

Ombudsman's Determination

Applicant	Mrs E
Scheme	Teachers' Pension Scheme (the Scheme)
Respondent	Teachers' Pensions (TP)

Outcome

1. Mrs E's complaint against TP is partly upheld.
2. To put matters right, TP shall reduce the amount of the overpayment it is seeking to recover to £5,667.51. TP should also pay Mrs E £1,000 in total for the serious distress and inconvenience caused.

Complaint summary

3. Mrs E is unhappy because TP is attempting to recover an overpayment of £13,506.15 from her.
4. The overpayment arose because TP originally calculated Mrs E's retirement benefits using an incorrect pensionable service record.

Background information, including submissions from the parties

5. From 17 November 1975 to 8 February 1980, Mrs E accrued pensionable service in the Scheme. Mrs E then left the Scheme and applied for a refund of her contributions.
6. On 2 June 1980, TP fully refunded Mrs E's contributions and she received a payment of £613.03.
7. As a result of the refund, Mrs E no longer held any accrued pensionable service under the Scheme. However, due to an error, TP did not update its system and its records continued to show that Mrs E had pensionable service for the period 17 November 1975 to 8 February 1980.
8. On 1 February 1983, Mrs E re-joined the Scheme and began to accrue pensionable service.

9. In 2004, TP began to issue estimates of retirement benefits (**EORBs**) annually to Scheme members.
10. The EORBs were typically a two-page document. The first page included a breakdown of Mrs E's estimated benefits from both the Scheme and the state pension. This breakdown would typically be accompanied by various information, including a figure for Mrs E's pensionable service expressed in years.
11. On the second page, there would be a box called "Statement of Service". This listed the periods of employment Mrs E had undertaken at different locations, and the duration. At the bottom of the second page was a section which said: "Total reckonable service for calculation of personal retirement benefits", and a figure was given in years and days.
12. There were no calculations included within the EORBs for the benefits shown.
13. On 31 August 2008, Mrs E left the Scheme and ceased accruing pensionable service.
14. On 24 April 2014, TP undertook an internal review of its records and noted that Mrs E's pensionable service was incorrect. It logged a note stating that her record needed to be updated with the correct amount of pensionable service. However, unfortunately, no action was taken to ensure this happened.
15. On 16 July 2014, Mrs E reached normal retirement age and was eligible to apply for her benefits from the Scheme.
16. On 8 August 2014, Mrs E applied to receive her benefits from the Scheme.
17. On 19 September 2014, TP sent Mrs E a statement confirming her benefits (**the 2014 statement**). The 2014 statement included a breakdown of the tax-free lump sum she could expect to receive and the annual income she could expect to receive thereafter.
18. The 2014 statement said "Pensionable service: 13 years 0 days" on the left-hand side of the page. On the right-hand side of the page, it said "(see note 3)" in small font.
19. Accompanying the 2014 statement was a two-page document entitled "Your retirement statement explained". This document was printed in small font, and section 3 stated:

"Pensionable service – This is the amount of service used in the calculation of your benefits from [the Scheme]. The total includes your periods of employment for which you have paid pension contributions to [the Scheme], additional periods you may have purchased separately and any credit for benefits transferred-in from other pension schemes."
20. Shortly after the 2014 statement was sent, Mrs E received her lump sum payment, and her regular income came into payment also.

21. On 15 December 2018, Mrs E's income from the Scheme was suddenly reduced. In particular, she received £345.77 instead of the usual £513.36.
22. By 20 December 2018, Mrs E had noticed her income was lower and she rang TP. However, she states that the representative she spoke to could not explain the reduction in her income. She was told it would be investigated.
23. On 7 January 2019, TP wrote to Mrs E confirming that it had made an error when it calculated her pension benefits in 2014. It said it had incorrectly continued to record her employment from 17 November 1975 to 8 February 1980 as pensionable service. It explained that this ought not to have happened, because she had received a refund of contributions for that period.
24. TP said that Mrs E's benefits had been calculated based on a pensionable service of 13 years, when they ought to have been calculated based on 8 years 281 days.
25. TP said it reduced her income to the correct level in December 2018, and there was also an overpayment which Mrs E would need to repay.
26. TP confirmed that the overpayment was £13,506.15; of which she had received £5,667.51 in 2014 as part of her tax-free lump sum payment (**the lump sum overpayment**), and the remaining £7,838.64 had gradually been received since then as part of her income from the Scheme (**the income overpayment**).
27. On 16 January 2019, TP wrote to Mrs E to chase repayment of the overpayment.
28. On 21 January 2019, Mrs E rang TP to request that it stop sending letters chasing the overpayment, as she needed time to consider the information and assess what she was going to do. Mrs E raised a formal complaint shortly afterwards.
29. TP responded saying that the overpayment needed to be repaid, but it did offer her £500 for the distress and inconvenience caused.
30. On 29 March 2019, TP wrote to Mrs E asking whether she would be accepting its offer and requesting an update from her. Mrs E subsequently escalated her complaint and it was referred to the Department for Education (**DforE**).
31. On 17 September 2019, DforE wrote to Mrs E. It confirmed that the TP had made an error when it originally calculated her Scheme benefits, and that this was disappointing. However, DforE noted that TP had already apologised and offered Mrs E £500 for distress and inconvenience caused. DforE considered this was a sufficient response, and it confirmed that the overpayment would need to be repaid.

Summary of Mrs E's position

32. Mrs E says she was not aware she was being overpaid benefits from the Scheme. She does recall receiving a refund of her contributions for the period 17 November 1975 to 8 February 1980. However, she was not aware that this period was used to calculate her benefits from the Scheme when they came into payment.

33. Mrs E did receive the EORBs from TP, as well as the 2014 statement. However, she only glanced at the key information and did not read the documents in detail. She assumed that TP had correct information on its system, and she trusted it to carry out the necessary calculations to provide her with the benefits she was entitled to.
34. Mrs E states that, when she received the lump sum payment in 2014, she used it to pay off the remainder of her mortgage, which was approximately £7,000.
35. Mrs E has said that her finances were complicated between 2014 and 2018, when the overpayment accrued, and she has struggled to identify exactly how the remainder of the lump sum would have been spent. However, during that time, she did put savings towards setting up her business and installing a new bathroom in her home.
36. Mrs E has provided a significant level of information regarding her income and outgoings from 2014 to 2018. She has highlighted that this evidence demonstrates she had a low level of disposable income during the period the overpayment accrued, and she did not save regularly.
37. In addition, Mrs E has provided evidence of additional expenditure she incurred through gradually building up her disposable income. In particular, she bought her son expensive wedding gifts, and she also went on two extended trips abroad. She has emphasised that this is expenditure she would never have incurred, but for the additional income she was receiving, which she thought she could rely on.
38. In terms of TP's handling of her complaint, Mrs E has highlighted that she had no warning at all before her income was reduced in December 2018. In addition, she was asked to repay the entire overpayment on 7 January 2019, and chased just over one week later when she had not done this.
39. Mrs E has explained that £13,506.15 is a significant amount of money for her, and being asked to repay this whilst simultaneously having her income suddenly reduced was hugely distressing for her. She needed time to process the information and re-plan her future, and TP's approach did not acknowledge this at all. The fact that it also chased her for payment just over a week later hugely added to her distress.

Summary of TP's position

40. TP has confirmed that the error with Mrs E's pensionable service record was spotted before her benefits came into payment, and it is unfortunate that it was not rectified at the time. In acknowledgement of the fact it could have prevented the overpayment, it has offered Mrs E £500.
41. However, TP has argued that it will need to recover the overpayment.
42. The Scheme is governed by the Teacher's Pensions Regulations 2010 (**the Regulations**), and section 114 states:

“(2) The Secretary of State may-

...

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

43. Under the delegated authority of the Regulations, TP has a statutory right to recover the overpayment.
44. TP also has a responsibility to recover the overpayment, in line with the HM Treasury’s guidance: “Managing Public Money” (**the MPM Guidance**). In particular, Annex 4.11.2 of the MPM guidance 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 own merits.”
45. The MPM Guidance then sets out various factors which TP acknowledges it must consider when seeking to recover an overpayment, including any defences against recovery which the Scheme member may have.
46. In relation to defences against recovery, TP has acknowledged that the Limitation Act 1980 (**the Limitation Act**), may time-bar recovery of an overpayment in certain circumstances. However, in this case, TP states that section 5 of the Limitation Act applies, as the overpayment relates to a breach of contract. Under this section, TP has six years in which to bring a claim for recovery of the overpayment, which it has done.
47. In relation to other defences against recovery, such as good faith and estoppel, TP has highlighted that these will only apply if all the relevant criteria are met.
48. TP has not provided evidence that it obtained information from Mrs E, to assess whether she did meet the relevant criteria.

Adjudicator’s Opinion

49. Mrs E’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:-
 - The starting position in overpayment cases is to say that money paid in error can be recovered, even if the party responsible for the error has been careless. However, the Adjudicator considered whether any legal defences applied in Mrs E’s case, and found that one did.
 - The Adjudicator noted that TP was seeking to recover the overpayment by way of repayment, which meant the Limitation Act was applicable. In particular, under the

relevant sections of the Limitation Act, TP had six years in which to bring a claim against Mrs E for the overpayment.

- The overpayment started to accrue in September 2014, but TP was considered to have brought a claim by 17 December 2019, as this was the date its Formal Response was received by The Pensions Ombudsman's Office. As such, TP had a right of recovery to the overpayment which was not time barred by the Limitation Act.
- The Adjudicator considered whether a new contract had arisen between Mrs E and TP, such that she would be entitled to the overpayments. However, the Adjudicator did not consider that the necessary elements for a contract were in place. In particular, the evidence did not indicate there was any intention on the part of TP to enter into a legal relationship with Mrs E to provide her with benefits in excess of her Scheme entitlement.
- The Adjudicator considered whether it might be unconscionable for TP to recover the overpayment from Mrs E for reasons such as hardship. However, whilst TP had invited Mrs E to provide information about her current financial circumstances, she had not yet done so. So, TP had not had the opportunity to consider writing off the overpayments on grounds of hardship and the Adjudicator did not give further consideration to this defence.
- The Adjudicator considered whether Mrs E may have a change of position defence against recovery of the overpayment, and outlined the criteria for this defence, stating that Mrs E must be able to show that 1) her circumstances have changed detrimentally; 2) the change of circumstances was caused by receipt of the overpayment; and 3) she is not disqualified from relying on the defence.
- The Adjudicator did not find that Mrs E's circumstances had changed detrimentally in relation to the lump sum overpayment, as Mrs E had used this money to pay off her mortgage, improve her home and invest in her business.
- However, the Adjudicator was satisfied that Mrs E had spent the income overpayment irreversibly on expenditure she would not otherwise have had; most notably, expensive gifts for her son and long-haul trips.
- The Adjudicator also did not believe Mrs E ought to be disqualified from relying on a change of position defence, as the evidence indicated Mrs E had spent the income overpayment in good faith. The Adjudicator referred to *Webber v Department for Education* [2016] EWHC 2519 (Ch) and explained that Mrs E would be considered as acting in good faith if she did not have actual or Nelsonian knowledge of the income overpayment when she spent it. Based on the written evidence provided, and the telephone conversations held with Mrs E, the Adjudicator was satisfied that Mrs E had not spotted the error on her benefit statements and so she was not aware of the overpayment.

- Finally, the Adjudicator considered whether an estoppel defence may apply for the remainder of Mrs E's overpayment, but found it did not. The Adjudicator noted that estoppel is generally a harder defence to establish, and the circumstances of Mrs E's case meant she had not met the relevant criteria. In particular, Mrs E had not relied on the lump sum overpayment to her detriment.
- In relation to the non-financial loss Mrs E had suffered, the Adjudicator did not believe TP's offer of £500 was sufficient. The Adjudicator noted that TP had not given Mrs E any warning before it reduced her income in December 2018, and it had also chased her for the overpayment within two weeks of writing to her about it for the first time. The Adjudicator believed this was an unreasonable way of handling the matter, and that TP has caused Mrs E serious distress and inconvenience as a result for which an award of £1,000 was more appropriate.

50. Mrs E accepted the Adjudicator's Opinion but TP did not. In particular, TP stated:

- The evidence indicates that Mrs E received the EORBs and 2014 statement, and so she had information within her possession to spot the error which led to the overpayment. As such, there is evidence to indicate she knew her benefits were being overpaid, and so a change of position defence is not made out as she did not spend the income overpayment in good faith.
- There is insufficient evidence that Mrs E did not save regularly during the period the overpayment accrued, as the Adjudicator suggests. In particular, her bank statements show a positive balance which was topped up by transfers.

51. The complaint was passed to me to consider. TP's further comments do not change the outcome. I agree with the Adjudicator's Opinion and I will only address the additional points raised by TP.

Ombudsman's decision

52. TP has argued that Mrs E had sufficient information to spot there was an error on her pensionable service record. TP believes Mrs E should have read the information she received and that, if she had done, then she ought to have realised the forecasted benefits may be incorrect.
53. I agree that Mrs E had information within her possession which could have enabled her to realise her forecasted benefits may be incorrect. She had received the EORBs and the 2014 statement, and these indicated her benefits had been calculated based on her pensionable service record which included a period accrued between 1975 and 1980. However, whether Mrs E received the information is not the test.
54. The test for good faith in a change of position defence is a subjective one. So, it is not enough for TP to show that Mrs E was sent documents which contained incorrect information. It needs to be clear that, on balance, Mrs E spotted the error and appreciated, or at least suspected, its implications.

55. To a pension professional, it may have been identifiable from the information Mrs E received that there was an error which may lead to an overpayment. However, in relation to pension matters at least, I am satisfied that Mrs E is a lay person and I have kept that in mind.
56. There is no evidence that Mrs E fully reviewed or appreciated the information sent to her. Instead, she has made unprompted statements which indicate her understanding of pensions is very basic at best. For example, she told the Adjudicator that she did not understand the difference between her Scheme pension and her state pension.
57. Mrs E has said that, when she received the EORBs and 2014 statement, she glanced at her forecasted benefits and did not read the remaining detail. She adds that she assumed TP had the correct information about her service and she trusted it would calculate her benefits correctly based on this. Whilst this may not have been particularly prudent of Mrs E, on the balance of probability, I do find it believable in this case.
58. The EORBs and 2014 statement contained a lot of technical information, and I do not find that the error in question was easy to spot. The forecasted benefits were the most prominent information contained on the documents, and this would be the most relevant information for a Scheme member.
59. I also find that Mrs E's account has been genuine and consistent since she was informed of the overpayment. In particular, when asked whether she remembers receiving a refund of her contributions in 1980, she has been honest and said that she did.
60. It may have been easier for Mrs E to argue that she did not remember receiving a refund of contributions from nearly 40 years ago, as opposed to stating that she simply did not read the EORBs and 2014 statement fully or understand them. I find that this adds to her credibility.
61. Overall, taking everything into account, I find that Mrs E did receive and spend the income overpayment in good faith.
62. TP has also argued that Mrs E does meet the criteria for a change of position defence, as she has not spent the income overpayment irreversibly. In particular, TP argues that Mrs E saved money during the overpayment period.
63. Mrs E has sent us a significant amount of evidence to portray her financial circumstances during the period of the overpayment, including a number of bank statements for different accounts.
64. Her circumstances were relatively complicated during the period in question. Nonetheless, on balance, I find that the evidence she has sent supports a change of position defence.

65. Mrs E has provided a breakdown of her income and expenditure during the overpayment period. The breakdown indicates she had a total income of approximately £1,643, and total essential regular outgoings of approximately £1,217.
66. Therefore, Mrs E had a disposable income of approximately £426 per month during the period of the overpayment. This is without accounting for essential, but irregular, outgoings such as clothes.
67. Mrs E's statements regarding her income are supported by her bank statements, as the amounts she has quoted are identifiable from them. Her income was largely made up of her pension from the Scheme and profits from her part-time business. Her income was received into her Co-op bank account, and I can see that her business earnings fluctuated, meaning her income was often even lower.
68. The bank statements also support the expenditure figures Mrs E has provided in her breakdown, as these outgoings can be identified from them. In particular, her Santander accounts appear to have been where her household expenditure and bills were paid or deducted from, so she regularly transferred money from her Co-op account to her Santander account (and then later her Nationwide account, when she switched banks).
69. From looking at the Santander and Nationwide statements Mrs E has been able to provide, I note that her balance statements did fluctuate. However, there is no overall increase and generally it is clear that transfers out are for spending and not savings.
70. Mrs E has been able to clearly evidence that she spent money on travelling and expensive gifts during the overpayment period. I can see that she sporadically built-up extra money in her Santander account, and this was used to pay for the gifts directly. The evidence indicates that she used her credit card to fund her travels, and this was ultimately paid off using money from her current accounts.
71. Given Mrs E's overall disposable income during the overpayment period, I do not find it likely that she would have had this expenditure but for the income overpayment.
72. I also cannot see evidence that Mrs E saved regularly during the overpayment period, or where such savings would have gone.
73. TP has not suggested where Mrs E built up any savings, or which account she transferred money from in order to do this. There is one transaction in July 2018 of £1,000 which Mrs E has marked as savings on her Nationwide account. However, I can see that this money was transferred into the joint account she holds with her son. The joint account statement then indicates this was spent almost immediately – with a large proportion being transferred to her son's personal account. So, I do not consider this money saved.
74. I uphold Mrs E's complaint in part, as I find that she has a change of position defence against the income overpayment.

Directions

75. Within 21 days of the date of this Determination, TP shall reduce the amount of the overpayment it is seeking to recover to £5,667.51, and contact Mrs E to discuss an affordable repayment plan.
76. TP shall also pay Mrs E £1,000 for the serious distress and inconvenience which she has suffered, unless she agrees to offset this amount against the overpayment owed.

Anthony Arter

Pensions Ombudsman
22 June 2021