

Ombudsman's Determination

Applicant	Mrs S
Scheme	Teachers' Pensions Scheme (the Scheme)
Respondent	Teachers' Pensions (TP)

Complaint Summary

1. Mrs S' complaint concerns an overpayment of pension benefits, amounting to £5,845.35 (net), which TP is seeking to recover using the repayment method.

Summary of the Ombudsman's Determination and reasons

2. The complaint is partially upheld against TP because:-
 - 2.1. Mrs S has a defence in law to the recovery of £3,755.67 of the overpayment.
 - 2.2. TP failed to follow up, in a timely manner, queries it had raised with Dorset Local Authority (**Dorset LA**) concerning discrepancies in Mrs S' pensionable service and salary history. The delays resulted in the overpayment accruing over a prolonged period.
 - 2.3. TP did not properly exercise its discretion concerning whether to seek recovery of the overpayment under the principles of unjust enrichment and/or Regulation 114 of The Teachers' Pensions Regulations 2010 (**the 2010 Regulations**).¹ TP cannot fetter its discretion as to whether to seek recovery. TP shall consider afresh whether to seek recovery of the overpayment. If it reaches the same conclusion on the matter, it shall recover the overpayment to which Mrs S does not have a defence in law against the recovery of, in accordance with the repayment schedule as set out in paragraph 79.3 of this Determination.
 - 2.4. TP's maladministration caused Mrs S to suffer serious distress and inconvenience for which she shall receive an award.

¹Relevant sections of the 2010 Regulations are set out in Appendix 1.

Detailed Determination

Material facts

3. The Scheme is a statutory scheme bound by the 2010 Regulations (as amended). TP administers the Scheme on behalf of the Department for Education (**DfE**).
4. Dorset LA, Mrs S' former employer, provided TP with service and salary information in respect of Mrs S for the purpose of the Secretary of State's functions under the 2010 Regulations.
5. On 25 May 2016, TP received Mrs S' application to claim her deferred benefits from 4 July 2016.
6. On 22 June 2016, TP emailed Dorset LA and provided details of the salary information it held for Mrs S. TP asked Dorset LA to confirm whether the information was correct, as Mrs S' full time equivalent annual salaries appeared to fluctuate.²
7. On 28 June 2016, TP wrote to Mrs S and advised:

“Please note we have identified possible missing service on your record for
DORSET 01/09/09 to 31/03/10

Despite several attempts, we have been unable to obtain the service from your relevant employer.

You may wish to contact the relevant employer directly and ask them to submit the service.

Please do not contact Teachers Pensions directly as any service must be provided by your relevant employer.

Any retirement benefits that become due for payment will be calculated without this service.”
8. Mrs S' retirement benefits were subsequently put into payment with effect from 4 July 2016.
9. On 26 July 2016, Dorset LA provided updated salary information to TP for the period requested. It asked TP to contact Dorset LA if it required further information.
10. On 9 August 2016, TP wrote to Dorset LA to query the revised salary information it had provided in respect of the periods 1 April 2010 to 31 October 2010 and 1 June 2011 to 31 March 2012. TP said:

“Both these periods are quite random updates and you now confirm that teacher did not work and worked a little part-time but originally she was full-

²In the email, TP provided details of the salary information it held for Mrs S in respect of the period 1 April 2009 and 31 March 2013.

time. This has decreased the service and an overpayment of benefits will be calculated. Please could you re-check the whole period 01.04.2009 to 31.03.2013 and confirm whether she was in full-time employment or part-time and if part-time, please supply details of the full-time salary and part-time salary paid [sic].”

11. On 12 May 2017, TP sent a further letter to Dorset LA. It explained that while running a pension increase exercise, it noted that Mrs S’ salary for particular periods³ seemed excessive in comparison to those submitted in respect of other periods. It asked Dorset LA to confirm the information and update the salary details as soon as possible.
12. On 8 February 2018, TP sent an email to Dorset LA. TP explained that on checking Mrs S’ service record, it had noticed some irregularities in her salary. It asked Dorset LA to confirm if her salary for the Scheme years between 1 April 2009 and 31 March 2013 were correct and to provide updated salaries, as appropriate.
13. On 14 March 2018, TP wrote to Mrs S and provided a revised statement of retirement benefits. TP included a breakdown of the original and amended service and salary details it had received from Dorset LA. It said, in summary:-
 - 13.1. Dorset LA had notified TP of changes to her service, which had affected the calculation of her retirement benefits. Her total pensionable service had reduced from seven years and 101 days to four years and 112 days. Her ‘best’ salary had also reduced from £29,792.76 per annum to £27,763.42 per annum.
 - 13.2. The changes had resulted in an overpayment of pension amounting to £2,111.93 (net) and an overpayment of lump sum amounting to £3,789.98.
 - 13.3. TP is obliged to recover all overpayments of public funds irrespective of the reason for the overpayment.
 - 13.4. If Mrs S had any queries concerning the calculation of the overpayment or her retirement benefits, she could contact TP.
14. On 8 May 2018, Dorset LA provided TP with revised salary details for Mrs S.
15. On 22 May 2018, Mrs S complained to TP. In summary, she said:-
 - 15.1. Her monthly pension was reduced with effect from 1 April 2018, without prior notification from TP. £130.98 was paid into her bank account instead of her usual monthly payment of £237.06.
 - 15.2. TP had failed to explain the basis of its revised calculation of her retirement benefits; in her opinion the calculations were incorrect.

³ These periods are detailed in Appendix 2.

- 15.3. She contacted TP on the telephone number TP had provided in its letter of 14 March 2018, on five separate occasions; her queries were not answered.
 - 15.4. TP had reassured her that she would receive written notification of the reduction in her pension but had failed to provide this.
 - 15.5. She had informed TP that Dorset LA had no record of any changes being made to her pensionable service.
 - 15.6. She wanted an apology for the lack of professionalism with which her case was handled and an award for the distress and illness this had caused her, which had resulted in a stomach ulcer.
16. Mrs S said that the situation had caused her distress and had adversely impacted her health. She asked TP to explain why her pension had to be reassessed almost two years after her date of retirement, given that there had been no change in her pensionable service. She also asked for her pension to be reviewed and requested a full breakdown of the calculations to enable her to discuss the figures with her accountant.
17. On 5 June 2018, TP replied to Mrs S' complaint. The response is summarised below:-
- 17.1. It apologised for the way Mrs S' case had been handled. It acknowledged that the standard of service Mrs S had received fell below the standards it aims to provide to members.
 - 17.2. At the time Mrs S' retirement benefits were originally calculated, the part-time service she completed between 1 April 2009 and 31 March 2013 had been recorded as full-time. The information was provided by Dorset LA and was incorrect. However, the error was not identified when her retirement application was processed.
 - 17.3. On 18 August 2016, Dorset LA amended Mrs S' service, in respect of the period concerned, to part-time. TP apologised that she had been led to believe that the changes had only been made recently and assured Mrs S this was not the case.
 - 17.4. Dorset LA provided the revised information after Mrs S' retirement benefits had been put into payment. It was regrettable that the revised information was not processed in a timely manner, resulting in the overpayment.
 - 17.5. Although it was reasonable for Mrs S to expect that the correct information would be provided to TP, she would have been aware of the fact that she was not employed full-time. Mrs S would also have been aware that she had not accrued seven years' pensionable service in the Scheme.
 - 17.6. TP was required to pay Mrs S the benefits to which she was entitled, in accordance with the Scheme Regulations. In recognition of the distress TP

had caused her, it was willing to offer her an ex-gratia payment of £100 (**the Offer**).

18. On 21 June 2018, TP informed Mrs S that subsequent to her being notified of her revised retirement award, Dorset LA had notified TP of further changes to her pensionable service, which had affected the calculation of her retirement benefits.⁴ TP said that the amount of the overpayment had reduced to £5,845.35, of which £3,755.67 was in respect of the lump sum. TP explained that Mrs S was owed arrears of pension amounting to £1.98 and offered to offset this against the overpayment.
19. On 1 July 2018, TP wrote to Mrs S requesting repayment of the overpayment (**the July 2018 Letter**).
20. On 15 July 2018, Mrs S complained to the DfE under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). The complaint is summarised below:-
 - 20.1. Mrs S said she was dissatisfied with the length of time TP had taken to respond to her complaint. She had asked for an apology for the way her case had been handled and for the fact that she had allegedly been overpaid, however she had not received an apology.
 - 20.2. She had requested a complete breakdown of how the figures had been calculated to enable her to review them against her wage slips with the assistance of her accountant. She needed information on how her part-time hours had been converted into full-time equivalent pensionable service. TP had failed to provide this.
 - 20.3. She had received a lump sum of £8,449.25 from the Scheme on her retirement; TP stated in its correspondence that she had received a lump sum of £8,470.37. So, the amount of the alleged overpayment was incorrect.
 - 20.4. The annual benefit statements she received from 2011 to 2016, stated that she was working part-time during the period 2009 to 2013. The only way TP could have obtained information concerning her employment was through Dorset LA. TP had not provided any evidence that it had corresponded with Dorset LA regarding her hours of work during that period.
 - 20.5. She had since contacted Dorset LA to query her employment record. She was informed that her employment had not been recorded as full-time; had she worked full-time her salary would have been much higher. Dorset LA said that TP had not questioned whether she had worked part-time.
 - 20.6. In TP's response to her complaint, it had implied that an error in the calculation of her benefits had occurred on one occasion only. However, the pension figures in the annual benefit statements she received between 2009 and 2015,

⁴ TP provided a breakdown of Mrs S' amended service and salary information.

were in line with the actual figures she received on her retirement, which TP was now claiming were overstated.

- 20.7. TP's response also stated that it had been aware of the discrepancy as early as August 2016. She questioned why TP had not taken any action in August 2016, to rectify the error in the calculation of her retirement benefits. She also queried why the pension was paid to her for a further 18 months if she was not entitled to it.
- 20.8. She had been given a reasonable expectation, through the annual benefit statements, that she would receive a certain level of lump sum and annual pension from the Scheme. Had she known the figures were inflated, she could have made further provisions for her retirement.
- 20.9. TP's response did not address her queries regarding the information displayed on her annual benefit statements. For example, her salary and reckonable service. It also did not mention anything about a reassessment of her benefits because of the discrepancy.
- 20.10. She does not accept the Offer.
- 20.11. She was unhappy that she had received the July 2019 Letter during the six-month period in which she had to make a formal complaint to the DfE.
- 20.12. She questioned whether she had in fact received an overpayment. Without full details of the overpayment, she was unable to ascertain whether this was the case.
- 20.13. She did not consider that she should have to repay the alleged overpayment. In any event she did not have the available funds to do so. The whole situation had made her extremely ill, resulting in her having to be treated by her doctor.
21. On 2 August 2018, TP wrote to Mrs S and advised that the DfE had considered her appeal under the IDRPs and had referred the matter to TP to conduct a further review and respond accordingly. TP's response is summarised below:-
 - 21.1. TP received Mrs S' complaint on 22 May 2018 and issued a response on 5 June 2018, which was within 10 working days from the date of receipt.
 - 21.2. The administration of the Scheme is a partnership between TP and employers participating in the Scheme. TP's records are compiled from information provided by the relevant employers and can only be amended following confirmation of any missing or incorrect details from the employer concerned.
 - 21.3. TP relies on employers to ensure that Scheme information is provided in a timely and accurate manner. This is provided through an annual return of service and salaries in respect of members in pensionable employment. It is usually received by TP in the summer following the end of the Scheme year.

- 21.4. If it is subsequently discovered that there has been an error or omission in the information provided in the annual return, the employer is able to submit amendments using the secure transfer utility (**STU**).
- 21.5. Regulation 43 of the 2010 Regulations, makes provision for the calculation of reckonable service where pensionable employment is part-time (**the Formula**).⁵
- 21.6. TP is unable to provide members with details of their final retirement benefits until details of their final service and salaries are received from their employer. However, to assist members in obtaining the most accurate calculation of their final retirement benefits, TP provides an estimate of retirement benefits (**EORB**) based on the latest service details received from their employer.
- 21.7. TP had examined all the service details submitted to TP by Dorset LA and noted that Mrs S had been employed in a full-time position from 1 September 1979 to 30 April 1980. Following a break in pensionable employment, Mrs S elected for her part-time employment with Dorset LA to be treated as pensionable from 1 November 2002. Dorset LA recorded her part-time employment using the Formula until 31 March 2009.
- 21.8. From 1 April 2009 to 31 March 2013, Dorset LA recorded Mrs S' pensionable service as concurrent service.
- 21.9. Where a teacher has more than one post with the same employer, the employer first calculates the concurrent service before providing service and salary data to TP. The spreadsheet historically used by employers in cases of concurrent employment, calculated the amount of service to be credited to the teacher in each post and then amalgamated their service. If the individual posts were paid at different salary rates, the spreadsheet also calculated the teacher's average full-time annual salary for each period of concurrent employment. However, only the results of the calculations were provided to TP in the annual return.
- 21.10. The employer is asked to submit the annual return showing the concurrent service with a part-time salary of "£1" and the number of days excluded for each full-time equivalent salary period. This "£1" part-time salary figure is an indicator of concurrent employment.
- 21.11. For the period in question, Dorset LA recorded Mrs S' service with a part-time salary of £1 but no days were excluded. This indicated that she had worked the equivalent full-time hours throughout her period of pensionable service in the Scheme. The information was accepted by TP, as it is possible for an individual to work in two or more part-time employments that equate to full-time service.

⁵ Details of the calculation provided by TP is set out in Appendix 3.

- 21.12. The service information TP received from Dorset LA was used to calculate the pension figures that were quoted in the EORBs Mrs S was sent prior to her retirement. So, the EORBs from 2011 were incorrect. The EORBs TP issued from 2012 to 2014, increased the reckonable service used in the calculation of the pension figures by one year each year. However, Mrs S' reckonable service should have increased in proportion to the part-time hours she had worked.
- 21.13. EORBs are estimates produced automatically, based on the service and salary information held on TP's records. They are not checked individually. TP is reliant on members to check their EORBs and to contact the relevant employer if they believe any of the information is incorrect.
- 21.14. On receipt of Mrs S' application for retirement benefits, her record was reviewed, and the unusual recording of her annual salary rates was noted at the time. As TP needed to confirm the details, it sent an email to Dorset LA.
- 21.15. Mrs S' initial award of retirement benefits was based on the service and salaries recorded by Dorset LA. TP had no reason to doubt that she had not worked concurrently in two or more positions that amounted to full-time employment.
- 21.16. On 26 July 2016, TP received a reply from Dorset LA that indicated that some of Mrs S' period of service was incorrect. TP sent a further email on 9 August 2016, and asked Dorset LA to check Mrs S' service and confirm details of the full-time equivalent salary and her part-time salary. Regrettably, Mrs S' award of retirement benefits had already been paid and a reminder to follow up the enquiry was overlooked by TP.
- 21.17. Dorset LA subsequently submitted various updates to Mrs S' service record using the STU. In 2017, the issue with Mrs S' service record was again identified by TP. So, TP sent Dorset LA a further email and requested confirmation of the correct position but did not follow this up.
- 21.18. On 8 February 2018, TP asked Dorset LA to provide the correct service details for Mrs S. Dorset LA provided the information to TP via the STU; it removed the £1 concurrent service indicator and included details of her part-time salary.
- 21.19. On 15 March 2018, Mrs S' retirement benefits award was revised to include the amended service and salary details. As her employment had been amended to a single part-time employment, with details of the days not worked in each period, it resulted in her overall pensionable service being reduced.
- 21.20. As Mrs S had also worked less than the full-time equivalent hours during each period the full-time equivalent salary rates were used in the calculation of her average salary, her average salary also decreased.

- 21.21. A letter was sent to Mrs S at the time her retirement award was recalculated requesting that she repay the money that had been overpaid from 4 July 2016 to 2 March 2018.
- 21.22. On 8 May 2018, Dorset LA sent TP a revised service update; this further reduced the amount of Mrs S' total pensionable service but slightly reduced the amount of the overpayment.
- 21.23. TP had explained that Mrs S was paid a lump sum of £8,449.25 on 4 July 2016. However, an additional payment of £21.12 was made on 30 June 2017, because an increase had been applied to her lump sum under the provisions of the Pensions Increases Act 1971.
- 21.24. Although Mrs S was in receipt of lower benefits than those stated on her EORBS, she was now in receipt of her correct benefit entitlement from the Scheme. TP cannot pay her benefits in excess of the benefits to which she is legally entitled.
- 21.25. The Offer was still open for Mrs S to accept.
22. On 18 January 2019, Mrs S complained to the DfE under stage two of the IDRP. Mrs S asked the DfE to waive the overpayment and explained that she had relied on statements made by TP, which indicated her pension had been calculated correctly. She had spent the money and could not afford to repay the overpayment.
23. On 30 January 2019, the DfE issued a response but did not uphold Mrs S' complaint. In summary, it said:-
- 23.1. Members are expected to check their EORBs and take action if they discover an error. It is unfortunate that Mrs S did not notice at the time that she was being credited with significantly more service than she had accrued under the Scheme.
- 23.2. The fact that Mrs S had spent the money was not, in itself, a valid defence against a claim for repayment.
- 23.3. If immediate repayment of the full amount due to the Scheme would prove difficult or impossible for Mrs S, it was open to her to ask TP to reconsider the claim on hardship grounds. Mrs S would need to engage with TP and provide supporting evidence.
24. In light of Mrs S' circumstances, the DfE encouraged Mrs S to contact TP to explore the possibility of a 'hardship defence' or to agree a mutually acceptable repayment plan. TP considered the information that Mrs S subsequently provided and concluded that, based on her financial position, she could afford to repay a small amount each month to the Scheme.⁶

⁶ TP's findings on Mrs S' hardship claim is detailed in Appendix 4.

25. Mrs S' position is summarised below:-

- 25.1. Mrs S has explained that she did not contact TP between 2012 and 2016, following receipt of the EORBs to query her service history. She does not recall studying the EORBs closely at the time. As she is not familiar with how pension benefits are calculated, she assumed the figures were correct. However, she would probably have noticed if the code "F" for full-time, or "P" for part-time, had been recorded incorrectly on the EORBs.
- 25.2. Mrs S says her main concern is that TP had identified a mistake in her service record in August 2016, but continued to pay her pension at the same rate. TP did not contact her until March 2018 to make her aware of the problem, which has compounded matters.
- 25.3. She and her husband moved into their home in 1988 with their two young children. They divorced two years later so she was a single parent from that point onwards. She never had money to spend on the house and they never went on holidays. She did all the painting and decorating herself.
- 25.4. She did a return to teaching course around 2000 and then worked part-time in schools and part-time teaching private tuition. She could not teach full-time as she was caring for her daughter who had glandular fever and her mother who had had a stroke and was living alone. She still did not earn enough to refurbish their house.
- 25.5. In 2007 she remarried but due to her husband working in bars and supermarkets only, they were no better off and they divorced in 2012, after two years apart. This left her no better or worse off than she had been before the marriage.
- 25.6. Mrs S provided copies of her bank statements between 29 October 2016 and 30 June 2018, and explained that when she received her pension from TP, she thought carefully about how she would spend it. The lump sum was used to:-
 - 25.6.1. Purchase a new bathroom suite, which was fitted in March 2017.⁷ She explained that they still had the avocado green bathroom suite from the 1970's; it was very stained and needed to be replaced. She shopped around carefully before buying one that she could afford. She painted and decorated the bathroom herself. If she had been paid the correct lump sum, she would not have been able to replace the bathroom.
 - 25.6.2. Contribute to her daughter's wedding. She helped pay the cost of the accommodation, flowers and other items. She does not have any

⁷ Mrs S has provided The Pensions Ombudsman (TPO) with documentary evidence that she spent £1,129.09 on purchases for her bathroom in early 2017. Mrs S has explained that she paid the plumber who fitted the bathroom over £2,000 for his workmanship but she does not have a receipt to evidence this.

receipts for these payments. However, some of these transactions are shown on her bank statements.⁸

- 25.7. Mrs S said that she used the monthly pension payments from TP to purchase a funeral plan. She was not expecting to have any income in the future to cover that cost. It was not something she wanted her children to have to try to find the money for; she did not think they would have been able to do so. The cost of the funeral plan was £3,688.⁹ She said she had reasoned that as she had not had the monthly pension from TP previously, she could manage without it for another year.
- 25.8. Mrs S said that she has been putting money aside in the event that she has to repay any or all of the overpayment. She said she that she can repay £200 per month.

26. TP's position is summarised below:-

- 26.1. TP has acknowledged that the revised information that was submitted by Dorset LA was not processed in a timely manner, which resulted in the overpayment of Mrs S' pension benefits. In recognition of this, it made the Offer to Mrs S.
- 26.2. However, responsibility for the original error lies with Dorset LA. Dorset LA provided TP with incorrect information and its failure to correct Mrs S' service record caused this unfortunate situation.
- 26.3. TP, as the administrators of the Scheme, is reliant on the information provided by Dorset LA. It is not responsible for the fact that Mrs S was given a false expectation concerning her pension benefits on her retirement.
- 26.4. TP is not always able to identify errors or omissions in service records from the information submitted in the annual returns. So, members are asked to review their service record to ensure that the details TP holds are correct. If the details are incorrect, they are asked to contact the relevant employer regarding any discrepancies and to encourage the employer to provide the correct information as soon as possible.
- 26.5. Mrs S does not appear to have queried her service record with Dorset LA at any time, despite receiving EORBs from 2011 onwards confirming that her service in the Scheme had increased by one full year each year. The final

⁸ Mrs S provided TPO with copies of her bank statements and has highlighted the payments she made towards her daughter's wedding. The bank statements evidence that Mrs S spent £816.85 on her daughter's wedding, which was in June 2017.

⁹ The evidence Mrs S has provided to TPO shows that she made an initial payment of £307 towards the Funeral Plan. The remaining balance was paid off in 12 monthly instalments of £281.75 commencing in November 2016.

EORB also included a breakdown of her service; Mrs S must have known at the time that she had not accrued that amount of service.

- 26.6. Given that participating employers have a statutory responsibility to the Scheme under the 2010 Regulations, it is reasonable for TP to expect employers to provide accurate data. The fundamental mistake was made by Dorset LA in providing information on Mrs S' part-time employment that overstated her pensionable service. Any subsequent communications from TP which mis-stated the actual position were as a direct result of the initial mistake on the part of Dorset LA.
 - 26.7. TP informed Mrs S of a possible discrepancy in her service on 28 June 2016; this was prior to her retirement on 4 July 2016.
 - 26.8. TP would not have been in a position to identify whether the discrepancy would result in an underpayment or overpayment. As Mrs S had applied to take her retirement benefits, it was required to put those benefits into payment.
 - 26.9. TP does not accept that it exacerbated matters by failing to keep Mrs S updated regarding its investigation into her service history. It provided Mrs S with sufficient information on her service record to enable Mrs S and Dorset LA to determine whether her service record was correct. TP would have been entirely unaware of the position at the time.
 - 26.10. TP considers that the Offer is appropriate given that Dorset LA incorrectly recorded Mrs S' service. Mrs S had the opportunity to identify the mistake in her service in the period leading up to her retirement.
 - 26.11. While it acknowledges that Mrs S has advised that she is unable to repay the overpayment, TP has a duty to ensure that benefits are correctly awarded in accordance with the Regulations that govern the Scheme. In line with guidance issued by Treasury on "Managing Public Money" (**the Treasury Guidelines**), TP is obliged to recover overpayments, regardless of how the overpayment has occurred. It has urged Mrs S to contact TP to discuss repayment options to avoid causing her financial hardship.
27. On 29 January 2020, TPO received TP's formal response to Mrs S' complaint.

Conclusions

28. The legal position is that a member is only entitled to the correct level of benefits from the pension scheme. A member cannot benefit from a mistake (this is known as unjust enrichment), regardless of who is responsible for the error. Consequently, the courts have decided that schemes are entitled to seek recovery of any overpayment, and this is also the view of TPO. However, there are defences against recovery that I can consider when forming a view on whether some or all of the overpayments can be recovered.

29. The starting point is that TP, the party responsible for administering the Scheme on behalf of the DfE, is required to pay benefits in accordance with the Regulations that govern the Scheme. TP is required to reduce a pension to the correct level going forward, if it is found that a member is being paid a higher pension from the Scheme than they are entitled to. If any benefits are overpaid, TP will generally be required to recover the past overpayment from the member; subject to any valid defence in law.
30. When exercising discretionary power under Regulation 114 of the 2010 Regulations to recover an overpayment, or when seeking recovery under the general law, TP should have regard to the Treasury Guidelines.
31. The Treasury Guidelines state that, in principle, public sector organisations should always pursue overpayments irrespective of how they arise. As recognised in the Treasury Guidelines, there can be circumstances where the recipient of an overpayment may not be required to repay some or all of the monies. These circumstances include where a defence against recovery applies under the general law and/or in some hardship cases. The Treasury Guidelines state that public bodies should have regard to “hardship” when considering whether to recover overpayments.
32. I will now consider whether Mrs S can rely on any defence in law against the recovery of the overpayment.

Legal defences against recovery

The Limitation Act

33. The Limitation Act 1980 (**the Limitation Act**) prevents the recovery of an overpayment if the overpayment occurred more than six years before a claim has been made for recovery, or six years from the point it was reasonable for the party making the claim to have become aware of the overpayment.
34. In the High Court case of *Webber v Department for Education and another* [2016] EWHC 2519 (Ch), the judge held that the applicable cut-off date for the purposes of the Limitation Act, was the date that TP brought its claim during the course of TPO’s complaint procedure. That date was identified as being the date TPO received TP’s response to Mr Webber’s complaint.
35. In Mrs S’ case, the relevant cut-off date is 29 January 2020, the date that TPO received TP’s response to her complaint. The formal response to TPO was received within the relevant timeframe for the purposes of the Limitation Act. It follows that TP made its claim for repayment within time, so it can recover all the overpayment subject to any other defence(s) available to Mrs S.
36. As there is no limitation defence in this case, I have considered whether any other defences apply.

Change of position

37. The most common defence in law against recovery of an overpayment is referred to as “change of position”; that is, the recipient has changed her/his position such that it would be unjust or inequitable to require the recipient to repay the overpayment either in whole or in part. Lord Goff stated the principle of change of position in *Lipkin Gorman*¹⁰ in very broad terms:

“At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.”

38. Lord Goff chose not to lay down a series of detailed rules about this defence, because he thought it more appropriate for the Courts to work matters out on a case by case basis. The balance of subsequent case law, however, does not support the view that the defence is purely discretionary.¹¹ Earlier in his judgment, Lord Goff said:

“the recovery of money in restitution is not, as a general rule, a matter of discretion for the court...where recovery is denied, it is denied on the basis of legal principle.”

39. The most obvious example of a detrimental change of circumstance is the expenditure of money. However, not all expenditure will count for the purposes of a change of position defence. For example, as a general rule, paying off a debt will not be a detrimental change of circumstances because a debt must always be repaid at some point. There is no absolute requirement that the monies have been spent on extraordinary items. For example, to purchase a car. The requirement is for there to have been a causal link between the overpayment and the expenditure.

40. Consequently, it is possible for the defence to succeed when the monies have been used to fund a better lifestyle. The expenditure must, however, be irreversible. Where the monies have been spent on purchases which have a re-sale value, and a reasonable person could sell the items without disproportionate expense or difficulty, the defence would only be available to the extent that the re-sale value was less than the initial outlay.

41. The Courts have been prepared to find that, where there has been a series of overpayments, a general change of position in the form of increased outgoings is possible.¹² There is Court of Appeal authority that a change of position defence is not limited to cases where the monies have been spent on specific identifiable items of expenditure. The Court of Appeal took the view that it may not be right for it to apply

¹⁰ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548

¹¹ See Chapter 27.1 of Goff & Jones, *The Law of Unjust Enrichment* for a detailed review of the case law.

¹² *Philip Collins Ltd v Davis* [2000] 3 All ER 808. A case where two itinerant musicians with a “relaxed and philosophical propensity to overspend their income escaped liability to the extent that increases in their everyday outgoings were referable to their receipts from the claimant.”

too demanding a standard of proof when an honest defendant says he has spent an overpayment on improving his lifestyle but cannot produce too detailed accounting.¹³

42. To make out a change of position defence, it has been established that certain conditions must be satisfied. Briefly, the recipient of the overpayment must be able to show that:

42.1. Her/his circumstances have changed detrimentally and irreversibly;

42.2. The change of circumstances was caused by receipt of the overpayment; and

42.3. She/he is not disqualified from relying on the defence; in particular, that she/he has acted in good faith.

43. With regard to the last point, a change of position defence is not open to an individual who acts in 'bad faith' when changing their position. I should make it clear that bad faith, in this context, is not synonymous with dishonesty.¹⁴ It can simply mean that if the recipient knew or had grounds for believing that a payment had been made in error, but then failed to make enquiries of the scheme before spending the money, the defence would not be open to the recipient. This is often referred to as "Nelsonian knowledge."

44. 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 careless or negligent in not identifying the overpayment, but did not have actual or Nelsonian knowledge that she was being overpaid, she would still be acting in good faith. In making a judgement as to Mrs S' knowledge at the time, it is not a question of deciding what she should have known; rather, it is a question of what she did know.

45. I note TP's comments concerning the fact that Mrs S had received a series of EORBs that showed her pensionable service had increased by a full year each year, although she was working part-time.

46. Mrs S says she does not recall studying the EORBs closely at the time. As she is not familiar with how pension benefits are calculated, she assumed the figures were correct. It could be argued that it was negligent of Mrs S not to have studied in detail the EORBs she received prior to her retirement. As stated in paragraph 44 above, her failure to do so would not prevent the good faith defence being available to her.

47. I also note that TP wrote to Mrs S on 28 June 2016, prior to her benefits being put into payment and explained that there was an issue with her service (see paragraph 7 above). This letter does not alert Mrs S to the possibility that her benefits may need to be recalculated at a later date, which may give rise to an overpayment. Despite

¹³ *National Westminster Bank plc v Somer UK Limited* [2002]

¹⁴ *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2002] EWHC at 135].

corresponding with Dorset LA, concerning the discrepancies it had identified in Mrs S' service and salary information, TP did not inform Mrs S of this possibility.

48. Given that TP had advised that there was service "missing" from her record, I find that it would have been more reasonable for Mrs S to have inferred from that letter that her benefits could potentially have been understated.
49. For the reasons stated in paragraphs 46 to 48 above, I find that Mrs S received the overpayment in good faith. I find no 'Nelsonian knowledge' existed.
50. For the sake of clarity, I would point out that if I find that Mrs S satisfies all the remaining requirements for the change of position defence, TP would not be required to reinstate Mrs S' pension to the inflated level. The defence would only relate to TP's attempt to seek repayment of the overpayment of past pension benefits.

The overpaid lump sum

51. Mrs S said that she used the lump sum she received to renovate her bathroom and to contribute towards her daughter's wedding. She said that she would not have been able to renovate her bathroom had she received the correct lump sum she was entitled to.
52. Mrs S received a lump sum of £8,449.25 on her retirement from the Scheme. It subsequently transpired that she had received an overpayment of lump sum amounting to £3,755.67.
53. Mrs S provided evidence of the purchases she made for her bathroom. Mrs S said that she paid the plumber who had fitted the bathroom over £2,000 for his workmanship but she did not have a receipt to evidence this. As Mrs S purchased items to renovate her bathroom, I find that she incurred the cost for the plumber to fit the new bathroom suite.
54. The overpaid lump sum is broadly equivalent to the expenditure Mrs S incurred to renovate her bathroom. Having considered Mrs S' financial circumstances at the time, based on the bank statements she provided, I find that on the balance of probabilities Mrs S would not have renovated her bathroom, had she received the correct lump sum she was entitled to.
55. For the reasons stated in paragraphs 53 and 54 above, I find that Mrs S has a change of position defence to the overpaid lump sum she received.

The overpaid monthly pension

56. Mrs S has said that she used the monthly pension she received from TP to pay for her funeral plan. She explained she had reasoned that as she had not had the monthly pension from TP previously, she could manage without it for another year by using it to pay the funeral plan.

57. Mrs S has provided copies of her bank statements in respect of the period of three months prior to the date she started receiving her pension from TP.¹⁵ Having considered these statements, I note that at the end of every month Mrs S had funds in excess of £400 in her bank account.
58. The pension Mrs S received from TP between November 2016 and November 2017 amounted to between £234.71 and £237.08 per month. The correct level of pension amounted to approximately £130 per month. This equates to a monthly variance of approximately £107.08.
59. Based on Mrs S' financial position prior to receiving the pension from TP (see paragraph 57 above), and the fact that she could have managed without the pension for another year, I find on the balance of probabilities, Mrs S would have purchased the funeral plan, had she been in receipt of the correct level of pension from TP.
60. Consequently, Mrs S did not change her position as a result of receiving a higher monthly pension than she was entitled to from the Scheme.

Other possible legal defences to recovery of an overpayment

61. There are other defences to recovery of an overpayment which might have the effect of requiring TP to continue to pay Mrs S' pension at the inflated rate; namely, estoppel and contract. I do not find that the necessary conditions for either of these defences to apply have been established in Mrs S' case.

Estoppel

62. 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:

62.1. on a clear and unequivocal statement (representation); or

62.2. on a mutual assumption of facts or the law (convention).

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

63. 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

¹⁵ 1 April 2016 to 28 June 2016.

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.”

64. With regard to estoppel by convention, in *Commissioner for Her Majesty’s Revenue and Customs v Benchdollar 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.”

65. For an estoppel by representation defence to exist, Mrs S would need to establish that there had been an unequivocal representation made by TP that her pension would continue at the higher rate. I do not find that a representation of this nature was made to Mrs S. Similarly, I do not find that a common assumption existed between the parties to allow an estoppel by convention to exist.

Contract

66. Similarly, I do not find that the necessary elements to form a contract exist in Mrs S’ case. Namely, offer, acceptance, consideration and the intention to create legal relations. Contract law is based on the principle of reciprocity and consideration. In this context, it refers to 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 TP intended to enter into legal

relations with Mrs S beyond her strict entitlement under the Scheme Regulations. In any event, a contract based on mistake is unlikely to be enforceable.

67. In the absence of any legal defence against recovery of the £2,089.68, TP is entitled to recover it.

Maladministration

68. I have also considered whether Mrs S has sustained any non-financial injustice as a consequence of maladministration on the part of TP.

69. I have no doubt that this matter has caused Mrs S considerable distress. TP notifying her that there had been an overpayment, and that it was seeking to recover it, would likely have come as an unpleasant shock. However, this does not by itself, amount to maladministration.

70. I note that TP has considered Mrs S' claim for the overpayment to be waived on the grounds of hardship, and that it has not sought to recover the overpayment while the matter is being investigated by TPO. As a matter of law, TP is able to recover the balance of the overpayment under the principles of unjust enrichment (a private law right) and also under Regulation 114 of the 2010 Regulations, which gives TP a discretion to recover overpayments. TP's discretion under Regulation 114 extends to both the amount to be recovered, if any, and the period of recovery.

71. It is not correct, as has been stated by TP in its submissions, that the Treasury Guidelines require an overpayment, once discovered, to be pursued regardless of the circumstances in which it arose. Annex 4.11 (Overpayments) of the Treasury Guidelines states:

“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.”

72. In proceeding on the basis that it was legally required to recover the overpayment come what may, TP did not properly consider its discretion under Regulation 114. I find that the error on the part of TP, to follow a proper decision making process, is sufficiently serious to justify a finding of maladministration. Consequently, it shall reconsider the matter.

The recovery period

73. I would generally expect the period of recovery not to be less than the period over which the overpayment built up. There may be circumstances where a shorter period is appropriate for example where the applicant has invested a lump sum or paid it into a bank account. In some cases, it may be appropriate, depending on the member's financial circumstances, for the period of recovery to be longer.

74. Mrs S has confirmed that she is able to repay any overpayment to which she does not have a defence in law against the recovery of, at a rate of £200 per month. I find that a repayment at this rate is appropriate.
75. A finding of maladministration is also warranted to the extent that TP:-
- 75.1. Failed to follow up in a timely manner a response to the queries it had raised with Dorset LA on 9 August 2016, concerning the discrepancies it had identified in the revised salary information.
- 75.2. Did not follow up matters with Dorset LA until February 2018, after it discovered in 2017 that the discrepancies had not been addressed.
76. I have considered TP's argument that the overpayment was caused by Dorset LA providing incorrect service and salary information. Having reviewed the evidence, I find that TP's maladministration, outlined in sub paragraphs 75.1 to 75.2 above, unreasonably delayed the process of reviewing Mrs S' retirement award, which resulted in an overpayment accruing over a two-year period.

Non-financial injustice

77. I have power to make reasonable awards for non-financial injustice (distress and inconvenience) arising as a consequence of maladministration. It remains for me to consider whether Mrs S has sustained non-financial injustice as a consequence of the maladministration on the part of TP.
78. Having considered the individual circumstances of Mrs S' complaint, I find that TP's maladministration has caused Mrs S serious distress and inconvenience, for which she shall receive an award.

Directions

79. Within 28 days of the date of this Determination, TP shall:-
- 79.1. Write to Mrs S and confirm that it will no longer seek recovery of the £3,755.67 lump sum she was overpaid.
- 79.2. Consider afresh whether to recover, in full or in part, the overpayment made to Mrs S, to which she does not have a change of position defence.
- 79.3. If TP determines that the overpayment is to be recovered in full or in part, it shall recover the overpayment at a rate of £200 per month for the first 10 months with the remaining £89.68 being paid in the 11th month.

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79.4. Pay Mrs S £1,000 in respect of the serious distress and inconvenience she has sustained as a consequence of the maladministration on the part of TP.

Dominic Harris

Pensions Ombudsman
20 February 2024

Appendix 1

80. Regulation 114 of the Teachers Pensions Regulations 2010

“Cessation, etc. of benefits where no entitlement

114. – (1) This regulation applies where after paying a benefit the Secretary of State determines that there was no entitlement to the benefit or there is no longer an entitlement to the benefit.

(2) The Secretary of State may-

(a) cease to pay the benefit;

(b) withhold the whole or any part of the benefit;

(c) in the case of a payment made when there was no entitlement to the benefit recover any such payment.”

Appendix 2

81. Details of the salary information TP provided to Dorset LA in its email of 12 May 2017

- 01/04/2009 to 31/08/2010 £240,480
- 02/09/2009 to 31/10/2010 £251,680
- 01/11/2010 to 31/05/2011 £316,250
- 01/04/2012 to 31/03/2015 £251,680

Appendix 3

82. Details of the Formula in TP's letter to Mrs S dated 2 August 2018

Regulation 43 states that where during a financial year a person has spent one or more periods in part-time pensionable employment for the purpose of calculating reckonable service attributable to any period of such employment, each of these periods counts as $365 \times \text{CS}/\text{FTCS}$ day of reckonable service, where –

CS is the person's contributable salary for the period, and

FTCS is what the contributable salary for the whole financial year would have been and had continued throughout the year.

Appendix 4

83. A summary of TP's findings following Mrs S' request for the overpayment to be waived on hardship grounds.

After considering Mrs S' financial circumstances, based on the three-month bank statements Mrs S had provided to TP, there seemed to be a floating balance of £1,500 at the end of every month. So, TP asked if there was scope for Mrs S to repay £100 a month.

TP appreciated that the bank statements may not have been a true reflection of Mrs S' finances. If that were the case, it would consider putting in place, a small monthly repayment plan until Mrs S reached State Pension age.

TP appreciated that Mrs S' health had deteriorated and that this could have an impact on her future income. It informed Mrs S that she could consider placing a charge on her property. The charge would not have compelled Mrs S to sell the property, it would have been a way for the DfE to safeguard the debt.