

## Ombudsman's Determination

Applicant	Mrs L
Scheme	Teachers' Pension Scheme ( <b>the Scheme</b> )
Respondent	Teachers' Pensions ( <b>TP</b> )

## Outcome

1. Mrs L's complaint against TP is partly upheld. To put matters right, TP shall repay Mrs L the overpayment it recovered from her and consider afresh whether to seek recovery of the overpayment. In addition, it shall make a payment to Mrs L for the serious distress and inconvenience she has experienced in connection with this matter.

## Complaint summary

2. Mrs L's complaint concerns an overpayment of pension benefits, amounting to £2,502.31, which TP recovered using equitable set-off. She has also complained about the poor customer service she received from TP.

## Background information, including submissions from the parties

3. The Scheme is a statutory Scheme bound, for the purposes of this complaint, by the Teachers' Pensions 2010 Regulations (as amended). TP administers the Scheme on behalf of the Department for Education (**DfE**).
4. On 6 May 2010, TP wrote to Mrs L and informed her that her retirement benefits had been calculated and made ready for payment (**the May 2010 Letter**). TP explained that it had calculated the figures using the service and salary information it had received from her previous employer (**the Employer**). The statement attached to the May 2010 Letter confirmed that Mrs L would receive a lump sum of £26,888.01 and an annual pension of £8,962.89. Mrs L received payment of her benefits from the Scheme in the same month.
5. On 29 March 2017, Mrs L contacted TP to query the information on the service record used to calculate her retirement benefits from the Scheme. She explained that her pensionable service was shown as terminated on 31 March 2003, but she had left pensionable service on 31 December 2003; a discrepancy of nine months.

6. On 11 April 2017, TP replied to Mrs L's enquiry concerning her pensionable service. It explained that its records had been compiled from information supplied by the Employer. TP explained that the sole responsibility for providing information on her pensionable service rested with the Employer. If Mrs L suspected that there were inaccuracies or omissions in the information TP held on its records, she should contact the Employer and ask it to provide the missing data through the Employer Portal.
7. On 10 April 2018, Mrs L contacted TP to discuss the discrepancy in her pensionable service. She asked TP for up-to-date contact details for the Employer.
8. On 13 April 2018, the Employer provided TP with an updated service record for Mrs L, in respect of the period 1 April 2003 to 31 December 2003.<sup>1</sup>
9. On 10 May 2018, Mrs L telephoned TP for assistance with accessing her My Pension online account. She requested an update on the calculation of her revised retirement benefits.
10. On 24 July 2018, TP wrote to Mrs L (**the July 2018 Letter**) and provided a statement of her revised retirement benefits. It said in summary:-
  - The Employer had notified TP of changes which had affected the calculation of her retirement benefits. Unfortunately, her lump sum had been overpaid by £702.16 and her pension had been overpaid by £1,800.15 (net).
  - Her total pensionable service had increased from 18 years and 3 days to 18 years and 149 days.
  - Her best average salary had decreased from £31,512.51 to £30,111.58.
  - Her best average salary period had changed. This affected "the amount of pensions increase payable."
  - TP was obliged to recover all overpayments of public funds irrespective of how the overpayment had occurred.
  - The total overpayment, which amounted to £2,502.31, would be recovered from her monthly pension at an initial rate of £104.27 over a period of 23 months. The recovery period would commence on 9 September 2018; a final deduction of £104.10 would be made on 9 August 2020.
11. TP enclosed an invoice for the sum of £2,502.31 and explained that it had been provided for Mrs L's records. It also explained that Mrs L did not need to contact TP if she was willing to accept the recovery terms it had proposed.
12. On 5 August 2018, Mrs L contacted TP. In summary she said:-

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<sup>1</sup> TP has no record of whether it took any action at the time.

- She had telephoned TP on 28 July 2018, and requested a breakdown of the calculation of the overpayment. She also requested details of the figures TP had used in its calculations, including information on how her average salary had been calculated.
  - She had made several repeated requests for an explanation in writing regarding the recalculation of the annual pension increase (**PI**) that had been applied to her pension.
  - She would have expected TP to notify her in writing before making any adjustments to her pension. She had assumed the adjustment related to the overpayment that it had only recently informed her of, despite her requesting an update since April 2018.
  - She noted that TP had planned to commence recovery of the overpayment from August 2018.<sup>2</sup> The July 2018 Letter stated that deductions would start in September 2018.
  - TP should not take any action to recover the overpayment until she had an opportunity to digest the information it had provided in the July 2018 Letter.
13. TP subsequently replied to Mrs L and provided details of how her best average salary had been calculated.
14. On 28 August 2018, Mrs L made a complaint to TP. In summary she said:-
- She had contacted TP in April 2018, to enquire about how the annual PI had been calculated and for information on any changes that had been made to her pension payments. She did not receive a response.
  - She noted that the annual PI which she understood was 3%, had not been applied to her pension. There had also been a slight reduction in the amount of her monthly pension.
  - She had telephoned TP between 13 July 2018 and 23 July 2018, to follow up responses to her enquiries. She was informed that a Manager would return her telephone call and that she would receive correspondence from TP regarding the reduction that had been applied to her pension. The Manager did not telephone her.
  - The matter had been ongoing since April 2018. She had since received an invoice for a substantial sum in respect of an overpayment that had arisen as a result of an administrative error in the recording of her employment history. TP was now seeking to reduce her pension, which she had accepted in good faith when she retired eight years prior.

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<sup>2</sup> Mrs L obtained this information from her My Pension online account.

- The recovery plan that TP had proposed would cause her undue hardship.
15. On 12 September 2018, TP replied to Mrs L and apologised for not responding to the enquiry she had made on 10 April 2018. It provided a breakdown of the overpayment of pension Mrs L had received between the 2010/11 and 2018/19 tax years, and said in summary:-
- It acknowledged that Mrs L had initially contacted TP on 29 March 2017, concerning her pensionable service.
  - Her service record was compiled from information provided by the Employer. The retirement benefits that TP calculated in May 2010, were based on the information TP held at the time.
  - It also acknowledged that Mrs L had expressed concerns at being notified of an overpayment eight years after her date of retirement from the Scheme. However, Mrs L would have had sufficient time to check her service record prior to March 2017. The amendment of her service record was made in response to information TP had received after Mrs L contacted the Employer.
  - Mrs L's retirement benefits were recalculated on 26 April 2018, to take account of her additional pensionable service. Regrettably, the process was not completed until 24 July 2018, when she was notified of the overpayment.
  - TP apologised that it had not returned Mrs L's telephone calls. It appreciated that the contents of the July 2018 Letter would have come as a shock. Mrs L was probably expecting her pension benefits to increase following the change in her total pensionable service.
  - TP explained that in the original calculation of Mrs L's retirement benefits, the PI was applied from the deemed date of 1 September 2001 up to her 60th birthday. However, following a review of her retirement benefits, the deemed date was amended to 1 January 2002. So, the PI was applied over a shorter period; this resulted in her retirement benefits being lower than the original figures.
  - The overpayment had arisen because her retirement benefits were recalculated. TP sought to recover all overpayments, in accordance with the Managing Public Money guidelines (**the Guidelines**)<sup>3</sup>.
  - Depending on the individual's financial circumstances, TP's usual practice was to seek recovery immediately on discovering the overpayment. The purpose of the July 2018 Letter was to ensure that the overpayment could be recovered at a manageable rate.

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<sup>3</sup>[https://assets.publishing.service.gov.uk/media/64c383ccf92186001486670d/Managing\\_Public\\_Money\\_-\\_May\\_2023\\_.pdf](https://assets.publishing.service.gov.uk/media/64c383ccf92186001486670d/Managing_Public_Money_-_May_2023_.pdf)

- TP apologised for not discussing the recovery plan with Mrs L prior to making the deductions from her monthly pension.
16. On 20 September 2018, Mrs L referred her complaint to the DfE through the Scheme's Internal Dispute Resolution Procedure (**IDRP**). In summary she said:-
- The response from TP did not address why her pension in payment had decreased in April 2018. She did not receive notification of any changes made to her pension despite making several requests to TP.
  - TP did not make any attempts to ascertain her financial circumstances before it commenced recovery of the overpayment. It did not contact her to establish whether she had the financial resources to settle the invoice.
  - TP's finance team should have contacted her to discuss repayment options and the recovery plan that was being proposed by TP, prior to issuing a demand for repayment and initiating the recovery process. TP had plenty of opportunities between 13 April and 31 July 2018, to contact her. The onus should not have been on her to contact TP, after the event. TP commenced the deductions in August instead of September 2018.
  - Overall, TP's response to her complaint was dismissive, inaccurate and did not address all the issues she had raised. Although TP had apologised, this did not excuse the fact that it had not provided the information she had requested.
17. On 9 October 2018, TP sent a further letter to Mrs L in connection with her complaint (**the October 2018 Letter**). In summary it said:-
- The DfE had referred the case to TP for review. If she remained dissatisfied with TP's response to her complaint, she could refer her complaint to the DfE.
  - The Employer had submitted details of Mrs L's pensionable service in 2006, covering the period 1 September 2002 to 31 March 2003, and indicated that Mrs L had left pensionable service in March 2003. When TP calculated her retirement benefits in May 2010, it was not aware that she remained in pensionable service until 31 December 2003.<sup>4</sup>
  - The May 2010 Letter included a statement showing the pensionable service Mrs L had completed in the Scheme (**the Statement of Service**). This would have shown that its records only held service up to 31 March 2003 with the Employer.<sup>5</sup>
  - Both TP and employers were responsible for the administration of the Scheme. Members of the Scheme had an obligation to check that the personal data TP held was accurate.

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<sup>4</sup> TP said 31 December 2004 in the letter but that was likely to be an error as Mrs L's last day of service was 31 December 2003.

<sup>5</sup> TP included a copy of the Statement of Service with this letter.

18. TP provided a breakdown of the calculation of Mrs L's original and revised best average salary and explained that:-
- The difference in Mrs L's revised average salary, when compared with her original average salary, was due to the fact that the period between 1 April 2000 to 31 December 2000 could not be included in her revised award. This was because it did not form part of the last 1,095 days of her pensionable service. As this period coincided with periods of some of her highest earnings, in terms of full-time equivalent earnings, this had the effect of reducing her best average salary.
  - It was regrettable that this had occurred and that the additional pensionable service was not incorporated into her retirement award until 2018. However, TP rejected any notion that it was responsible for the failure on the part of the Employer to provide accurate and full information on her pensionable earnings.
  - As Mrs L's pension entitlement had changed, TP had to take the necessary steps to ensure that she was paid her correct entitlement in accordance with the Teachers' Pensions Regulations (**the Regulations**) that govern the Scheme.
19. There were further exchanges between Mrs L and TP concerning the revision of Mrs L's retirement benefits and TP's request for the return of the overpaid sums.
20. On 16 November 2018, Mrs L referred her complaint to the DfE through the Scheme's IDRP. In summary she said:-
- She did not receive a Statement of Service with the May 2010 Letter.
  - She questioned why TP was not notified at the time or was not aware that she had completed additional service. Moreover, why the additional service had reduced her retirement benefits and caused a considerable overpayment. Had she known the effect it would have on her retirement benefits she would not have continued in service after 1 April 2003, as there would have been no financial incentive.
  - TP's calculations were complicated; she did not fully understand why there had been a reduction in the level of her retirement benefits.
  - She had repeatedly asked TP why her monthly pension payments had been reduced and why the PI had not been applied to her pension.
  - TP had enclosed a copy of a letter dated 26 April 2018 (**the 26 April 2018 Letter**) with the October 2018 Letter. It was supposedly sent to her by TP. It included some calculations, without any of the supporting information that she had also requested. She did not receive a copy of that letter at the time and TP had not referred to it during any of its previous communications.
  - She was appalled at the treatment and service she had received from TP. It had caused her considerable distress.

21. On 6 December 2018, the DfE issued a response but did not uphold Mrs L's complaint. In summary it said:-
- The DfE's responsibility was to ensure that the Regulations had been applied correctly.
  - While it appeared counterintuitive that an increase in Mrs L's total pensionable service would cause a reduction in her retirement benefits, TP was correct to say that the reduction in her retirement benefits was due to the application of the Regulations.
  - At the time that Mrs L was an active member of the Scheme, the Scheme was a "defined benefit final average salary scheme," where the benefits that would be paid out were determined by a formula set out in the Regulations, using service and salary information.
  - In Mrs L's case, the decrease in the average salary, used in the calculation of her retirement benefits, had an effect on her benefits that was greater than the effect of the increase in her pensionable service, resulting in an overpayment.
  - The DfE was satisfied that TP had explained the effect of the recalculation of Mrs L's retirement benefits in sufficient detail and had provided her with the necessary information and data. It acknowledged that correspondence between the parties was complicated by the fact that TP believed Mrs L had received the 26 April 2018 Letter, when Mrs L had confirmed she had not.
  - The DfE had checked TP's correspondence recording system. The 26 April 2018 Letter was created on the same date. It could see no reason why it would not have been issued at the time, although it accepted that Mrs L had not received it.
22. TP has confirmed that it commenced recovery of the overpayment using equitable set-off in August 2019 and the final deduction was made in August 2020.
23. The Pensions Ombudsman (**TPO**) received TP's formal response to Mrs L's complaint on 27 January 2020.

### **Mrs L's position**

24. She disputed the calculation of the overpayment.
25. She had previously stated that she did not receive a Statement of Service on her retirement from the Scheme. It was some years later, when her records became available to her online, that she was able to view information on her pensionable service. Being a logical person, she expected the addition of 146 days pensionable service, and the payment of over £700 in pension contributions, would have provided additional retirement benefits.

26. She had been doubly disadvantaged as she continued to work and pay pension contributions over a nine-month period, only to be told years later that she had received an overpayment of benefits.

### **TP's position**

27. TP identified that the 26 April 2018 Letter was not sent until 24 July 2018. It apologised to Mrs L for the oversight.
28. TP was satisfied that the correct PI had been applied to Mrs L's annual pension. Mrs L's initial pension, following the recalculation, was £6,928.76 per annum. This increased to £10,228.14 per annum following the application of PI due up to 9 April 2018.<sup>6</sup>
29. TP's standard procedure, following a recalculation of retirement benefits, is to provide the member with details of the revised award. Where an overpayment of benefits has occurred, the case is referred to TP's finance department to provide options for repaying the overpayment. Unfortunately, in this instance there was a delay between the point of adjusting Mrs L's benefits and TP issuing the 24 July 2018 Letter. It apologised to Mrs L for any inconvenience this had caused her.

### **Adjudicator's Opinion**

30. Mrs L's complaint was considered by one of our Adjudicators who concluded that further action was required by TP. The Adjudicator's findings are summarised below, in paragraphs 31 to 70.
31. The starting point was that TP, the party responsible for administering the Scheme on behalf of the DfE, was required to pay pension benefits in accordance with the Regulations that govern the Scheme. TP was required to reduce a pension to the correct level, if it was found that a member was being paid a higher pension from the Scheme than they were entitled to. TP would generally be required to recover the overpayment from the member; subject to any valid defence in law.
32. Regulation 114 of the Teachers Pensions Regulations 2010 (**the 2010 Regulations**) gives TP discretionary powers in relation to recovery of overpayments.<sup>7</sup> When exercising its discretionary power under Regulation 114 to recover an overpayment, or when seeking recovery under the general law, TP should have regard to the Guidelines.
33. The Guidelines state that, in principle, public sector organisations should always pursue overpayments irrespective of how they arise. As recognised in the 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

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<sup>6</sup> TP has provided a table detailing the PI applied to Mrs L's revised pension. This is detailed in Appendix 2.

<sup>7</sup> Regulation 114 of the 2010 Regulations is set out in Appendix 1.



cases. The Guidelines also state that public bodies should have regard to “hardship” when considering whether to recover overpayments.

## **Legal defences against recovery**

### *Change of position*

34. 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*<sup>8</sup> 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.”

35. 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, did not support the view that the defence was purely discretionary.<sup>9</sup> 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.”

36. The most obvious example of a detrimental change of circumstance is the expenditure of money. However, not all expenditure would count for the purposes of a change of position defence. For example, as a general rule, paying off a debt would 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 had been spent on extraordinary items. For example, to purchase a car. The requirement is that there has to have been a causal link between the overpayment and the expenditure.

37. Consequently, it was possible for the defence to succeed when the monies had been used to fund a better lifestyle. The expenditure must, however, have been irreversible. Where the monies had been spent on purchases which had 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.

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<sup>8</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548

<sup>9</sup> See Chapter 27.1 of Goff & Jones, *The Law of Unjust Enrichment* for a detailed review of the case law.

38. The Courts have found that, where there had been a series of overpayments, a general change of position in the form of increased outgoings was possible.<sup>10</sup> There is Court of Appeal authority that a change of position defence is not limited to cases where the monies had 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 too demanding a standard of proof when an honest defendant says he had spent an overpayment on improving his lifestyle but could not produce too detailed accounting.<sup>11</sup>
39. 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:
- Her/his circumstances have changed detrimentally and irreversibly;
  - The change of circumstances was caused by receipt of the overpayment; and
  - She/he is not disqualified from relying on the defence; in particular, that she/he has acted in good faith.
40. 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. The Adjudicator explained that bad faith, in this context, was not synonymous with dishonesty.<sup>12</sup> It could 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 was often referred to as “Nelsonian knowledge.”
41. Bad faith did not, however, include acting negligently, so a careless recipient might still be able to invoke a change of position defence. If Mrs L was careless or negligent in not identifying the overpayment but did not have actual or Nelsonian knowledge that she was being overpaid, she would have still been acting in good faith. In making a judgement as to Mrs L’s knowledge at the time, it was not a question of deciding what she should have known; rather, it was a question of what she did know.
42. TP maintained that Mrs L would have received a Statement of Service with the May 2010 Letter detailing her period(s) of pensionable service. However, Mrs L said that she did not receive this and that it was only when she accessed her benefit statement online in 2017, that she became aware of the discrepancy in her pensionable service.
43. In the Adjudicator’s view, on the balance of probabilities, Mrs L did not receive the Statement of Service in May 2010. Based on the queries Mrs L raised with TP, if she had received the Statement of Service she would more likely have studied it and

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<sup>10</sup> *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.”

<sup>11</sup> *National Westminster Bank plc v Somer UK Limited* [2002]

<sup>12</sup> *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2002] EWHC at 135].

contacted TP at that time to query any discrepancy in her service. So, the Adjudicator was satisfied that Mrs L only became aware of the discrepancy in 2017, and contacted TP at the earliest opportunity.

44. Further, Mrs L's online benefit statement showed that a period of pensionable service was missing from her total service. It was the Adjudicator's view that it would have been more reasonable for Mrs L to have inferred from that information that her retirement benefits could potentially have been understated.
45. Consequently, it was the Adjudicator's view that Mrs L received the overpayment in good faith and did not have actual or 'Nelsonian knowledge' that she was being overpaid. The Adjudicator then considered whether Mrs L satisfied the other requirements of the good faith test.
46. The Adjudicator pointed out that if Mrs L satisfied all the requirements for a change of position defence, TP would not be required to reinstate Mrs L's pension to the inflated level. The defence would only relate to TP's recovery of the overpayment of past pension benefits.

#### **The overpaid lump sum**

47. Mrs L said that she used the entire lump sum she received from the Scheme in May 2010, to purchase bonds to "bolster her retirement income."
48. Mrs L received an overpayment of lump sum amounting to £702.16. As the overpaid lump sum was less than 5% of the lump sum Mrs L was entitled to on her retirement from the Scheme, it was the Adjudicator's view that Mrs L would not have done anything materially differently had she been paid the correct lump sum by TP.
49. So, in the Adjudicator's view, Mrs L did not have a change of position in relation to the overpaid lump sum she received from the Scheme.

#### **The overpaid monthly pension**

50. During the investigation Mrs L was given the opportunity to provide details of how the monthly pension was spent and copies of her bank statements so that a change of position defence could be considered. Mrs L did not provide copies of her bank statements to TPO or other documentation showing how the money was spent. Mrs L said that she used the monthly pension she received from the Scheme for general living expenses.
51. The overpaid pension Mrs L received each month amounted to between £15.72 and £19.91. Without evidence of how Mrs L spent the overpaid pension, the Adjudicator was unable to conclude that she changed her financial position as a result of receiving a higher monthly pension than she was entitled to.

## Other possible legal defences to recovery of an overpayment

52. There were other defences to recovery of an overpayment which might have required TP to continue to pay Mrs L's pension at the inflated rate; namely, estoppel and contract.

### *Estoppel*

53. 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:

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

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

54. For an estoppel by representation defence to exist, Mrs L needed to establish that there had been an unequivocal representation made by TP that her pension would continue at the higher rate. The Adjudicator explained that she had not seen that a representation of this nature was made to Mrs L. It was also the Adjudicator's view that a common assumption did not exist between the parties to allow an estoppel by convention to exist.

### *Contract*

55. The Adjudicator was unable to identify that the necessary elements for a contract exists in this case, namely, offer, acceptance, consideration, and the intention to enter into legal relations. The evidence did not support the view that TP intended to enter into legal relations in addition to those which already existed due to Mrs L's status as a retired member of the Scheme.

### *Limitation*

56. 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.

57. The Limitation Act is a legal defence against recovery of an overpayment if the scheme managers decide to recover the overpayment using the repayment method. However, the Limitation Act was not applicable in cases where scheme managers recover the overpayment using equitable set-off.

58. In the absence of any legal defence against recovery of the overpayment of £2,502.31, TP was entitled to recover it.

### **Recovery of the overpayment using equitable set-off**

59. Where there has been an overpayment in a statutory scheme equitable set-off may be available, subject to the requirements of section 91(6) of the Pensions Act 1995 (**the 1995 Act**), and any available defences Mrs L may have, to enable recovery of the overpayments by reducing future pension payments.

60. Under section 91(1) of the 1995 Act:

“(1) Where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme -

- (a) the entitlement or right cannot be assigned, commuted or surrendered,
- (b) the entitlement or right cannot be charged or a lien exercised in respect of it, and
- (c) no set-off can be exercised in respect of it,

and an agreement to effect any of those things is unenforceable.”

61. Section 91(5) provides that:

“In the case of a person (“a person in question”) who is entitled to a pension under an occupational pension scheme, or has a right to a future pension under such a scheme, subsection (1) does not apply to any of the following, or an agreement to effect any of the following:

[...]

- (f) subject to subsection (6), a charge or lien on, or set-off against, the person in question’s entitlement, or right, for the purposes of discharging some monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension.”

62. Under section 91(6):

“Where a charge, lien, or set-off is exercisable by virtue of subsection 5(d) (e) or (f) –

- (a) its amount must not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person in question’s entitlement or accrued right; and

- (b) the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme,

and where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff.”

63. It was accepted in *Burgess v BIC*<sup>13</sup> and the later *CMG (CA)*<sup>14</sup> case at first instance (without the court considering detailed arguments on the subject) that equitable recoupment was a form of set-off for the purposes of section 91(5). Where the amount of overpayment was being disputed, the trustees of an occupational pension scheme could not commence recovery of the overpayment under an occupational pension scheme without an order of a “competent court.” The same analysis applied in relation to the recovery of overpayments by way of set-off under a statutory public sector occupational pension scheme.
64. *CMG (CA)* also confirmed at first instance that a “dispute” for the purposes of section 91(6) extends to both a dispute about whether the overpayment was recoverable and the amount of each deduction going forward. The *CMG (CA)* judgment confirmed that TPO is not a competent court for the purposes of section 91 of the 1995 Act. Trustees or managers of an occupational pension scheme would be acting in breach of law and could be found responsible for maladministration if they failed to comply with these decisions.
65. Under section 117 of the 1995 Act, to the extent that any provision included in Part 1, which would include section 91, conflicted with the provisions of an occupational pension scheme, the provisions of the scheme were overridden by section 91. So, TP should not have sought to recover the overpayment using the mechanism of set-off without an order of a competent court.
66. It follows that TP was in breach of section 91 and acting outside its powers by seeking to recover the overpayment by deducting the overpayments from Mrs L’s pension payments without an order of a competent court. So, TP should, unless Mrs L agrees that the money should not be repaid, repay the money that was deducted in breach of section 91. However, this would not necessarily preclude TP from recovering the overpayment from future instalments of Mrs L’s pension using equitable set-off, provided it acts in accordance with the law (notably section 91). The total amount of past overpayments would remain the same.
67. Mrs L also raised concerns about the annual PI not being added to her pension in payment. TP provided evidence that the annual PI had been applied to Mrs L’s

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<sup>13</sup> *Burgess v BIC UK* [2018] 054 PBLR (040)

<sup>14</sup> *The Pensions Ombudsman v CMG Pension Trustees Ltd and CGI IT UK Limited* [2022] EWHC 2130 (Ch)

pension (see Appendix 2). The Adjudicator was satisfied that the annual PI had been applied to Mrs L's pension.

### **Maladministration**

68. The Adjudicator had no doubt that this matter had caused Mrs L 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 did not by itself, amount to maladministration.
69. In the Adjudicator's opinion, the following instances were examples of maladministration on the part of TP:-
- TP did not notify Mrs L until July 2018, that she had received an overpayment of retirement benefits and that it would be seeking recovery of the overpayment.
  - TP did not properly consider whether Mrs L had any legal defences against the recovery of the overpayment nor did it discuss a recovery plan with Mrs L before it commenced deducting the overpayment from her monthly pension. Furthermore, it commenced recovery from an earlier date than it had advised in the July 2018 Letter.
  - TP commenced recovery of the overpayment from Mrs L's pension without an order of a competent court in breach of section 91 of the 1995 Act.
  - TP did not consider ceasing recovery of the overpayment despite Mrs L requesting it did so, while she digested the information she had received from TP.
  - By proceeding on the basis that it was legally required to recover the overpayment without considering the circumstances of Mrs L's case and any legal defences, TP did not properly consider the Guidelines or its discretion under Regulation 114 of the 2010 Regulations. The error on the part of TP to follow a proper decision making process was sufficiently serious to justify a finding of maladministration and it should reconsider the matter.
70. In the Adjudicator's view, Mrs L was entitled to a distress and inconvenience award in recognition of the serious non-financial injustice she had sustained because of TP's maladministration in connection with this matter.
71. Both Mrs L and TP confirmed that they accepted the Adjudicator's Opinion.

### **Ombudsman's decision**

72. As both Mrs L and TP have accepted the Adjudicator's Opinion, I shall not make any further comments on this complaint other than to note that where there has been an overpayment in a statutory scheme, it can be said that there are in effect two cross-claims between the member and the manager of the scheme, which can be offset.

73. Specifically, Mrs L's pension entitlement is a statutory debt owed to her by TP and is liable to be offset against the overpayment, which is a debt owed by Mrs L to TP. Therefore, subject to any defences to the claim which Mrs L may have, it is inequitable that she can insist her full entitlement under the Scheme without allowing the claim for the overpayment to be satisfied. It follows that it is correct that, as touched upon in the Adjudicator's Opinion, TP can rely on equitable set-off as the basis for recovery, subject to the requirements of section 91(6) of the 1995 Act and any valid defences in law to recovery. Equitable set-off is similar but not identical to equitable recoupment, which applies in relation to trust based schemes but cannot apply to statutory schemes.

74. I uphold Mrs L's complaint in part.

## **Directions**

75. Within 28 days of the date of this Determination TP shall:-

- Repay Mrs L the overpayment it recovered from her by way of deductions from her pension.
- Consider afresh whether to recover the overpayment in accordance with the Guidelines and the Regulations, and after considering whether any defences are available. If TP determines that the overpayment is to be recovered, in full, it shall recover the overpayment at a rate of £100 per month over a period of 24 months followed by a final deduction of £102.31 (with the recovery amount pro-rated over the same period if TP decides to recover the overpayment only in part). TP should obtain an order from the County Court before proceeding, to comply with section 91(6) of the 1995 Act.
- Pay Mrs L £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

22 April 2024



## **Appendix 1**

### **76. 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**

77. Table detailing the PI applied to Mrs L's pension following the recalculation of her retirement benefits

<b>Effective date</b>	<b>Excess pension</b>	<b>Post 88 GMP</b>	<b>Pre 88 GMP</b>	<b>NIMOD</b>	<b>Total pension (per annum)</b>	<b>Gross monthly pension</b>
09/04/2018	£8,551.51	£873.60	£825.24	£22.04	£10,228.31	£852.36
08/04/2019	£8,756.75	£894.40	£825.24	£22.57	£10,453.82	£871.16
06/04/2020	£8,905.61	£909.48	£825.24	£22.95	£10,617.38	£884.79
12/04/2021	£8,950.14	£914.16	£825.24	£23.06	£10,666.48	£888.88
11/04/2022	£9,227.59	£941.72	£825.24	£23.77	£10,970.78	£914.24
10/04/2023	£10,159.58	£969.80	£825.24	£26.17	£11,928.15	£994.02