

## Ombudsman's Determination

Applicants	Mr D Tower House School Torbay Ltd ( <b>THST Ltd</b> )
Scheme	Teachers' Pension Scheme ( <b>the Scheme</b> )
Respondents	Teachers' Pensions

### Complaint Summary

Mr D has complained that Teachers' Pensions, having disallowed part of the pensionable service for Miss R, a former teacher at Tower House School, returned the employee contributions to her but refused to return a refund of employer contributions to him personally or in his capacity as the former sole director and shareholder of THST Ltd.

### Summary of the Ombudsman's Determination and reasons

The complaint is upheld against Teachers' Pensions because it has incorrectly offset overpaid contributions due to THST Ltd against contributions owed by Element Schools Ltd (**ES**).

## Detailed Determination

### Material facts

1. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
2. Mr D has said that from 1982 until 2012, he was the sole proprietor of Tower House School. THST Ltd was incorporated in 2012 and Mr D was the sole shareholder and director. From 2012, Tower House School was operated by THST Ltd. Mr D holds the physical building from which Tower House School operated in a separate pension fund.
3. THST Ltd rented the school's premises, initially from Mr D although over later years various percentages of the property were transferred into his self-invested personal pension, until May 2017 when it ceased trading. At that point ES, of which he was not a director or shareholder, leased the premises until it went into administration in December 2017.
4. He says there was no transfer of ownership of THST Ltd and there was no element of goodwill. The Director of ES, Ms Kirsten Clayton, merely leased the premises from his pension fund. This appears to be supported by an email from his solicitors, Trethowans, dated 3 August 2020, in which it confirmed that it did not act on the sale of any business to ES and simply dealt with the grant of two leases to ES, both dated 30 May 2017. Further, there is no record at Companies House that a transfer of ownership of the share capital of THST Ltd occurred. Between 2012 and 28 August 2018, when THST Ltd was dissolved by voluntary strike-off, Mr D was the sole director, shareholder and person exercising significant control of THST Ltd.
5. Miss R worked at Tower House School from March 2000 until her retirement on 30 November 2016. On 28 February 2017, Teachers' Pensions wrote to Mr D to say that part of Miss R's salary, which related to bursary duties, was not pensionable under the Teachers' Pensions Regulations 2014 (**the Regulations**). It asked for alternative salary figures excluding all such payments and said that, as a result, both Miss R and the school would be entitled to a refund of the excess contributions paid. The excess employer contributions totalled £28,803.62.
6. On 8 May 2017, Mr D sent Teachers' Pensions a copy of the contract of employment between Miss R and himself dated 10 March 2000. In this he is defined, as an individual, as Miss R's employer.
7. On 6 June 2017, Mr D emailed the Independent Education & Boarding Schools Team (**IEBT**). He said:

"I am writing to notify you that Tower House School was transferred to Element Schools Limited...on 30 May 2017. It has been transferred as a going concern and will continue to operate from its premises...I am not aware there will be any

changes to the education offered and I am aware of only minimal staffing changes. I have ceased to be Proprietor and have now retired...”

8. On 19 June 2017, Mr D wrote to Teachers’ Pensions regarding Miss R’s retirement benefits. In this letter he said: “I have now sold Tower House to Element Schools Limited...”
9. On 21 December 2018, Mr D wrote to Teachers’ Pensions to confirm that Miss R’s employment with THST Ltd had ended on her retirement on 30 November 2016. He stated his position as the sole director of THST Ltd, and proprietor of Tower House school, until 30 May 2017 when it ceased trading and explained the position regarding ES.
10. Mr D wrote to Teachers’ Pensions, on 8 January 2019, to make a formal complaint about its continued refusal to refund the employer’s pension contributions to him following its decision to disallow some of Miss R’s service in calculating her pension.
11. On 16 January 2019, Teachers’ Pensions replied to Mr D to confirm that unless he could provide evidence to show that the employer’s share of pension contributions was paid from his personal bank account, he was not entitled to receive a refund. It said that this was its final response and if Mr D remained dissatisfied, he could raise a formal complaint with the Department for Education (**DfE**) under the Scheme’s Internal Dispute Resolution Procedure.
12. On 4 February 2019, Peplows Chartered Accountants (**Peplows**) wrote to Teachers’ Pensions on Mr D’s behalf. It confirmed that THST Ltd had been dissolved on 28 August 2018 and therefore had no bank account. It said that when the company ceased trading Mr D was the only creditor of THST Ltd and was owed a substantial amount of money. Therefore, any funds due to THST Ltd should be paid to Mr D to settle part of that debt. It also enclosed a copy of the final trial balance for THST Ltd which it said showed that Mr D had personally paid more than £275,000 to ensure that pension payments and salaries were paid when the company had insufficient funds to do so.
13. On 11 March 2019, Peplows wrote to the DfE setting out Mr D’s position regarding the refund of the employer contributions.
14. The DfE responded to Peplows on 2 May 2019. It said that it had established that Tower House School continued as an entity after May 2017 and continued to be registered as an independent school and participate in the Scheme after this date. Its IEBT records showed that although Mr D ceased to be the proprietor of Tower House School, another proprietor took over.
15. It said that as it was Tower House School that participated in the Scheme as the employer and paid contributions to the Scheme, Teachers’ Pensions was correct in its approach and it did not uphold Mr D’s appeal.

16. Teachers' Pensions has confirmed that the excess employer contributions amount to £28,803.62. Miss R received a refund of her excess member contributions at the end of May 2018.

17. Summary of Mr D's position:-

- THST Ltd ceased trading on 30 May 2017. At that time he granted a lease of the premises to ES. He did not sell THST Ltd to ES; it was a straightforward arm's length lease agreement. He was content not to receive any consideration for goodwill because Tower House School was running at a loss.
- He accepts that he misstated that he had "sold Tower House to Element Schools Ltd" but maintains that he was unaware of the implications of this statement and that he merely wished to convey that he and THST Ltd were no longer responsible for the payment of teachers' and employers' pension contributions.
- Neither Tower House, the building, nor THST Ltd, nor any fixtures and fittings nor stock were sold to ES or its directors. He received no consideration at all for the transfer of the business.
- He did not receive the refund of his Employer's contributions and was told by Teachers' Pensions that any reimbursement was to be made to ES. He disputes this as Miss R was never employed by ES.
- Teachers' Pensions has said that Tower House School continued as an entity after May 2017. It did not. Contributions to the Scheme after May 2017 were from the Element School.
- At the time of Miss R's retirement, in November 2016, he was her employer and therefore he is due the refund of contributions.

18. Summary of Teachers' Pensions' position:-

- Mr D had sold the school at about the same time as Miss R had retired, so the refund of the employer's share of the contributions was due to the new owners.
- Tower House School employed Miss R. It was therefore responsible for the employer's pension contributions and it is the entity to which any refund of contributions must be made. A refund of employer contributions cannot be made to an individual.
- IEBT accepted Ms Kirsten Clayton as the proprietor of Tower House School in October 2017. The school carried on being treated as registered until contact was received from the Administrator of ES in January 2018.
- After this, IEBT wrote to Ms Clayton at the school address to inform her that, as it had been confirmed that the school had closed, the school's particulars had been deleted from the register of Independent Schools.

- There is a lack of any correspondence from Mr D regarding closing Tower House School at the time of his cessation as proprietor.
  - It is the school that participates in the Scheme as an employer and not any individual, meaning that any monies repayable would be to the school and not to any individual. Because the school was not withdrawn from the Scheme nor otherwise excluded prior to Mr D ceasing to be the proprietor, the school continued to participate in the Scheme after Mr D ceased to be the proprietor.
  - The school went into administration owing more than £34,000 to the Scheme and the £28,803.62 that it would otherwise have returned to the school is to be used to offset this debt.
  - The information held by IEPT supports Teachers' Pensions' position that the school continued to operate beyond Mr D ceasing to be proprietor, a position that is further supported by the correspondence from the time.
  - Under the Regulations, the school participates in the scheme as the employer, not the proprietor. A participating school only ceases to participate where the Scheme Manager issues a notice to that effect, which usually occurs following a written application to leave from the proprietor.
  - Mr D was never due a refund, the school was, and if the school had not gone into administration owing contributions to the Scheme, then this refund would have been made to the school.
19. Mr D's complaint was considered by one of our Adjudicators who issued an Opinion on 19 January 2022 (**the Opinion**) in which he concluded that there had been maladministration on the part of Teachers' Pensions.
20. Following receipt of the Adjudicator's Opinion, Teachers' Pensions made the following additional comments:-
- With respect to the definition of 'employer', following further research, it noted that the Regulations have their basis in the Public Service Pensions Act 2013 (**the 2013 Act**), which contains the power to make scheme regulations. Definitions in the 2013 Act carry over into the Regulations made under the Act, except where the Regulations provide for a different interpretation. Under the Act, an employer is defined in section 37 as:
    - any employer of persons to whom the scheme relates; or
    - the person responsible for the remuneration of an officeholder to whom the scheme relates; or
    - other person (in addition to or instead of those mentioned in (a) or (b)) as scheme regulations allow.

- It agrees that the definition of employer in the Regulations is very narrow and does not cover the circumstances in this case. As stated above, this means that the definition under the Act applies instead. Therefore, in accordance with the definition in the Act, it concedes that an individual could be the employer of a teacher and a Scheme employer under the Regulations.
- However, although it now accepts that Mr D was Miss D's employer while he was a sole trader, it believes that he ceased personally to be her employer when THST Ltd was incorporated in 2012. In its view, when individuals change their businesses from a sole trader model to a limited company, there is a fundamental change in that it is the company that owns the business, not the individual. It therefore believes that teachers employed at the school, including Miss R, automatically became employees of THST Ltd in 2012, with the liability for contributions then sitting with the company and not Mr D personally. This leads it to conclude that Mr D was not a Scheme employer nor the employer of teachers. It therefore still considers that there is no basis for the incorrectly paid employer contributions to be returned direct to Mr D.
- To summarise, its view is that once Mr D ceased to be sole trader in 2012, not only was he no longer the employer in terms of the Regulations (the Scheme employer), but the company was also the employer of Miss R, despite her contract not being re-issued at that time. It believes that THST Ltd, albeit essentially owned and run by Mr D, was the scheme employer and employer of Miss R.
- It agrees that it is unclear how THST Ltd became ES. However, based on the evidence it holds it continues to consider ES to be the successor employer for THST Ltd. As neither legal entity now exists, the decision to use the refund to offset unpaid contributions due to the Scheme continues to seem reasonable.
- Its experience of schools being transferred or taken over mostly comes from the process of local authority schools converting to academies. That experience shows it that both assets and liabilities are passed on to the new school, and it considers that will normally be the reality in the case of independent schools too.
- It appreciates that Mr D has said that he erroneously informed Teachers' Pensions that he had sold the school when he meant to convey that the staff would be employed after 30 May 2017 by someone else. However, it considers the weight of evidence supports the conclusion that Tower House School was sold as a going concern to ES.
- It has looked at Companies House records and, while it agrees that there is no indication that THST Ltd was transferred to the new proprietors via a share sale, it does not consider that this does not mean that Tower House School was not sold, or in some other manner passed on to ES.

21. Teachers' Pensions has made further comments as follows:-

- The overwhelming weight of the evidence is that the business did transfer as a going concern and in those circumstances it would be wrong to say that the refund can only be due to THST Ltd. Rather, the business having transferred, there is the real possibility the obligation [in respect of payment of the refund] transferred and thereafter became due to ES.
- Not only did the school continue to trade post May 2017, from the same premises and with the same staff and pupils but there is no suggestion that another school either applied for or was accepted for the purposes of Ofsted inspections or for continued membership of the pension scheme.
- Mr D's statements, in June 2017, that "Tower House School was transferred to Element Schools Limited...as a going concern", that he was "not aware there will be any changes to the education offered and...of only minimal staffing changes" and that he had "now sold Tower House to Element Schools Limited..." are significant in that context. Had any of the parties involved understood this to be anything other than a transfer of the school these provisions would have been re-engaged.
- There being no record of a sale of THST Ltd with Companies House means only that the transfer took place by way of an asset sale rather than stock sale. Similarly, the fact that solicitors acting for Mr D in the grant of leases to ES did not act in the sale of any business does not mean there was not one. Neither does the fact that Mr D only leased to ES the premises from which the school was run negate there having been transfer of the business concomitantly.
- There is no reason why the debt owed by Teachers' Pensions, might not have transferred with the business during which it arose. It is entirely within the gift of the parties to such a transaction to agree assignment of such an asset. There is no presumption either way. Precedents for small scale transfers typically make optional provision for such assignment, which can be effective even without notice to the obligor.
- It disagrees that the terms under which the business transferred are not relevant. In its view, they are determinative, and for the complaint to be upheld there needs to be a finding that the terms did not include the transfer of this particular asset.

## **Conclusions**

22. This complaint was originally brought by Mr D, in a personal capacity, and is to do with Teachers' Pensions refusal to refund excess employer contributions in respect of Miss R to him. It is not to do with the decision to partially disallow Miss R's pension entitlement from 2012. That would be for her to pursue and I have put aside any comments regarding that aspect of this case.

23. That THST Ltd was incorporated in 2012 and Mr D was the sole shareholder and director is not in dispute and is evidenced by Companies House records.
24. Teachers' Pensions has raised the issue of the transfer of Miss R's employment when THST Ltd was incorporated in 2012. It says that Miss R's employer automatically transferred from Mr D to THST Ltd. Mr D has confirmed that no new employment contract was issued to Miss R. So, on that basis, I can only assume that the reference to an automatic transfer in 2012 is to the operation of the Transfer of Undertakings and Protection of Employment Regulations 2006 (**TUPE**).
25. Broadly, TUPE provides that when an undertaking (usually a business) is transferred from one entity to another, an employee working for that undertaking is automatically transferred to the new entity on the same terms and conditions of employment. One element that does not automatically transfer (in most circumstances) are rights under an occupational pension scheme. However, this is a moot point here as it is not in dispute that Miss R's membership of the Scheme continued uninterrupted after the incorporation of THST Ltd.
26. The letter from Peplows to Teachers' Pensions requesting that the contributions be repaid to Mr D personally, indicates that the incorporation in 2012 might have amounted to a transfer to which TUPE would apply. However, it is not in my jurisdiction to make a finding of law about whether the incorporation of THST Ltd amounted to a TUPE transfer of the Tower House School business. In any event, the key question for me to consider is who was responsible for paying Miss R's contributions. Under Regulation 192(1) of the Regulations, relevant extracts of which are set out in the Appendix, it is the member's employer who is responsible. "Employer" is not further defined in the Regulations where the school is not maintained by a local authority, as was the case with Tower House School.
27. I agree that, in the absence of a general definition of "employer" in the Regulations, it is reasonable to refer to the definition in section 37 of the Public Service Pensions Act 2013. Under the second limb of that definition, an employer is defined as "the person responsible for the remuneration of an office-holder to whom the scheme relates."
28. I note that in its response to Mr D, dated 16 January 2019, Teachers' Pensions challenged him to produce evidence to show that the employer's share of contributions was paid from his personal account. The fact that he did not do so at that stage would suggest that the employer contributions were met from company funds. Furthermore, Mr D has included testimony from Peplows, together with evidence in the form of company accounts, to the effect that over the last two years of THST Ltd's existence he personally paid £275,000 "to ensure that such expenses as pension payments and salaries were paid when the company had insufficient funds to do so". The implication being that THST Ltd was ordinarily liable for employer contributions, but that Mr D had to subsidise these from approximately 2015 onwards.
29. Teachers Pensions now accepts that an individual can be the employer of a teacher and a Scheme employer under the Regulations. For his part, Mr D appears to



concede that it was THST Ltd, not himself in a personal capacity, that was ordinarily responsible after 2012 for paying Miss R's contributions.

30. So, it would now appear to be generally agreed that, following the incorporation of THST Ltd in 2012, it became Miss R's employer and it was responsible for the payment of pension contributions.
31. If that is the case, and THST Ltd indeed became responsible for paying the employer contributions from 2012, I cannot direct that Teachers' Pensions should return the contributions direct to Mr D even though he was the sole shareholder, director and creditor of THST Ltd, because THST Ltd is a legally distinct entity.

### **Addition of THST Ltd to the complaint**

32. At the time Mr D brought his original complaint, THST Ltd had been dissolved and the complaint was brought solely by Mr D in his personal capacity. During the investigation, Mr D applied to court to restore THST Ltd to the register, and a consent order granting the restoration was issued on 3 February 2022. Mr D has requested to amend his complaint to now include THST Ltd as an applicant, I have consented to this amendment and I am prepared to consider Mr D's complaint brought both as an individual and in his capacity as a director on behalf on THST Ltd. The remaining issue before me now is whether it is reasonable for Teachers' Pensions to offset the overpaid contributions against the debt owed to it by ES.

### **"Sale and purchase agreement"**

33. By referring to ES as a "successor employer" Teachers' Pensions seems to be advancing the argument that there was a sale of the business operated by THST Ltd to ES, even if there was no sale or purchase of the share capital of THST Ltd itself.
34. I acknowledge it is not entirely clear what was transferred from THST Ltd to ES (if anything). ES has since gone into administration. Page 3 of the Administrator's report for ES (**the Administrator report**) states:

"In May 2017 Element Schools Limited entered into a Sale and Purchase Agreement with [Mr D] for the acquisition of the Tower House School Torbay Limited... operating from leasehold premises owned by [Mr D]."
35. However, neither a share sale nor any change in control of THST Ltd are reflected in Companies House records for THST Ltd, which show only Mr D as a director, shareholder and person exercising significant control. Mr D has also confirmed that THST Ltd was not sold to ES, but that he simply leased the building to it. This also appears to be supported by the email from Trethowans which states that it "did not act on the sale of any business to Element Schools Limited."
36. But this account cannot be entirely reconciled with Mr D's email of 6 June 2017 to the DfE informing it of a new proprietor, Ms Kirsten Clayton, on 5 June 2017. This strongly suggests that the business of Tower House School (not THST Ltd) was

indeed transferred to ES as a going concern, but for nil consideration. Tower House School was then renamed Element School.

37. I acknowledge Teachers' Pensions' argument that the circumstances of the business sale or transfer for nil consideration (if that is what occurred) are not clear, and Mr D's explanation is not always entirely consistent. However, my role is to determine the complaint brought by Mr D, and the existence or otherwise of a written transfer or sale agreement between Mr D and ES is only relevant to the narrow extent that any such agreement included a term that addressed whether the right to receive employer contributions refunds in respect of Miss R's employment passed to ES or remained with Mr D or THST Ltd.
38. Teachers' Pensions have stated that for Mr D's complaint to be upheld, it is necessary to make a finding that there was a term in a transfer agreement between Mr D/THST Ltd and ES that the right to receive refunded employer contributions did not pass to ES. I consider that this argument misplaces the burden of proof, given that it is Teachers' Pensions that is making the assertion. It is for Teachers' Pensions to establish, on the balance of probabilities, that there was, firstly, an asset sale or transfer of Tower House School to ES that was documented by a written agreement and, secondly, that it was a term of this agreement that the refund of employer contributions relating to Miss R would be payable to ES.
39. I do not consider that TP have presented sufficient evidence that either a written agreement exists or that, if it did exist, it contained a term addressing which party had a right to receive the refund of employer contributions due in respect of Miss R. Mr D has been consistent in stating that there was no such written agreement, which is supported by the statement made by his solicitors. It is of course possible, as Teachers' Pensions suggests, that Mr D might have instructed a different firm of solicitors to draw up such an agreement, but it presents no positive evidence that this happened. Unsupported by evidence, I do not find this suggestion persuasive. Although Mr D has used imprecise language at times in his submissions to describe how Tower House School came to be operated by ES, he has co-operated fully with my investigation and I do not consider it likely that he has deliberately withheld information.
40. Even if I accepted there was sufficient evidence to suggest that a sale or transfer occurred, and that this was documented in a written agreement, it is not in dispute that Miss R retired before any such transaction took place and there can be no continuity of her employment between THST Ltd and ES, even if the business of Tower House School was transferred to ES. If Teachers' Pensions is correct that THST Ltd was Miss R's employer after 2012, then the refund of contributions in relation to her service can only be due to THST Ltd, not to the business of Tower House School, or ES. Indeed, the need to recalculate Miss R's benefits, and then refund contributions, became known and due before THST Ltd had ceased to operate the school – and so the refund arguably should have been paid prior to that cessation in any event. Furthermore, there is no contractual or other relationship between Miss R and ES and so it would be inherently unlikely that any such agreement would have

provided for the right to receive a refund of employer contributions relating to Miss R to transfer to ES. Accordingly, I consider that I do not need to see a copy of a sale agreement (if any such agreement exists) between Mr D and ES.

41. Despite the inconsistency in the accounts of what occurred in 2017, I consider that it does not ultimately detract from the conclusion below.

### **Offsetting contributions**

42. I acknowledge it is possible for Teachers' Pensions to argue that there is a degree of continuity between the business operated by THST Ltd and of ES. On a practical level, a school continued to be run from the same building and there is clearly a degree of continuity between the operations of the two entities, which Mr D effectively acknowledges in his email of 6 June 2017 to the DfE (see Para 7 above).
43. Teachers' Pensions appears to rely on this continuity to allow it to "offset" the contributions owed to the Scheme by ES and those owed in respect of Miss R as a self-help remedy. However, as set out above, I do not consider that it is the continuity of the school as a business that is key, but rather who Miss R's employer was under the Regulations as it was the responsibility of these individuals or entities to make the required employer contributions. I consider that the employer can only have been Mr D or THST Ltd, and from 2012 was likely to have been THST Ltd.
44. The school as a business had no legal personality and could not have been responsible for making or receiving refunded contributions. So, the continuation of the school as a business (if that is indeed what happened) is not relevant to the issue of the contributions. The refunded contributions are, as set out above, due to Miss R's employer. It would appear to me that the unpaid contributions in respect of other staff members after June 2017 are due from an entirely different person or entity, the proprietor or ES.
45. Accordingly, I do not agree that Teachers' Pensions can properly set-off payments in the manner it is attempting to as the two sums are insufficiently connected and neither Mr D nor THST Ltd are liable to pay the later unpaid contributions. I also cannot see a statutory right of set-off in the Regulations which would allow Teachers' Pensions to set-off the sums in the manner it has attempted.
46. Based on the evidence and the balance of probabilities, I do not consider that I can safely direct that the contributions are paid direct to Mr D personally if he was not responsible for paying the employer contributions after 2012. But, with THST Ltd now added as an applicant, and given that THST Ltd was incorporated on 19 March 2012, while the refunded pension contributions related to Miss R's service from August 2012, I am confident that I am directing that the contributions are being returned to the party that had responsibility for paying them.
47. So to summarise, I find the refund of employer contributions in respect of Miss R are payable to THST Ltd. The contributions are not payable to ES, and Teachers'

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Pensions are not able to offset this sum against unpaid contributions owed by ES in respect of different members.

48. I uphold the complaint.

**Directions**

49. Within 28 days, Teachers' Pensions shall pay to THST Ltd:

- the sum of £28,803.62, being the excess employer contributions paid in respect of Miss R's disallowed service; and
- late payment simple interest on the above amount from 1 June 2018 (being the approximate date Miss R was paid her refund of contributions and therefore a reasonable date to assume the employer contributions would have been refunded to THST Ltd) to the date of payment. Interest to be at the Bank of England base rate.

**Dominic Harris**

Pensions Ombudsman  
17 October 2023

## APPENDIX

### Regulation 192 of the Teachers' Pension Scheme Regulations 2014

192

(1) In respect of each pay period, the employer of a person (P) in pensionable service in that pay period is to pay contributions on P's pensionable earnings in the pay period at the following percentage rate of those earnings—

- (a) 14.1% from 1st April 2015 until 31st August 2015 inclusive;
- (b) 16.4% from 1st September 2015;
- (c) at the rate determined in each successive valuation report with effect from a date to be notified to employers by the scheme manager.

(2) Exclusion from pensionable service for any period under paragraphs (1) and (2) of regulation 24 does not apply to paragraph (1) or to Chapter 5 of this Part.

...

“employer” , for a person employed by the governing body of a school maintained by a local authority, means—

- (a) the local authority; or
- (b) for the purpose of an additional pension election, the local authority and the governing body;