –
 - (i) at least 2 years, where D was in pensionable employment at any time after 5th April 1988, or
 - (ii) at least 5 years, where D was not in pensionable employment after 5th April 1988.

(2) ...

(3) An adult pension is payable to D’s surviving adult from the day after the date of D’s death.

(4) Except as otherwise provided in these Regulations, the pension is payable for life.

(5) D falls within this paragraph if –

- (a) D was not in pensionable employment after 31st December 2006, or
- (b) D did not pay contributions under regulation C9 of TPR 1997 or regulation 19 (election to pay contributions by a person serving in a reserve force) in respect of a period after that date.

(6) If D falls within paragraph (5), the pension ceases to be payable if D’s surviving adult marries, forms a civil partnership, or lives with another person as if they were husband and wife or civil partners.

(7) Paragraph (6) does not apply –

- (a) if the Secretary of State determines that paragraph (6) does not apply in the circumstances of the particular case –
 - (i) to prevent cessation of a pension, or
 - (ii) to reinstate a previously ceased pension;
- (b) to so much of any pension as is payable in respect of section 9(2B) rights to a widow or widower whose entitlement arose from a death occurring before 5th December 2005 and who forms a civil partnership or lives with another person as if they were civil partners;
- (c) ...”

7. In 2014, Teachers’ Pensions began an exercise to check on the current circumstances of individuals in receipt of adult beneficiaries’ benefits, such as a widow’s pension. It issued declarations to be completed and returned by the beneficiary. Teachers’ Pensions sent a declaration to Mrs S in May 2016. Mrs S completed and returned the declaration informing Teachers’ Pensions that she had remarried in 2004.
8. On 23 August 2016, Teachers’ Pensions wrote to Mrs S informing her that there had been an overpayment of her widow’s pension because it should have ceased when she remarried. It said it was obliged to recover any money incorrectly paid out of public funds and asked Mrs S to arrange repayment of the overpaid amount as soon as possible. Mrs S was given the options of a card payment, BACS transfer or a cheque. Teachers’ Pensions said Mrs S should contact its finance team if she would find it difficult to repay the overpayment or would like to discuss it. It apologised for sending Mrs S disappointing news.
9. On 11 November 2016, Teachers’ Pensions responded to a letter from Mrs S. It apologised for not having provided her with information about appealing the cessation of her pension. Teachers’ Pensions said the TPS was a statutory scheme and paid benefits as provided for under its regulations. It referred Mrs S to “The Teachers’ Superannuation Regulations 1988”, which it said could be viewed on www.legislation.gov.uk. Teachers’ Pensions quoted “Regulation 70¹”. It said:-
 - 9.1. Entitlement to a pension was determined according to the regulations as they were at the time the pension came into payment. At the time Mrs S’ pension came into payment, entitlement ceased on remarriage.
 - 9.2. With the introduction of the “2007 regulations”, it was determined that spouse’s pensions should in future be payable for life. However, the cost of this was reflected in changes to contributions and benefits and applied only to the surviving partners of members who had pensionable service on or after 1

¹ Regulation 70 appears to have been taken from The Teachers’ Superannuation Regulations 1976 (SI1976/1987)

January 2007; that is, those who had contributed to the cost of funding this improvement.

- 9.3. It did not issue letters on an individual basis to widows or widowers to advise them that their pension would stop on remarriage. The onus was on the individual to inform it of any change in their personal circumstances. Mrs S would have received newsletters sent to all pensioners in which they were requested to notify it of any change in circumstances. A change in marital status would come into this category. The information was provided with Mrs S' P60s.
 - 9.4. The exercise it had recently undertaken was implemented to recover any spouses' pensions overpaid due to remarriage or cohabitation. It was the first time it had carried out such an exercise and it had helped to identify a number of changes to which individuals may have forgotten to notify it. It had helped Teachers' Pensions to correct its records and prevent the accrual of large debts. The requirement to complete a declaration brought the TPS in line with a number of other public service pension schemes which used this process. The declarations had not been issued in bulk, so not every spouse received one in 2015.
 - 9.5. Mrs S' declaration had been received on 28 July 2016 and it was at this point that her pension was stopped. It appreciated that this would have come as a shock, but it was required to act in accordance with the TPS regulations.
 - 9.6. It recovered overpayments in line with guidance issued by HM Treasury, "**Managing Public Money**". Where an overpayment was discovered, recovery had to be pursued regardless of the circumstances in which it arose.
 - 9.7. Its policy was to take the person's personal circumstances fully into consideration and to give due regard to the avoidance of hardship. If Mrs S wished to discuss a repayment plan, she should contact its finance team.
 - 9.8. If she wished, Mrs S could raise a formal complaint with the Department for Education (**DfE**).
10. Mrs S submitted an appeal to the DfE on 19 December 2016. In its response, the DfE said:-
- 10.1. Its responsibility was to ensure that the TPS regulations had been applied correctly and that Teachers' Pensions had followed an appropriate process to apply the regulations. It was satisfied that Teachers' Pensions had applied the TPS regulations correctly.
 - 10.2. Mrs S would have completed a form **TFB50**² in order to claim her pension. This contained information about the benefits payable to teachers'

² Teachers' Pensions has confirmed that it does not have a copy of the form which Mrs S completed to claim her spouse's pension. It has provided a generic copy.

beneficiaries and when benefits were no longer payable. It enclosed a copy of the form.

- 10.3. Subsequent newsletters contained a reminder to inform Teachers' Pensions of a change in circumstances.
 - 10.4. As Mrs S had remarried in 2004, she should have informed Teachers' Pensions of the change in her circumstances.
 - 10.5. Now that the change in Mrs S' circumstances had been identified, Teachers' Pensions was obliged to recover the overpayment in line with Managing Public Money.
 - 10.6. It was clear that Mrs S was very worried about the financial implications of her change in circumstances. If full repayment of the debt would be difficult, she might want to explore alternative repayment plans with Teachers' Pensions. It would, however, need to seek proof of financial hardship and would require Mrs S' co-operation in assessing her means.
11. Mrs S applied to the Pensions Ombudsman in October 2018. The Pensions Ombudsman's Office (**TPO**) received Teachers' Pensions' response to Mrs S' complaint on 27 February 2019.

Summary of Mrs S' position

12. Mrs S submits:-
- 12.1. Teachers' Pensions' May 2016 letter was the first personalised letter which she had received since 1995. She responded to this letter promptly and honestly. She had also kept Teachers' Pensions informed about changes of address. She made no secret of her remarriage and informed all those she considered needed to be informed, such as HMRC, her banks, insurance companies, her employer and others.
 - 12.2. Any application forms she may have completed in 1995 would have been done during a period of great stress and she has no recollection of what she may have signed or read. She was not provided with a copy of the form. The letter informing her about her widow's pension did not mention the obligation to notify Teachers' Pensions of any change in her circumstances.
 - 12.3. She receives numerous newsletters which she does not read; instead, she discards them immediately. She does not recall ever reading a newsletter from Teachers' Pensions nor has she retained any. A sensible organisation would not put important information in a newsletter which may not be read. Other organisations require pensioners to provide annual, witnessed declarations. The fact that Teachers' Pensions needed to carry out the reconciliation exercise shows that the use of newsletters had not worked.

- 12.4. The copy newsletters provided by Teachers' Pensions are titled "Teacher Pensioner News", "Newsletter" or "Your annual update" and indicated that they were for information only. This is a far cry from her receiving an instruction to update Teachers' Pensions about her remarriage. The information was printed on the back and there was no incentive to do anything other than give a cursory glance at the headlines.
- 12.5. She had no reason to visit Teachers' Pensions' website.
- 12.6. Teachers' Pensions has not provided her with a breakdown of its calculation of the overpayment. For example, she will have paid income tax on all of her pension payments. A gross sum of nearly £48,000 would translate into a net sum of around £38,000. Her net monthly pension was a lot less than £300³.
- 12.7. She cannot prove that she was unaware of the implications of her change in circumstances. However, Teachers' Pensions cannot prove that she was and it should be required to do so. It has acknowledged in its letters that she probably was not aware of the need to inform it of her change in circumstances.
- 12.8. Teachers' Pensions has ignored her arguments that she acted in good faith; despite this being a factor mentioned in Managing Public Money.
- 12.9. The loss of her widow's pension represents a considerable loss of income at a time in her life when income and expenditure have to be balanced carefully.
- 12.10. Teachers' Pensions' letters have been unnecessarily blunt and insensitive. The demands for repayment have caused her a great deal of stress, which has been made worse by her sense of injustice. This stress could have been reduced if Teachers' Pensions had made it clear from the outset that the overpayment could be repaid over a period.
13. With regard to how the overpayment was spent, Mrs S has explained that, following her husband's death, she was solely responsible for household expenditure and her pension was subsumed into this. She has explained that she cannot say if the pension was spent on anything specific and the amount was not so great as to prompt undue or excessive expenditure. Mrs S says it afforded her a slightly easier life.
14. Mrs S has explained that, following her remarriage, she remained the major breadwinner because her husband relied upon contract work. Their joint income at the time of their marriage in 2004 was around £42,000. They both retired at the end of 2007 and their joint income was then around £25,000. She receives an occupational pension but her husband does not.
15. On request, Mrs S provided copies of statements for two bank accounts covering the period roughly three months prior to being notified of the overpayment and three

³ In 2016, Mrs S' TPS pension was £389.09 per month.

months after to give an indication of her income and expenditure pattern. These show that, on average, Mrs S' expenditure matched her income.

Summary of Teachers' Pensions' position

16. Teachers' Pensions submits:-

- 16.1. At the time of Mrs S' death, it was in the process of assuming responsibility for administration of TPS pensions. It set up a separate administrative arrangement for widow's pensions and copies of documents sent or received were not held on the main TPS record. It does not have copies of the documents issued to or received from Mrs S at the time of Mr S' death.
- 16.2. There would have been a TFB50 form, which had to be completed in order to apply for payment of a widow's pension. Since Mrs S' pension was put into payment, she must have returned a TFB50. The notes to this form included a section "Conditions of payment" which explained that the pension was payable for life unless the claimant remarried or lived with another person as husband and wife.
- 16.3. This information was not included in the initial notification letter because it was thought that this would be distressing for a recently bereaved individual.
- 16.4. Since 2004, all pensioners receive a P60 and a newsletter. The newsletters have contained a section entitled "Changes we need to know about", which included the need to notify it about remarriage. Therefore, Mrs S received instructions each year from 2004 onwards to notify it if she remarried. The importance of the warning should have been clear to anyone reading the newsletters, but it has no record of Mrs S contacting it about her remarriage. Mrs S has said that she did not read the newsletters, but each one stated: "Please ensure that this important information is kept in a safe place and is read with your P60 ...".
- 16.5. In addition, it provides information on its website about the conditions for payment of a widow's pension.
- 16.6. It was reliant upon adult beneficiaries notifying it about changes in their circumstances. However, it became apparent that this was not happening and, therefore, it undertook an exercise to check the circumstances of adult beneficiaries in order to prevent the accrual of debt where the beneficiary may have forgotten to contact it.
- 16.7. It appreciates that Mrs S may not have taken in the information provided at the time of her husband's death, but the fact remains that the information was provided in the expectation that she would act upon it if her situation changed at a later date. Mrs S was informed that she should keep the TFB50 notes for future reference. She should have referred to the TFB50 notes when her circumstances changed.

- 16.8. It considers it unusual that Mrs S thought HMRC and her bank needed to be informed of her remarriage, but not the pension scheme paying her widow's pension. At the very least, it would have expected her to consult its website or information provided previously, which she had been instructed to keep, to check whether remarriage might affect her widow's pension. Mrs S was aware that she needed to notify it of a change of address, which she did on more than one occasion, and also confirmed that her bank details had not changed. It seems odd that she did not think to inform it of her change in marital status.
- 16.9. Previous Pensions Ombudsman's Determinations have accepted that the processes it had in place prior to 2014 were sufficient to provide information about the effect of remarriage on a spouse's pension. It, therefore, argues that Mrs S could have identified that she was in receipt of an overpayment and a change of position or estoppel defence cannot be considered.
- 16.10. It has previously been determined that issuing newsletters was a proportionate and reasonable approach. The Pensions Ombudsman has said that there were sufficient warnings in the newsletters to alert people to the effect of remarriage on a spouse's pension.
- 16.11. The newsletters for the first eight years of issue clearly said, at the top, that they contained important information, should be kept in a safe place and should be read with the P60 and Pay Advice. Mrs S did have the information to, at the very least, keep the various documents regarding her widow's pension and inform it of her remarriage. It is difficult to see how not reading this literature can be said to have been acting in good faith. This view has previously been expressed in Pensions Ombudsman Determinations.
- 16.12. It has previously been determined that a change of position defence does not arise when the person has used the money on general living expenses. Even if Mrs S had continued to accept her widow's pension in good faith, her outgoings have always been broadly similar to her income and a change of position defence is not made out.
- 16.13. It did not receive any notification of Mrs S' remarriage in 2004 or at any time prior to July 2016. For the purposes of the Limitation Act 1980, it could not, with reasonable diligence, have discovered the overpayments before 2016. It, therefore, had until 2022 to request the return of the overpayment for the full amount to be within the limitation period. It has made its claim within the limitation period and the full amount is recoverable.
- 16.14. It considers that it is legally required to pursue recovery of all of the overpayment. However, it would not want Mrs S to suffer excessive financial hardship and she has been urged to contact it to discuss repayment.
17. Teachers' Pensions has referred to a number of previous decisions which it considers support its position.

18. I issued a Preliminary Decision on 10 November 2022. Mrs S made further representations in response to that Decision.

Mrs S' representations

19. Mrs S submits:-

- 19.1. It has been accepted by the Pensions Ombudsman that, had she been asked to complete a declaration in 2004, she would have done this with the same honesty as she did in 2016. Had Teachers' Pensions sent her such a declaration in 2014, when it started its review process, then two years of stress could have been avoided and the overpayment would have been less.
- 19.2. As she has said previously, she did dispose of all of the newsletters without reading them. However, the Pensions Ombudsman concluded that this was not the case, thus considering her to have been dishonest.
- 19.3. The Pensions Ombudsman has accepted that most cases are a finely balanced judgment call. In court proceedings, the defendant is deemed to be innocent unless proven to be culpable, and the same approach should apply to this case.
- 19.4. As well as satisfying the good faith test for a change of position defence, she also satisfies the other elements for this defence.
- 19.5. Quoting from the Managing Public Money guidelines, she considers that the Pensions Ombudsman's Preliminary Decision may be an interpretation of the law but is not justice:

"Above all, nothing in this document should discourage the application of sheer common sense."

Conclusions

20. Mrs S' complaint concerns Teachers' Pensions' actions to recover an overpayment of pension which has arisen because her widow's pension should have ceased when she remarried.
21. At the time Mrs S began to receive her TPS pension, Regulation E28(3) (see paragraph 2 above) provided that a widow's pension was not payable during or after any remarriage; unless the Secretary of State determined otherwise in the particular case. This provision is now found in Regulation 94 of the 2010 Regulations (see paragraph 4 above). As it stands, Mrs S has been paid more widow's pension than she was strictly entitled to under the TPS Regulations. She will be required to repay the overpayment unless she is able to rely on one of the legal defences against recovery.

Change of position

22. The most common defence against recovery of an overpayment is referred to as “change of position”; that is, the recipient has changed their position such that it would be unjust or inequitable to require them to repay the overpayment, either in whole or in part. To make out a change of position defence certain conditions must be satisfied. Briefly, the recipient must be able to show, on the balance of probabilities, that:-
 - 22.1. Their circumstances have changed detrimentally and irreversibly;
 - 22.2. The change of circumstances was caused by receipt of the overpayment; and
 - 22.3. They are not disqualified from relying on the defence.
23. With regard to the last point, a change of position defence is not open to someone who acts in bad faith when changing their position. I wish to make it clear, however, that bad faith is not synonymous with dishonesty. It can simply mean that, if the recipient knew or had grounds for believing that the payment had been made in error, but could not be sure, the defence would not be open to them. This includes cases where someone might suspect that there was something amiss and could have taken simple steps to ascertain the correct position but did not do so. In other words, the recipient of a payment made in error cannot turn a blind eye to any doubts they might have. This is commonly referred to as having “Nelsonian Knowledge”.
24. Bad faith does not, however, include acting negligently, so a careless recipient might still be able to invoke a change of position defence. If Mrs S was merely careless or negligent but did not have actual knowledge of the possibility of there being an overpayment, which she failed to query, she would still be acting in good faith. In making a judgment as to Mrs S’ knowledge of the circumstances in which her pension should cease, it is not a question of deciding what she should have known; rather, it is a question of what she did know.
25. The burden of proof is on Mrs S to show that she acted in good faith in continuing to accept her widow’s pension after her remarriage. It is for her to show, on the balance of probabilities, that she was unaware that her pension should have ceased or that she was unaware that she needed to check the position with Teachers’ Pensions. I recognise that only Mrs S can know what her knowledge of the conditions for payment of her pension was at the relevant time. Mrs S is, however, providing evidence of what she read (or did not read) many years ago and her memory of events that long ago may not be reliable. I also do have evidence that she was sent newsletters for the period from 2004 to 2016 on multiple occasions after she remarried. I have to come to a decision, on the balance of probabilities, based on the available relevant evidence, including the representations Mrs S made in response to my Preliminary Decision. It is, in essence, a judgment call and, in most of the cases I see, it is a finely balanced judgment.

26. Mrs S has referred to a defendant being deemed to be innocent unless proven to be culpable. She says that the same approach should be applied to her case. However, the burden of proof test applies to criminal cases. I am required to apply the balance of probabilities test, which is relevant to civil cases.
27. In Mrs S' case, the information about the conditions for payment of a widow's pension was included in the notes to the TFB50 form and in annual newsletters issued after 2004. I note Mrs S' point that Teachers' Pensions has been unable to produce a copy of a TFB50 completed by her. However, the process for claiming a widow's pension at the time required a claimant to complete a TFB50 before payment would be made. It is safe, therefore, to assume that Mrs S did complete a TFB50 at the time. That being said, I accept that individuals might not read all of the information they are sent at what is usually a very stressful time. I consider that she may not have remembered what was in the notes to the TFB50 form she read in 1995 when she remarried in 2004.
28. With regard to the annual newsletters, the picture is less certain. In the 2004 newsletter; that is, the one issued around the time of Mrs S' marriage, the request to notify Teachers' Pensions was the second item on the front page just below the notification about the pensions increase for that year. However, in subsequent years the request for notification was located on the back page.
29. Mrs S' position is that not once in the 12 years from 2004 to 2016, did she read any of the newsletters sent to her each year with her P60. If that is the case, then, despite the fact that it might be said to be somewhat careless of her to have failed to read these documents, she would satisfy the good faith condition for a change of position defence.
30. I acknowledge that, when asked to complete the 2016 declaration, Mrs S promptly and fully disclosed her remarriage. I am sure that, had she been asked to complete a declaration in 2004, she would have done so with the same measure of honesty. However, on the balance of probabilities, I find that Mrs S did read one or more of the annual newsletters sent to her between 2004 and 2016, referring to the fact that she did need to notify Teachers' Pension of remarriage. I do not find it credible that she disposed of all of these newsletters relating to her pension without reading any of them. I also acknowledge that the newsletters did not go into the detail of the consequences of remarriage, but they made it clear that this was something on which Mrs S should notify Teachers' Pensions. If, as I find, on the balance of probabilities, she did read one or more of the newsletters sent to her between 2004 and 2016, this would have put her on notice that her widow's pension might be affected by her remarriage and that she should have taken steps to clarify the position with Teachers' Pensions. The fact that she did not do so means that a change of position defence is not now available to her.
31. There are other defences to the recovery of an overpayment; for example, estoppel and contract.

Estoppel

32. Estoppel is a legal principle which provides that, if a party causes another party, either by statement or action, to believe that a particular set of facts or circumstances is true, they should not be allowed to draw back from the statement or action if it would be unjust or unconscionable for them to do so. The requirements for an estoppel defence are similar to those for a change of position, including the need to have acted in good faith. In addition, a claimant must be able to demonstrate that they relied to their detriment either:

- (i) on a clear and unequivocal statement (representation); or
- (ii) on a mutual assumption of facts or the law (convention).

And that it was reasonable for them to have done so.

33. In the case of *Steria v Hutchinson* [2006] 64 PBLR, Neuberger LJ said:

“When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it.”

34. With regard to estoppel by convention, in *Commissioner for Her Majesty’s Revenue and Customs v Bencdollar Limited and Others* [2009] EWHC 1310 (Ch), the judge said:

“... the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings ... are as follows:

- i) It is not enough that the common assumptions upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
- ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.
- iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

- iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
- v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”

35. Setting aside for the moment the question of good faith, in Mrs S’ case, I have not identified a clear and unequivocal statement on the part of Teachers’ Pensions to the effect that her widow’s pension would continue after she remarried. In fact, all of the statements issued by Teachers Pensions said the opposite. Nor do I see that there was any assumption to this effect expressly shared between Teachers’ Pensions and Mrs S. I do not find that Mrs S can rely on an estoppel defence to the recovery of the overpayment.

Contract

36. With regard to contract, I do not find that the necessary elements to form a contract exist in Mrs S’ case. These elements are: offer, acceptance, consideration and the intention to create legal relations. In particular, I find that the latter two elements are missing. Contract law is based upon the principle of reciprocity and consideration, in this context, is something of value, however small, given in exchange for the promise made under the contract. I do not see that Mrs S gave any consideration in the circumstances. Nor is there any evidence that Teachers’ Pensions intended to enter into legal relations with Mrs S beyond her strict entitlement under the TPS regulations. In any event, a contract based on mistake is unlikely to be enforceable.

Limitation

37. Teachers’ Pensions asserts that it was not and could not reasonably have been aware that Mrs S had remarried until it received her declaration in July 2016. It argues this because, under the Limitation Act 1980 (**the Limitation Act**), Teachers’ Pensions would normally have six years from the date of each erroneous payment in which to bring a claim for repayment. Section 32 of the Limitation Act provides for the limitation period to be postponed in cases of fraud, concealment or, as in Mrs S’ case, mistake. In such circumstances, the limitation period begins to run from the date on which the mistake was discovered or could, with reasonable diligence, have been discovered.
38. Teachers’ Pensions has argued that it has previously been determined that issuing newsletters was a proportionate and reasonable approach for it to take. The Courts have found that a claimant must show that they could not have discovered the situation without taking exceptional measures which they could not reasonably have been expected to take. The Courts have described the test thus:

“... how a person carrying on business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by reasonable but not excessive urgency”⁴

39. Teachers’ Pensions, as noted in paragraph 7 above, introduced procedures in 2014 so that, after that date, spouses of deceased members who are subject to the remarriage rule now have to sign a declaration each year that they have not remarried or cohabited and the notification explains that the pension will cease on remarriage. I understand that the reason Teachers’ Pensions reviewed its procedures in 2014, was that it had identified a number of other cases where remarriage or cohabitation was not identified. The new procedures will remove any evidential issue in future cases about whether the member was aware of this rule. I also understand that, following the change in procedure, Teachers’ Pensions wrote to members to whom this rule applied to check whether any had remarried or co-habited. This is the reason why Mrs S and a number of other cases were identified.
40. It might be argued that by relying only on the newsletters as a means of ensuring that Teachers’ Pensions was notified of remarriage or cohabitation it was not acting with reasonable diligence. Most pension schemes, for example, now ask pensioners to sign annual certificates of existence and asking a member to sign a marital status declaration is similar. On the other hand, it is common practice for occupational pension schemes to use newsletters to keep in touch with pensioners and to provide them with information about the scheme and their benefits. In the absence of evidence demonstrating that the system is not working (which Teachers’ Pensions must have had by 2014), it may be reasonable to rely on the newsletters and to proceed on the assumption that members will read them. I find that, in Mrs S’ case, in the period up to 2014 (plus a reasonable time to then contact members) Teachers’ Pensions was acting with reasonable diligence by relying on the newsletters. I see no reason to depart from my previous view on this issue.
41. In cases before me, limitation does not begin to run until Teachers’ Pensions could with reasonable diligence have discovered the overpayments (which I agree extends to 2016) and stops running when TPO receives a formal response rejecting the member’s complaint.⁵ TPO received Teachers’ Pensions’ formal response rejecting Mrs S’ complaint on 27 February 2019 which is well within the 6-year limitation period. I find that Teachers’ Pensions is not restricted by the Limitation Act in seeking to recover the overpayments of Mrs S’ widow’s pension.

⁴ *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400

⁵ *Webber v Department for Education* [2016] 2519 Ch.

Maladministration – Non-financial Injustice

42. In addition to considering whether Mrs S has any legal defence against the recovery of part or all of the overpayment, I have also considered whether she has sustained any injustice as a consequence of maladministration.
43. I accept that being notified of the overpayment will have come as an unpleasant shock for Mrs S. However, Teachers' Pensions was obliged to take steps to rectify the situation as soon as it became aware that Mrs S was no longer entitled to the pension. Notifying Mrs S of the overpayment does not, in and of itself, amount to maladministration. Having been notified of Mrs S' change of circumstances, Teachers' Pensions acted reasonably promptly to amend its records and notify her of the overpayment.
44. Teachers' Pensions has acknowledged that it failed to provide Mrs S with information about appealing the cessation of her pension. This does not, however, appear to have unduly hampered Mrs S in initiating an appeal; that is, she did not sustain injustice as a consequence of the failure to notify her of her appeal options.

Amount and Period of Recovery

45. Teachers' Pensions is able to recover the overpayments from Mrs S which I have found, as matter of law, to be due under principles of unjust enrichment (a private law right) and also under Regulation 114 of the 2010 Regulations, which gives it a discretion to recover overpayments. It is not correct, as has been stated by Teachers' Pensions in its submissions, that the Managing Public Money guidance requires an overpayment, once discovered, to be pursued regardless of the circumstances in which it arose. Annex 4.11 (Overpayments) of Managing Public Money 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.”
46. By acting in Mrs S' case as if it was absolutely required to recover the overpayment, Teachers' Pensions did not properly consider its discretion under Regulation 114 and so the decision was not properly taken. Teachers' Pensions, therefore, does need to formally reconsider whether the overpayment should be recovered.
47. Teachers' Pensions' discretion under Regulation 114 extends to both the amount to be recovered and the period of recovery. In reconsidering its discretion, it should have regard to my findings about the non-availability of the defence of change of position and estoppel, and the guidelines in Managing Public Money, including those on hardship. I recommend that Mrs S provides Teachers' Pension with details of her financial circumstances to assist with this decision.
48. If Teachers' Pensions decides to recover some or all of the overpayment, it will need to determine a reasonable period for the recovery. It would be best if both parties can

agree this. I would generally expect a reasonable period of recovery to be not less than the period over which the overpayment built up, but the financial circumstance of Mrs S may mean that a longer or shorter period is appropriate. If Mrs S considers that the proposed period will cause her undue hardship, I can, if necessary, determine whether the period proposed is reasonable once the matter has been through the TPS internal dispute resolution process. I would hope, however, that this will not be necessary, and agreement can be reached by the parties.

Directions

49. Within 28 days of the date of this Determination, Teachers' Pensions shall consider afresh whether to recover, in full or in part, the overpayment made to Mrs S. Teachers' Pensions shall have regard, among other things, to HM Treasury Managing Public Money Guidance (Annex 4.11), my findings of the non availability of the defences of change of position, estoppel and contract, and any evidence of hardship provided by Mrs S.
50. If Teachers' Pensions determines that the overpayment is to be recovered in full or in part, it shall also determine an appropriate period of recovery.

Anthony Arter CBE

Deputy Pensions Ombudsman
18 October 2023