Ombudsman's Determination

Applicant:	Mr D
Scheme:	Teachers' Pension Scheme (**TPS**)
Respondent:	Teachers' Pensions

Outcome

1. I do not uphold Mr D's complaint and no further action is required by Teachers' Pensions.

Complaint summary

2. Mr D has complained that Teachers' Pensions is seeking to recover £5,742.50 which it says has been overpaid to him.

Background information, including submissions from the parties

Background

3. Mr D's late wife, Mrs D, was a member of the TPS. In September 1996, Mrs D died while she was still in pensionable service.

4. At the time of Mrs D's death, the Teachers' Superannuation (Consolidation) Regulations 1988 (the **1988 Regulations**) were in force. The 1988 Regulations provided for the payment of a short-term and a long-term widower's pension.

5. The conditions for payment of a long-term widower's pension were set out in Regulation E28, which provided:

> "(1) A pension under regulation E25 payable to a surviving spouse or a nominated beneficiary ("an adult pension") is to be paid -
>
> (a) from the day on which any short-term pension that became so payable under regulation E23 ceases to be payable, or
>
> (b) if no short-term pension became payable, from the day after that of the death.

(2) Subject to paragraph (3), an adult pension is payable for life.

(3) Unless the Secretary of State determines otherwise in the particular case, and subject always to regulation E1(3)(c) and (d) (guaranteed minimum pension for surviving spouse), an adult pension is not payable during or after any marriage or period of cohabitation outside marriage."

6. On 15 October 1996, Teachers' Pensions wrote to Mr D confirming that he was entitled to a widower's pension. The letter referred to an enclosed form, for Mr D to complete and return, and a leaflet[1] explaining the benefits payable to a teacher's beneficiary.

7. On 2 December 1996, Teachers' Pensions wrote to Mr D explaining that he would receive a short-term pension payable for three months; followed by a long-term pension of £513.34 per annum payable from 1 January 1997. Teachers' Pensions said:

> "Instructions for payment have been sent to the Pensioner Services Section. To apply please complete the enclosed TFB50 form and return it immediately to the Pensioner Services Section at the above address."

8. From 1 January 1997, Mr D began to receive a widower's pension.

9. On 8 April 2001, Mr D telephoned Teachers' Pensions to notify it of a change of address.

10. In 2004, Teachers' Pensions began issuing annual newsletters to pensioner members of the TPS. The newsletters included reminders to inform Teachers' Pensions of any changes in the pensioner's circumstances. For example, the 2010 newsletter stated:

> "Changes we need to know about
>
> Please inform us:
>
> …
>
> + If you receive a pension by virtue of being a dependant of a deceased member and subsequently enter into a new marriage or partnership …"

11. In the later years, the format of the newsletters changed. For example, the 2016 newsletter stated:

> "**Important:**
>
> To ensure the correct pension is paid to you, it's vital that we have your most up to date information on our records.

[1] Teachers' Pensions has provided a copy of Leaflet 450 May 1995 which it believes would have been sent to Mr D.

Please tell us:

- If you remarry, enter a civil partnership or co-habit and you are in receipt of a spouse's, civil partner's or nominated financial dependant's pension, provided by a person who retired or ceased pensionable service before 1 January 2007 ..."

12. On 13 December 2006, Mr D wrote to Teachers' Pensions notifying it of a change of address. On 16 December 2006, Mr D began to co-habit with a partner.

13. On 24 October 2010, Mr D remarried. On 25 October 2010, he telephoned Teachers' Pensions to provide it with new bank details.

14. In 2014, Teachers' Pensions began an exercise to check the current circumstances of individuals in receipt of an adult beneficiary's benefit. It issued declarations to be completed and returned by the beneficiary. This exercise was completed in stages.

15. Teachers' Pensions sent Mr D a declaration to complete in May 2016. On 16 May 2016, Mr D telephoned Teachers' Pensions. He said that he was concerned that his widower's pension might be ceased and that he relied upon this income. Mr D said he had not received any previous notifications that his widower's pension might cease if he remarried. He said that all he had received were P60s. The person Mr D spoke to said she would check the file. She said Teachers' Pensions would usually say something in the letter notifying a person of their benefits. She said she could not find anything on Teachers' Pensions records to indicate that he had previously been made aware of the conditions for payment of a widower's pension. She suggested that Mr D complete and return the declaration and inform Teachers' Pensions that he had not been aware that co-habiting or remarrying meant he was no longer entitled to his pension. Mr D said it would not have stopped him getting married but it had come as a blow to be told he might lose the pension.

16. On 23 May 2016, Teachers' Pensions received a completed declaration from Mr D.

17. On 14 July 2016, TP wrote to Mr D acknowledging receipt of the declaration and apologising for the delay in responding. It informed Mr D that his widower's pension ceased in the event of remarriage and, since his pension had continued after his marriage, there had been an overpayment of £3,911.06 (net). Teachers' Pensions said it was obliged to seek recovery of the overpayment and asked Mr D to repay via card payment, BACS transfer or cheque. It said it had always been the case that a spouse's pension would cease on remarriage or cohabitation and referred Mr D to an enclosed form (**TFB50**) which it said would accompany an application for benefits. Teachers' Pensions also referred Mr D to the annual newsletters. It said, if he would find it difficult to repay the overpayment or he would like to discuss repayment, he could contact its finance team.

18. In response to a query from Mr D, Teachers' Pensions wrote to him, on 1 August 2016, referring to the 1988 Regulations and quoting Regulation E28 (see paragraph 7). It said it did not have a copy of a TFB50 completed by Mr D on its records but the

pensions payroll administrator would have required one. In response to a further query from Mr D, Teachers' Pensions wrote again, on 19 September 2016, explaining that the 1988 Regulations applied at the time of his wife's death and he would not have received a copy of the regulations. It sent a reminder for repayment on 30 September 2016.

19. In response to a letter from Mr D, Teachers' Pensions wrote to him, on 21 October 2016, explaining his next course of action would be a formal complaint and providing an address to write to. Mr D submitted a complaint on 4 November 2016. Teachers' Pensions responded, on 17 November 2016, again referring to the information contained in the newsletters. It said its process was now supported by the issuing of declaration forms. It referred to guidance from HM Treasury concerning the recovery of overpayments from public funds. Teachers' Pensions said it appreciated that the situation would have come as a shock to Mr D and it would take his personal circumstances into account. It said, if he wished to discuss repayment over a longer period, he should contact its finance team. It also gave Mr D details of how to take his case to the Department for Education (**DfE**).

20. The DfE reviewed Mr D's case and asked Teachers' Pensions to provide a more detailed response. Teachers' Pensions issued its response on 22 December 2016. This is summarised as follows:-

- The 1988 Regulations stated that an adult beneficiary's pension is not payable during or after any marriage or period of cohabitation.

- When widowers' pensions were introduced, in 1988, they were contingent upon the individual's status as a widower of the deceased member. It followed that, if that status changed, the entitlement was lost.

- The information Mr D had been provided with in his telephone call on 16 May 2016 was incorrect. There was evidence that he had been provided with information regarding the need to notify it if he remarried or cohabited. Teachers' Pensions enclosed a copy of the letter sent to Mr D with the application form and a copy of Leaflet 450.

- The letter sent to Mr D informing him of the benefits payable also included a TFB50. This was required in order for his widower's pension to be put into payment. The fact that Mr D's pension was put into payment confirmed that he had completed a TFB50. The notes to the TFB50 explained that the widower's pension continued for life unless the claimant remarried or cohabited.

- Reminders to notify it of changes in circumstances were issued in the annual pensioner newsletters.

- It had become apparent that some adult beneficiaries were not informing it of changes in their circumstances. It, therefore, decided to undertake an exercise to check the current circumstances of all beneficiaries.

- It noted that Mr D had said he had been cohabiting since 2007. His widower's pension should have ceased in 2007 and he was asked for the exact date his cohabitation commenced. It would have to recalculate the overpayment. If Mr D did not confirm the exact date of cohabitation, it would need to recover his widower's pension from 1 January 2007.
- Mr D could appeal further to the DfE within six months of the date of Teachers' Pensions' letter.

21. In response to a query from Mr D, Teachers' Pensions wrote to him again on 18 January 2017. It explained that, at the time Mr D's pension was put into payment, it had recently taken over the payment of pensions from the previous administrator. It said the previous administrator continued to calculate the amounts payable until 1998 and the TFB50 was one of its forms. Teachers' Pensions said the TFB50 would have been sent to the previous administrator and it did not hold copies of its paper files. It reiterated that Mr D's pension could not have been put into payment unless a TFB50 had been completed and returned. Teachers' Pensions disagreed that its exercise to check the circumstances of adult beneficiaries was an acceptance that previous processes were inadequate. It confirmed that the newsletters had been issued with pensioners' P60s and said it was unlikely that one had not been included with Mr D's P60 for 18 years. It said the 2004 newsletter had been printed on the same piece of paper as the P60[2].

22. On 26 January 2017, Teachers' Pensions notified Mr D that the overpayment was £5,742.50 (net). It sent Mr D a reminder on 19 March 2017.

23. Mr D wrote to Teachers' Pensions on 24 April 2017. It responded on 19 July 2017. Teachers' Pensions' response largely reiterated the points made in its earlier letter. It enclosed a copy of the 2006 newsletter. Teachers' Pensions also provided an income and expenditure form for Mr D to complete so that it could consider a hardship claim.

24. On 18 April 2018, Teachers' Pensions wrote to Mr D noting that it had not heard from him since its letter of 19 July 2017. It said it was required to continue to seek recovery of the overpayment and asked Mr D for an update. A further request for an update was sent to Mr D on 20 July 2018.

25. In response to a letter from Mr D dated 17 August 2018, Teachers' Pensions wrote to him, on 4 September 2018, saying it had reviewed his case and was satisfied it had answered his questions in previous correspondence. Teachers' Pensions said Mr D had been advised he could appeal to the DfE within six months of its letter of 22 December 2016. It said an appeal might now be considered out of time but suggested he write to the DfE explaining why he had not appealed within the six months. Teachers' Pensions referred to the income and expenditure form sent to Mr D previously.

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[2] Mr D disagrees with this statement.

26. Mr D wrote to Teachers' Pensions on 17 September 2018. It responded, on 28 September 2018, as follows:-

- It was not disputed that Mr D had been given incorrect information on 16 May 2016. This did not alter its position that he had been informed about the conditions for entitlement to his pension.
- It was irrelevant whether Mr D had received a newsletter in 2016. The newsletters were issued automatically with the P60s and it was highly unlikely that he had not received any of those sent in the 18 years he had been receiving P60s.
- It did not have a copy of a completed TFB50, but Mr D's pension could not have been put into payment unless a TFB50 had been completed and returned.
- It acknowledged that the copy TFB50 sent to Mr D previously dated from 1998. It enclosed a copy of the version used prior to 1998. The wording had not changed.
- No interest would be applied to the overpayment.
- It required completion of the income and expenditure form to consider whether recovery of the overpayment would cause Mr D financial hardship. It enclosed a copy of HM Treasury's guide "Managing Public Money".
- It had not previously stated that other members were unaware of the conditions for payment of their adult beneficiaries' pensions; rather, it had said that some beneficiaries were failing to inform it of changes in their circumstances.
- It had referred Mr D's case to the DfE because it felt a stalemate had been reached and it could not assist him any further.

27. The DfE issued a response, on 12 October 2018, declining Mr D's appeal. It noted that Mr D did not feel that he should be liable for the overpayment because he had been unaware that his widower's pension would cease on cohabitation or remarriage. The DfE said Mr D would have received a death benefits pack in 1996, which would have included Leaflet 450. It referred to the newsletters issued to pensioners but noted that Mr D disputed receipt of any of these. The DfE said Teachers' Pensions had a duty to ensure that TPS benefits only remained in payment whilst the recipient was entitled to receive them. It said that, following his cohabitation and remarriage, Mr D was no longer entitled to his widower's pension. It also said that Teachers' Pensions was obliged to recover the overpayment. The DfE noted that Mr D had said he was unable to repay the amount due and it urged him to complete the income and expenditure form and discuss the matter with Teachers' Pensions.

28. Teachers' Pensions wrote to Mr D, on 8 November 2018, asking for an update. It asked that, if Mr D intended to pursue an appeal to the Pensions Ombudsman, he notify it to avoid unnecessary update requests. Teachers' Pensions requested an update from Mr D again on 27 November 2018.

29. On 31 December 2018, Teachers' Pensions wrote to Mr D requesting an update and a reference number for his application to the Pensions Ombudsman. It said, once it had received this, recovery would be suspended until the Pensions Ombudsman had made a determination.

30. Teachers' Pensions wrote to Mr D, on 5 February 2019, saying it had not been contacted by the Pensions Ombudsman's Office (**TPO's Office**) and asking him for a reference number. It said it was willing to offer Mr D the option to repay the overpayment over the same period as it had accrued, which it considered was in line with what the Pensions Ombudsman would suggest. Teachers' Pensions said this would mean a monthly payment of £47.86 over ten years.

31. Teachers' Pensions wrote to Mr D, on 20 February 2019, saying it had still not received any confirmation that his case was with TPO's Office, despite a number of reminders. Teachers' Pensions said it had referred the matter to Optima Legal to pursue recovery. It asked Mr D to make contact to discuss a resolution.

32. Mr D applied to TPO's Office on 31 May 2019. TPO's Office received Teachers' Pensions' response to Mr D's complaint on 2 September 2019.

Mr D's position

33. Mr D submits:-

- Teachers' Pensions had never made it clear to him that his pension would cease if he started to co-habit or remarried. If it had done so, he would have completed a declaration at a much earlier date. He would not now be facing an impossible demand for the repayment of £5,742.50.

- The first notification he received regarding the consequences of his change in circumstances was Teachers' Pensions' letter of 8 May 2016, enclosing a declaration. These questionnaires should have been issued annually.

- In his telephone call on 16 May 2016, the person he spoke to confirmed that he had not been sent any previous notification that his pension would cease on remarriage.

- He is not disputing the cessation of his pension. He is disputing that he must now make a large and unexpected repayment, which he cannot afford.

- Teachers' Pensions states that the relevant regulations have been regularly updated. He does not agree that more recent regulations should apply to his situation; particularly since he was not made aware of them.

- Teachers' Pensions should not be trying to impose conditions retrospectively.

- Teachers' Pensions claims that he signed a TFB50 form agreeing to the terms and conditions for payment of his pension. Despite many requests from him for it to send him a signed copy, Teachers' Pensions has failed to do so. Teachers'

Pension sent him a blank copy of a TFB50 form which has a publication date two years after his wife died.

- He finds it extremely distressing and detrimental to his health to continue to receive letters from Teachers' Pensions demanding repayment but not offering an adequate response to his questions. It is very stressful and confusing to receive letters from many different people at Teachers' Pensions.

- Teachers' Pensions has asked him to submit information about his financial and medical circumstances. He considers this to be a gross invasion of his privacy.

- He did not receive any of the annual newsletters, but, even if he had done, he would not have necessarily read them or spotted the relevant information. He would not have expected annual newsletters to contain such important information.

- He has provided copies of the P60s he has in his possession, which do not have the annual newsletters printed on the back[3].

- He was sent a copy of the 2006 newsletter. A newsletter is not an official looking document which he would read in detail. The relevant paragraph, in the 2006 copy, was located on the back page amongst other matters.

- When his wife died, their three children were still financially dependent on him and his TPS pension made an important contribution towards the household finances.

- He suffered poor mental health following the death of his wife, which eventually led to him taking early retirement at age 61. He was not in a frame of mind to study the annual newsletters and find the relevant paragraphs.

- He does not have copies of old bank statements with which to show how his TPS pension was spent. He did not make any significant savings during the period for which he was in receipt of his TPS pension. His only savings are premium bonds which he has paid into since.

- From 2007 to 2016, his income consisted of pensions from previous employments, plus his State pension. He estimates that this totalled around £1,100 per month in 2007 and had risen to around £1,400 per month in 2016. His current wife worked part-time and contributed approximately 10% to 12% of the household costs. They did not have a lot of surplus income after meeting their everyday costs.

34. Mr D has provided a breakdown of his current income and expenditure which shows that his monthly income is around £2,183 and his basic monthly expenditure is around £1,171. He also pays around £164 per month in donations to charity and

[3] The 2008/09 and 2009/10 letters provided refer to a newsletter being enclosed.

£127 per month for leisure activities. Mr D has also provided estimates for expenditure on holidays and gifts for family.

Teachers' Pensions' position

35. Teachers' Pensions submits:-

- The overpayment arose because it has no record of Mr D informing it of his cohabitation or remarriage; either at the time or at any time since.
- The TPS is a statutory scheme and is bound by the regulations which apply at the relevant time. At the time of Mr D's wife's death, the 1988 Regulations applied. Regulation E28 provided for the commencement and duration of long-term family pensions. Specifically, E28(3) provided that an adult pension is not payable during or after any marriage or period of cohabitation; unless the Secretary of State determines otherwise.
- Regulation 31(2) provided that no benefit was to be paid unless a written application for payment had been made.
- At the time of Mr D's wife's death, there were separate administrative arrangements for the payment of pensions. Copies of documents received or issued were held separately from the main TPS record. It does not, therefore, have copies of all of the documents issued to or received from Mr D.
- Mr D was provided with a letter enclosing an application form and Leaflet 450. Section 4.5 in Leaflet 450 stated: "The pension will continue for life, unless your widow/widower remarries or cohabits as man and wife".
- Mr D was sent a letter, on 2 December 1996, confirming details of his pension and explaining that, to apply for his long-term pension, he needed to complete and return a TFB50. Mr D's pension would not have been put into payment if he had not returned a TFB50. The notes to the TFB50 stated: "The pension … continues for life, unless the claimant remarries or lives with another person as husband and wife". The content of the TFB50 and accompanying notes would not have changed between 1996 and 1998 because there had been no change in the conditions for payment of a long-term pension in that time.
- The letter sent to Mr D confirming his ongoing pension would not have referred specifically to duration, but would have said whom to contact if his circumstances changed. It does not have a copy of this letter.
- Mr D contacted it, on a number of occasions, to update his details, but it has no record of him notifying it that he had commenced cohabitation in 2006 or that he had remarried in 2010. It was, therefore, unaware of the position.
- Since 2004, it has issued P60s and newsletters to all pensioners. The newsletters include details of changes which it needs to know about. Therefore, Mr D received

instructions each year to notify it if he cohabited or remarried. The importance of the warning in the newsletters should have been clear to anyone reading them.

- Mr D has said that he did not receive any newsletters. However, he has provided evidence that he received his P60s. It can confirm that the newsletters were enclosed with the P60s and, in some cases, printed on the reverse of the P60 document.

- It also provides information about the conditions for payment of a widower's pension on its website.

- The information provided to Mr D in the May 2016 telephone conversation was incorrect. There was evidence that he was provided with information about the requirement to notify it if he remarried or cohabited. It is immaterial that the evidence is not on his file.

- Mr D should have been aware, from the information provided when he applied for his pension and over the years since, that his pension would cease if he cohabited or remarried.

- It was reliant upon beneficiaries notifying it of changes in their circumstances, but it became apparent that this was not happening. Therefore, it decided to undertake an exercise to check beneficiaries' current circumstances. This was an enhancement to the service it provides; not an acceptance that its previous processes were inadequate.

- The responsibility for keeping it informed of changes in circumstances lies with the beneficiary; as it always has done.

- Mr D has never made any attempt to enter into discussions regarding the recovery of the overpayment.

Adjudicator's Opinion

36. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by Teachers' Pensions. The Adjudicator's findings are summarised below:-

    - Teachers' Pensions, on behalf of the TPS, was seeking to recover an overpayment of pension which had arisen because it had continued to pay Mr D's widower's pension after the date on which he had commenced cohabitation.

    - Regulation E28(3) of the 1988 Regulations provided that a widower's pension was not payable during or after any marriage or period of cohabitation. The 1988 Regulations had since been revoked, but were in force at the time Mr D first became eligible for his pension. Subsequent regulations had provided that the revocation of the 1988 Regulations did not affect the continuity of the law and anything done under the revoked regulations had effect as if done under corresponding provisions in the subsequent regulations.

- The Adjudicator noted Mr D's argument that Teachers' Pensions had not been able to provide a copy of the form TFB50 signed by him. He had argued that this indicated that he did not agree to the terms and conditions of payment which Teachers' Pensions now referred to. The fact that Teachers' Pensions had not been able to provide a copy of the TFB50 did not alter the fact that the continued payment of Mr D's pension was governed by the regulations which applied to the TPS. Teachers' Pensions would be required to apply Regulation E28(3) (or the corresponding subsequent provisions) regardless of whether Mr D had signed a TFB50. However, the Adjudicator was of the view that it was more likely than not that Mr D had completed and returned a TFB50 at the time because his long-term pension would not have been put into payment otherwise.

- In short Mr D had received more widower's pension than he was strictly entitled to under the regulations which govern the TPS. The Adjudicator noted than Mr D accepted that his widower's pension should cease. His disagreement with Teachers' Pensions lay with the requirement for him to repay the overpayment of £5,742.50 (net). The starting point in any case where there had been an overpayment of pension was that the overpaid amount could be recovered. Mr D would be required to repay the overpayment unless he could establish that he had one of the legal defences to recovery.

- The most common defence against recovery of an overpayment was referred to as "change of position"; that is, the recipient had changed their position such that it would be unjust to require them to repay the overpayment, either in whole or in part. Change of position as a defence to a claim in unjust enrichment.

- To make out a change of position defence, certain conditions had to be satisfied. Briefly, the recipient of the overpayment had to be able to show that:-

  - Their circumstances had changed detrimentally and irreversibly;

  - The change of circumstances had been caused by receipt of the overpayment; and

  - They were not disqualified from relying on the defence.

- If these conditions were satisfied the Pensions Ombudsman might direct that some or all of the overpayment could not be recovered.

- With regard to the last point, a change of position defence was not available to an individual who acted in bad faith when changing their position. The Adjudicator said she wished to make it clear that bad faith, in this context, was not synonymous with dishonesty. It could simply mean that, if the recipient had good reason to think that a payment had been made in error, the change of position defence would not be available to them. This included the situation where someone might suspect that there was something amiss and could have taken simple steps to ascertain the correct position but did not do so. In other words, the recipient of an overpayment could not turn a blind eye. Bad faith did not, however, include acting negligently; so, a careless recipient might still be able to invoke a change of position defence.

- Teachers' Pensions had pointed out that information relating to the conditions for payment of a widower's pension had been provided for Mr D at the time he applied for the pension. In particular, it had referred to Leaflet 450 and the notes to the TFB50. The Adjudicator acknowledged that both documents contained the information that the widower's pension would cease if Mr D cohabited or remarried. Teachers' Pensions had also referred to the annual pensioner newsletters issued since 2004. Whilst the newsletters did not go into detail as to the conditions for the continued payment of a widower's pension, they did ask pensioners to notify Teachers' Pensions of certain changes in circumstances, including cohabitation and remarriage. The fact that Teachers' Pensions was asking to be informed of such matters would suggest that they might have an effect on the payment of a pension.

- Teachers' Pensions argued that Mr D should have known that he needed to contact it when he began cohabiting. However, the test for good faith was subjective, rather than objective; that is, it was not a question of what Mr D <u>should have</u> known but what he <u>did</u> know. Of course, only Mr D could know what he knew. For the purposes of the Pensions Ombudsman's investigation, it was necessary to come to a judgment, on the balance of probabilities, as to what it was likely that Mr D knew.

- The Pensions Ombudsman had accepted, in previous cases, that individuals may not read the information provided in Leaflet 450. The death of a spouse could be an extremely stressful time and there was generally a lot of administration to deal with. The Adjudicator said she thought the same would apply to the notes accompanying the TFB50. In her view, it was unlikely that Mr D had read Leaflet 450 or the TFB50 notes in any detail at the time and he had had no reason to return to either of them in subsequent years.

- The position with the newsletters was less certain. Mr D had argued that he had not received a single newsletter since Teachers' Pensions started to send them out in 2004. In the Adjudicator's view, it was unlikely that he had not been sent any of the newsletters in the 12 years between 2004 and 2016. She accepted that Mr D probably failed to read the newsletters in any detail and might, therefore, have missed the requests to contact Teachers' Pensions if he began to cohabit or if he remarried. It was her opinion that Mr D satisfied the good faith condition for a change of position defence. It remained to consider whether he had satisfied the other conditions in order for him to be able to rely on this defence against the recovery of the overpayment.

- The most obvious example of a detrimental change of circumstances was 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 would always have to be repaid at some point. There was no absolute requirement that the monies had been spent on extraordinary items, such as the purchase of a car or a holiday. The requirement was for there to be a causal link between the overpayment and the expenditure. It was, therefore, possible for the defence to succeed where the overpayment comprised a series of payments and had been used to fund a better lifestyle. However, the expenditure had to be irreversible. Where the monies had been spent on items with a re-sale value and a reasonable person could sell the item without disproportionate expense or difficulty, the defence would only succeed to the extent that the re-sale value was less than the initial outlay.

- The evidence indicated that Mr D's monthly TPS pension had been absorbed into his everyday income and expenditure. He had explained that he was unable to provide evidence, such as bank statements, to show how he had spent the pension in the relevant period. Mr D had, however, provided a breakdown of his current income and expenditure. The Courts had taken the view that it might not be right to apply too demanding a standard of proof when an honest defendant said he had spent an overpayment on improving his lifestyle but could not produce detailed accounting. In the Adjudicator's view, for the purposes of the Pensions Ombudsman's investigation, it would be acceptable to take Mr D's current financial circumstances as indicative of his income and expenditure over the period in question.

- Mr D's evidence showed that he currently had a monthly income in the region of £2,183 and his basic monthly expenditure was around £1,171. He also paid around £164 per month in donations to charity and £127 per month for leisure activities. This would mean that he had surplus income of around £721. Mr D's TPS pension was around £50 per month. It represented around 2% of his monthly income. In the Adjudicator's view, this would not be sufficient to establish an improved lifestyle for the purposes of a change of position defence.

- The Adjudicator accepted that Mr D had been disappointed to be told he would no longer receive his widower's pension. However, in her view, it was not possible to conclude that Mr D had changed his circumstances to his detriment as a result of receiving the overpayment. It was her opinion that Mr D did not have a change of position defence to the recovery of the overpayment of £5,742.50.

- There were other defences to the recovery of an overpayment; for example, estoppel and contract. These arose less often in pension cases but could be considered if the circumstances of the case suggested that it would be appropriate to do so.

- Estoppel was a legal principle which provided that if, by statement or action, a person caused another person to believe that a particular set of facts or circumstances were true, then they should not be allowed to draw back from those statements or actions, if it would be unjust or unconscionable to do so. The requirements for estoppel were similar to the change of position defence. However, the person had to demonstrate that they had relied to their detriment either:

  - on a clear and unequivocal statement (representation); or

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

- In an overpayment case, the effect of an estoppel was that the payer would be held to comply with the incorrect payment. The payer would be estopped from seeking to recover the overpayment. However, the overpayment did not, in and of itself, constitute a representation. The Adjudicator said she had not been able to identify the kind of clear and unequivocal statement or mutual assumption required for estoppel in Mr D’s case. The statements by Teachers’ Pensions relating to Mr D’s entitlement to a widower’s pension had been accompanied by notes to the effect that the pension would cease on cohabitation or remarriage.

- The Adjudicator said she had also not been able to identify the necessary elements for a contract to exist; that is, offer, acceptance, consideration and an intention to enter into legal relations. In particular, she said she could not see that there had been any intention on the part of Teachers’ Pensions to enter into a legal relationship with Mr D beyond his entitlement under the TPS Regulations.

- Finally, the Adjudicator considered whether the Limitation Act 1980 (the **Limitation Act**) had any bearing on the extent to which Teachers’ Pensions might seek to recover the overpayment. The Limitation Act provided timescales within which action had to be commenced where there had been a breach of law.

- Briefly, Section 5 of the Limitation Act required a claim to be brought within six years of the “cause of action”. In Mr D’s case, this would be within six years of the date of each overpayment of the monthly pension.

- The Courts had decided that the cut-off date for the purposes of the Limitation Act in cases before the Pensions Ombudsman was the date on which TPO’s Office received a response to a complaint. TPO’s Office received Teachers’ Pensions’ response to Mr D’s complaint on 2 September 2019. This would mean that, under Section 5, Teachers’ Pensions could recover all overpayments made within six years from 1 September 2013. However, Section 32 of the Limitation Act provided that the six year period could be postponed in cases of fraud, concealment or (as in Mr D’s case) mistake. The limitation period did not begin to run until the claimant (Teachers’ Pensions) had discovered the mistake or could, with reasonable diligence, have discovered it.

- Teachers' Pensions had become aware that it had been paying Mr D's pension in error in May 2016; that is, when it received a declaration from him informing it that he had been co-habiting since 2006 and had remarried since 2010.

- Teachers' Pensions could not have been aware of the change in Mr D's circumstances unless and until he notified it of such. The Adjudicator noted Mr D's comments that Teachers' Pensions should have been issuing annual declarations at an earlier date. Teachers' Pensions argued that the decision to do so represented an enhancement to its service, rather than an admission of any previous failing.

- The Courts had said that a claimant must show that they could not have discovered the situation without taking exceptional measures which they could not reasonably have been expected to take. The Courts had described the test as: "how a person carrying on business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by reasonable but not excessive urgency"[4]. The Pensions Ombudsman had previously noted that Teachers' Pensions did not have a statutory obligation to issue declarations[5]. On that basis, the Adjudicator was of the view that Teachers' Pensions had acted with reasonable diligence by issuing information at the point eligibility for a pension was confirmed, by issuing reminders in annual newsletters and by responding when it became aware that pensioners were still not notifying it of relevant changes in their circumstances.

- It was the Adjudicator's opinion that Section 32 would apply and the limitation period would begin to run from May 2016. Teachers' Pensions would have until May 2022 to take action to recover the overpayment. Its response to TPO's Office was well within this timeframe and the Limitation Act did not restrict its claim for repayment of the whole of the overpayment.

- Having concluded that Mr D had not established a defence against the recovery of the overpayment, the Adjudicator went on to consider whether he had sustained any injustice as a consequence of maladministration.

- The Adjudicator accepted that being notified of the overpayment would have come as an unpleasant shock for Mr D. However, Teachers' Pensions had been obliged to take steps to rectify the situation as soon as it became aware Mr D was no longer entitled to the pension. Notifying Mr D of the overpayment did not, in and of itself, amount to maladministration. Teachers' Pensions had offered Mr D the option to repay the overpayment over 10 years at the rate of £47.86 per month. In the Adjudicator's view, the Pensions Ombudsman would find this to be an appropriate offer.

- The Adjudicator noted that it had taken some three years for Mr D's case to make its way to the Pensions Ombudsman. However, the evidence did not indicate that

[4] *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400
[5] PO-11441 27 June 2017

this had been because of maladministration on Teachers' Pensions' part. With the possible exception of the two months between receipt of his declaration and notifying him of the cessation of his pension, Teachers' Pensions had responded promptly and appropriately to Mr D's many queries. It had acknowledged that Mr D had been given some incorrect information in the telephone conversation in May 2016; that is, he had been told that there was no evidence that he had been informed about the conditions for the payment of his widower's pension. It appeared that the person Mr D spoke to was looking for a specific letter to him; rather than the general information provided in Leaflet 450 and the notes to the TFB50 form. In the Adjudicator's view, this would not be sufficient for the Pensions Ombudsman to uphold Mr D's complaint against Teachers' Pensions.

37. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D provided further comments which are summarised below. I have considered Mr D's comments, but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Mr D's further comments

38. In addition to his earlier points, Mr D submits:-

- He still disputes that he received clear annual newsletters. There were notes on the back of some of the P60s he received, but he would not necessarily have read these. He doubts that anyone receiving a P60 at the end of the tax year would make a careful study of the small print on the back.

- It was a failure on the part of Teachers' Pensions not to make its rules and regulations clear to pension recipients. The request to be updated should have been made in a separate questionnaire. When he received the declaration, in 2016, he completed and returned it immediately and would have done so had he received one sooner. The regulations and change of circumstances requests should have been sent to him annually in a separate document advising that the contents were important.

- He was not to know that the person he spoke to on the telephone was not qualified to give him an official answer. The telephone discussion confirmed his previous suspicions that he had not been sent notifications.

- In his view, it is essential that Teachers' Pensions should be able to produce a copy of the TFB50 form with his signature on it. It was deceptive of Teachers' Pensions to send him a document issued two years after his wife's death, which it claimed he had signed. If Teachers' Pensions claims that the wording of the 1998 TFB50 form was the same as for the 1996 form, it should be able to send him the 1996 form.

- Being referred to a debt collection company was extremely harsh and amounted to bad practice by Teachers' Pensions. It was a very stressful period for him. He has never been in debt and the pressure from Teachers' Pensions was stressful.

- Teachers’ Pensions’ request for financial and medical information was a gross invasion of his privacy.
- He has not entered into discussion about recovery of the overpayment because he was convinced that he was not liable to repay it..
- When the additional costs of holidays, Christmas and birthday gifts to family, and small weekly contingency spending are included, his surplus monthly income is well below £400.
- In order to avoid the stress of an ongoing dispute with Teachers’ Pensions, he is agreeable to paying 50% of its claim; that is, he will pay £2,871.25 over 10 years at £23.92 per month. Should he die before the £2,871.25 is paid in full, Teachers’ Pensions will be paid the balance from his estate.

Ombudsman’s decision

39. The terms and conditions under which Mr D’s pension was payable are as set out in the 1988 Regulations and subsequent TPS regulations. I note Mr D’s continued concern that Teachers’ Pensions has been unable to provide a copy of a signed TFB50 form. However, the terms and conditions for the payment of his pension were not governed by the TFB50 form. It could not override or amend the 1988 Regulations. As to whether Mr D did sign and return a TFB50 form in 1996, I note that pensions under the TPS are payable upon written application. The fact that Mr D’s long-term widower’s pension was put into payment strongly suggests that he did indeed sign and return a form at the time. I agree that it would be preferable for Teachers’ Pensions to be able to provide a signed copy of the form, but the fact that it is unable to do so makes no difference to the outcome of Mr D’s case.

40. Mr D has referred to the fact that Teachers’ Pensions sent him a copy of the TFB50 form dating from 1998. I do not agree that this was an attempt by Teachers’ Pensions to deceive Mr D in any way. The 1998 form was sent to him as an example of the form which had been in use. Teachers’ Pensions has always acknowledged that it does not have the form signed by Mr D.

41. I note Mr D’s suggestion that he (and other pensioners) should have been sent copies of the regulations and a questionnaire on an annual basis in a separate document. Teachers’ Pensions has already recognised that its practice of including a reminder to notify it of changes in circumstances in annual newsletters might not reach everyone because not everyone reads a newsletter.

42. The question of whether the annual newsletter was sufficient to alert Mr D to the requirement to notify Teachers’ Pension that he had commenced cohabitation does not alter the fact that he has been overpaid. It does, however, have a bearing upon the question of whether he received the overpayment in good faith. Whilst I doubt that Mr D did not receive any of the newsletters issued between 2004 and 2016, I accept

that he is one of those who does not read the newsletters and, therefore, he did not see the reminders. I accept that Mr D received the overpayment in good faith.

43. On its own, good faith is insufficient for me to find that Mr D has a legal defence against the recovery of the overpayment. The details of the various defences which might potentially have been available to Mr D were set out in my Adjudicator's opinion. I find that Mr D has not shown that he relied to his detriment on the overpaid monies. In other words, Mr D has not shown that he took any action, including the expenditure of money, which he would not otherwise have done but for receiving the overpaid pension. I find that the defences of change of position and/or estoppel are not made out. Nor do I find that a contract to continue paying the widower's pension, regardless of the terms and conditions set out in the TPS regulations, had formed between Teachers' Pensions and Mr D.

44. With regard to the Limitation Act, I find that the time for Teachers' Pensions to make a claim for repayment of the overpaid pension began to run from May 2016; that is, from the date on which it was notified by Mr D of his cohabitation and remarriage. Teachers' Pension could not have known about the change in Mr D's circumstances until he notified them of such. I am satisfied that Teachers' Pensions' actions in providing leaflet 450 at the point at which entitlement was first established and subsequently following this up in annual newsletters meets the 'reasonable diligence' requirement for a Section 32 postponement. The fact that Teachers' Pensions now issues specific declarations to those in receipt of a pension does not mean that its previous approach could be said to have failed the reasonable diligence requirement.

45. I do not uphold Mr D's complaint.

46. Since Mr D has been unable to establish a legal defence to recovery, he must repay the £5,742.50 he has been overpaid. Teachers' Pensions has offered Mr D the option to repay this sum at the rate of £47.86 per month over ten years. In light of the income and expenditure information provided by Mr D, I find this offer to be very reasonable. I note Mr D's counter-offer, but this does not recognise his liability for the full amount of £5,742.50.

Anthony Arter
Pensions Ombudsman

22 November 2021