

Ombudsman's Determination

Applicant: Ms S

Scheme: Teachers' Pension Scheme (**TPS**)

Respondent: Teachers' Pensions

Outcome

1. Ms S' complaint against Teachers' Pensions is partly upheld. To put matters right, Teachers' Pensions shall recalculate the amount it is seeking to recover on the basis that Ms S has a partial change of position defence amounting to £3,384.14.

Complaint summary

2. Ms S has complained that Teachers' Pensions is seeking to recover the sum of £37,968.06 which it says has been overpaid to her.

Background information, including submissions from the parties

Background

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of correspondence between the parties.
4. In 2011, Ms S elected to take "phased retirement". This option allows members of the TPS to take part or all of their retirement benefits from the scheme whilst remaining in employment. In order to take phased retirement, members must satisfy certain conditions. These include a minimum reduction in salary of 20% and a minimum of 25% of the value of the benefits remaining in the scheme.
5. The relevant regulations are The Teachers' Pensions Regulations 2010 (SI2010/990) (as amended) (the **2010 Regulations**). Extracts from the 2010 Regulations are provided in Appendix 1.
6. In May 2011, Ms S elected to take 25% of her TPS retirement benefits with effect from 1 September 2011. In March 2012, Ms S applied for a second phased retirement and again elected to take 25% of her benefits. She subsequently decided not to proceed with this application. In September 2012, Ms S reapplied for a second

phased retirement and elected to take 50% of her benefits with effect from 1 September 2012.

7. Ms S applied for “final” retirement in October 2013. She ceased pensionable employment on 31 August 2014 and her retirement benefits became payable with effect from 1 September 2014. On 1 September 2014, Ms S called Teachers’ Pensions to query the amount of her lump sum and to say she had not received any payments. She has provided a transcript of the call recording which Teachers’ Pensions was subsequently able to provide. Extracts from the transcript are provided in Appendix 2. A payment of £59,137.84 was made to Ms S’ bank account on 1 September 2014 in respect of her lump sum.
8. In 2017, Teachers’ Pensions undertook a reconciliation exercise which identified an overpayment of Ms S’ retirement benefits. Teachers’ Pensions has explained that the service used to calculate Ms S’ first phased retirement benefits had been included in the service used to calculate her final retirement benefits. As at the date of her final retirement, Ms S’ total pensionable service amounted to 37 years and 215 days. Her final retirement benefits should have been calculated by reference to her total service less the service previously used to calculate her phased retirement benefits: 8 years and 333 days in 2011; and 9 years and 114 days in 2012. Ms S’ final retirement benefits should, thus, have been calculated by reference to service of 19 years and 133 days. Instead, the benefits were calculated by reference to pensionable service of 28 years and 101 days: 19 years and 133 days plus 8 years and 333 days.
9. On 21 September 2017, Teachers’ Pensions wrote to Ms S informing her that her retirement benefits had been recalculated and enclosing a statement. Ms S was provided with a telephone number to call if she required further information.
10. Ms S asked the National Education Union (**NEU**) to assist her. The NEU wrote to Teachers’ Pensions, on 12 January 2018, requesting further information.
11. On 27 March 2018, Teachers’ Pensions wrote to Ms S confirming that an overpayment of her retirement benefits, amounting to £37,968.06, had occurred. It explained that service used in her phased retirement had been included in her final retirement. Teachers’ Pensions explained that this had also changed the calculation of Ms S’ average salary. Ms S’ best average salary was now £51,612.44; not £56,049.55. Teachers’ Pensions provided a revised statement of benefits and said the overpayment was made up of £18,437.12 net pension and £19,530.94 lump sum. It explained that it was obliged to recover all overpayments and asked Ms S to repay the £37,968.06 as soon as possible. She was offered the options of card payment, BACS transfer or cheque. Ms S was provided with a telephone number to call if she had a query.
12. On 19 April 2018, Teachers’ Pensions sent Ms S a payment reminder and asked her to make payment within 10 working days. It said failure to make payment might lead to additional interest charges being applied or legal action by the Department for Education (**DfE**).

13. The NEU requested further clarification as to the cause of the overpayment and asked that Teachers' Pensions refrain from taking recovery action whilst it advised Ms S.
14. On 30 April 2018, Teachers' Pensions wrote to Ms S. It referred to a recent telephone call and said it had noted Ms S' comments. Teachers' Pensions said:

"I acknowledge that the above amount is not an insignificant amount to repay and clearly we do not wish to put anyone in the position of hardship. However, we should also not confuse the inconvenience of repaying the debt with hardship¹. Where a single repayment cannot be secured, we have the discretion to offer repayment plans of up to 36 months without the need to secure any financial evidence of the ability to pay. If, this is still not an option, then we are obliged to seek further information by issuing an Income and Expenditure Form (also referred to as a Means Questionnaire) to review, fairly, what may be deemed affordable repayment amounts."
15. Teachers' Pensions enclosed an income and expenditure form and asked Ms S to complete and return it, together with documentary evidence of any hire purchase, credit card and/or loan repayments and her previous three months' bank statements.
16. Teachers' Pensions wrote to the NEU, on 10 May 2018, setting out the background to the error in calculating Ms S' final retirement benefits. It said it was not its intention to cause Ms S undue stress, but it was required to recover the overpayment in line with guidance issued by HM Treasury². Teachers' Pensions said it appreciated that such a substantial sum would not be readily available. It said it was able to offer an instalment plan. It explained that it could offer a maximum repayment period of 36 months, but that this could be reconsidered in certain circumstances. It asked that Ms S complete the income and expenditure form. Teachers' Pensions also asked the NEU to reassure Ms S that her home was not at risk. This was a reference to Ms S having been told that a charge could be put against her property.
17. Teachers' Pensions explained that this was its final response but a complaint could be raised with the DfE under the internal dispute resolution procedure (**IDRP**).
18. Teachers' Pensions also wrote to Ms S on 10 May 2018. It apologised for any distress caused by her telephone conversation.
19. The DfE provided an IDRP decision on 21 November 2018. It noted that Teachers' Pensions had confirmed that mistakes had been made and it had fallen short of the service which was expected. The DfE said Teachers' Pensions would contact Ms S regarding compensation for its poor service. The DfE said it appreciated Ms S' distress that the overpayment had occurred and that she was being asked to repay the money she had received in error. It said the TPS was governed by statutory

¹ Ms S has said that she was offended by this comment.

² Managing Public Money

regulations and Teachers' Pensions was obliged to pursue recovery regardless of who was responsible for the incorrect payment.

20. The DfE said it understood that Ms S had made financial decisions based upon the pension she had been advised she would receive and that she would find it difficult to repay the overpayment. It suggested that Ms S complete the income and expenditure form and discuss a reasonable repayment schedule with Teachers' Pensions.
21. Teachers' Pensions wrote to Ms S, on 28 November 2018, offering her £500 in recognition of distress and inconvenience caused by the incorrect information provided in the September 2014 telephone call. It said the £500 would be offset against the overpayment it was seeking to recover. Ms S did not accept the £500.
22. Ms S applied to The Pensions Ombudsman (**TPO**) in July 2019. TPO received Teachers' Pensions' response to Ms S' complaint on 25 October 2019.

Ms S' position

23. Ms S submits:-

- Inadequate training of staff at Teachers' Pensions led to the double counting of a quarter of her service and the overpayment of £37,968.06. It is possible that a culture of target-setting and quantity not quality contributed to the error. A lack of due diligence then allowed the error to go unchecked for three years.
- An inadequate procedure for responding to a report of an error meant that, when she telephoned Teachers' Pensions to suggest that the lump sum was more than she had expected, she was reassured and led to believe that the money was hers.
- Staff at Teachers' Pensions made inappropriate suggestions and threats. She was told that interest could be charged, legal action could be taken and a charge made against her house.
- Having been reassured that the money was hers, she spent it making the last two years of her partner's life³ as wonderful as possible. During the 18 months from September 2014, they travelled frequently and used first class travel and comfortable hotels because her partner suffered pain as a consequence of his cancer. She knew this expenditure would be for a limited period and believed her long term financial position to be secure. As a consequence, she was happy to indulge her partner and herself. She cannot now recover this expenditure.
- The error will have long-term consequences. She had intended to move to be closer to family following the death of her partner. She spent much time and petrol in 2017 preparing for this move, but has had to put her plans on hold because of the financial uncertainty. She would be moving to a more expensive area and would require a mortgage to buy a property she might be prepared to live in for the rest of her life. The delay caused by this situation has reduced the period over

³ Ms S' partner died in August 2016.

which she would be allowed to have a mortgage, which may make the monthly cost prohibitive. Her plans may no longer be possible.

- She would like the overpayment waived. 20% of the pension went back to the Treasury in tax anyway. She does not wish to enter into protracted negotiations with HMRC to recover the tax⁴. She does not wish to endure a total loss of savings or the need to live on significantly reduced means.
- She has suffered much distress and anxiety because of an avoidable error by Teachers' Pensions.

24. The NEU, on Ms S' behalf, submits:-

- When Ms S fully retired, she did so in the knowledge that her partner had a limited life expectancy. They decided to "push the boat out" because their time together would be limited. Ms S aimed to make that time as comfortable as possible for her partner.
- Ms S received unequivocal confirmation from Teachers' Pensions, in writing and on the telephone, that her pension was correct. She received ongoing confirmation that the pension was correct via annual Teachers' Pensions updates and P60s. This created a significant change of position by Ms S.
- For a change of position defence to succeed, the injustice of requiring repayment must outweigh the injustice of denying part or full restitution. Demanding repayment from Ms S for a mistake caused by miscalculation of her entitlement would be the weightier injustice. The amount which Teachers' Pensions is proposing to reclaim is an unacceptable proportion of Ms S' income. The amount of £37,968.06 is 310% of Ms S' annual pension; whereas it represents around 0.000005% of Teachers' Pensions' annual expenditure.
- With regard to an estoppel defence, Ms S should not be required to repay an overpayment where Teachers' Pensions has done something to indicate that the money was paid correctly, the overpayment was not her fault and she has subsequently spent the money to the extent that she cannot afford to repay it.
- Upon receiving notification that she would receive a lump sum of £59,433.64, Ms S queried this with Teachers' Pensions. Teachers' Pensions has acknowledged that Ms S was given incorrect information in 2014. The reassurance Ms S received on the telephone, together with annual pension statements and P60s, constitutes further indication that her pension was correct. It was reasonable for Ms S to assume she had title to the overpayment.
- In her submission to TPO, Ms S has testified that the mistake has placed her in a difficult position. Repayment would be injurious to her health and wealth.

⁴ Teachers' Pensions is seeking to recover the net pension overpaid to Ms S.

25. Ms S has provided extracts from her bank statements over the period September 2014 to December 2015. Ms S has explained that, between 1 and 16 September 2014, she repaid over £38,000 of debt. In particular, Ms S says she discharged an overdraft of £1,000.78 and paid £28,416.39 to discharge a loan which had formed part of a 125% mortgage. She also refers to two payments made in September 2014, of £3,442.34 and £5,189.10, to settle credit card debts. Ms S has explained that she spent £3,384.14 on double glazing and a front door. She has provided invoices dated 20 October 2014 and 5 May 2015.
26. Ms S has explained that her monthly mortgage payments reduced from £715.17 to £558.70 as a result of the payment she made. However, she has made the point that the ongoing payments had to be made out of her pension, rather than her salary, and represented a bigger burden. She has explained that she was also paying off a loan at the rate of £139 per month. Ms S says that, between September 2014 and September 2017, she was paying £697.70 per month in mortgage and loan repayments.
27. Ms S has also explained that she travelled to America to visit her brother in October 2014 and to Canada to see her sons in 2015.

Teachers' Pensions' position

28. Teachers' Pensions submits:-

The cause of the overpayment

- It identified the overpayment during a reconciliation exercise in 2017. Service used to calculate Ms S' first phased retirement benefit had been incorrectly included in the calculation of her final retirement benefits. It refers to Regulation 60 and paragraph 13 of Schedule 7 in the 2010 Regulations (see Appendix 1).
- It must ensure that TPS members receive their correct entitlement and, therefore, Ms S' retirement benefits were recalculated.
- The overpayment arose as a result of an administrative error. It does not agree that target-setting contributed to the error or that a lack of due diligence caused the delay in identifying it.
- Having listened to the 2014 telephone call, it accepts that Ms S was given incorrect information and that the call handler was confused as to how phased retirement operated. This is regrettable but was not caused by inadequate procedures. Phased retirement can be quite complex. The call handler attempted to resolve Ms S' query. However, it might have been prudent to refer the case to the retirement benefits team for a thorough review. It accepts that the error could have been identified earlier if this approach had been taken.

Recovery

- It has authority to recover overpayments of pension under various provisions contained in the 2010 Regulations. It refers to Regulation 114(c) (see Appendix 1).
- The principles for recovering overpayments are set out in Section A4.11.2 and Box A4.11A in Managing Public Money. These include taking account of possible defences against recovery and, if necessary, recovery by deductions from future pension under Section 6(b) of the Pensions Act 1995.
- It has explained to Ms S that it has discretion to offer repayment plans up to 36 months without the need for any evidence of her ability to repay the overpayment. It would always ask that an income and expenditure statement is completed in order to consider whether a longer repayment period is appropriate. It acknowledges that the Pensions Ombudsman would normally expect recovery to take place over a similar period to that over which the overpayment accrued. It would like to discuss this with Ms S.
- It notes Ms S' comments concerning a total loss of savings and living on significantly reduced means. It has taken her to mean that repayment of the overpayment would cause her financial hardship. It cannot consider this aspect of Ms S' complaint until she has completed an income and expenditure statement.
- It regrets the situation and apologises to Ms S for the impact the error has had on her. It cannot agree to reduce the amount it is required to recover and it has no authority to waive the overpayment.
- It notes Ms S' comments concerning its letter of 30 April 2018. There was no intention on its part to cause any offence. The purpose of the letter was to outline the options available to Ms S.
- It is mindful that there was a delay in notifying Ms S that there had been an overpayment and that her retirement benefits had been recalculated. The amount of overpayment relating to Ms S' lump sum was unaffected by the delay. It does, however, recognise that Ms S has been caused distress, anxiety and inconvenience. Its offer of compensation was intended to recognise the non-financial injustice arising from the matter.

Redress

- It is prepared to increase its offer of compensation for non-financial injustice to £1,000. It believes this is in line with guidance issued by the Pensions Ombudsman.

Adjudicator's Opinion

29. Ms S' complaint was considered by one of our Adjudicators who concluded that further action was required by Teachers' Pensions. The Adjudicator's findings are summarised below:-

- 29.1 Ms S' complaint concerned the action proposed by Teachers' Pensions to recover the sum of £37,968.06 which had been overpaid to her. The overpayment was made up of £18,437.12 net pension and £19,530.94 lump sum. The overpayment had arisen because Teachers' Pensions had included a period of pensionable service in its calculation of Ms S' final retirement benefits which had already been used for partial retirement.
- 29.2 The starting point in any case where retirement benefits had been paid in error was that the overpayment could be recovered. The fact that the overpayment had arisen because of an error by Teachers' Pensions did not alter this position. Ms S had been paid £37,968.06 more than she was strictly entitled to under the TPS Regulations. She would be required to repay this sum unless she was able to establish one of the legal defences to recovery.
- 29.3 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 was 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 had to be able to show, on the balance of probabilities, that:-

- Their circumstances had changed detrimentally;
- The change of circumstances had been caused by receipt of the overpayment; and
- They were not disqualified from relying on the defence

If all of these elements were satisfied the Pensions Ombudsman might direct that some or all of the overpayment might be kept by the recipient.

- 29.4 With regard to the last condition, 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 someone had good reason to think that a payment had been made in error, a change of position defence was not available to them. This included circumstances where someone suspected 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 to any doubts they might have as to the possibility of there having been an error.

- 29.5 In Ms S' case, she did have some doubts as to whether the benefits she had been told she would be paid were correct. She did not turn a blind eye to her doubts and had taken steps to ascertain the correct position by contacting Teachers' Pensions. She had been reassured that the amounts which had been quoted were correct. Teachers' Pensions had acknowledged that Ms S had been given incorrect information at the relevant time.
- 29.6 Having reviewed the transcript of the telephone call, the Adjudicator noted that Ms S had informed Teachers' Pensions' call handler that her total service was "something like 38 years" and she had already had "about 18 years". The call handler had responded by saying that she had taken nine years and 114 days from Ms S' total service of 37 years and 215 days. In response, Ms S had referred to Teachers' Pensions having "paid out" eight years and nine years. She further questioned whether Teachers' Pensions had only paid out nine years and 114 days and then appeared to accept what she had been told about just nine years being subtracted from her total service.
- 29.7 On the basis that Ms S appeared to be fully aware of the amount of service which had already been used to calculate her two partial retirements, it was perhaps surprising that she would accept that only nine years and 114 days had been subtracted from her total service on this occasion. However, the call handler had reassured Ms S that she had checked the calculation.
- 29.8 When making a judgment as to whether Ms S satisfied the good faith element for a change of position defence, it was not a question of deciding what she should have known but what she did know. The question was whether there was any remaining doubt in Ms S' mind as to the veracity of the figures she had been quoted. In the Adjudicator's view, it was a matter of balancing the knowledge Ms S clearly had as to the way in which partial retirement worked against the reassurance she had received on the telephone that the calculation had been checked. It was an extremely finely balanced judgment. The Adjudicator said she had come to the view that the Pensions Ombudsman would likely be prepared to accept, on the balance of probabilities, that Ms S received the payment of £37,968.06 in good faith.
- 29.9 However, the Adjudicator explained that she needed also to consider whether, and to what extent, Ms S had been able to establish the other elements necessary for a change of position defence against the recovery of £37,968.06.
- 29.10 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 was not considered a detrimental change of circumstances because the debt would have to be paid off at some point. Ms S had explained that she had used the majority of the lump sum she had been paid in 2014 to settle debts and reduce her mortgage commitment. In the Adjudicator's view, this expenditure would not be considered a detrimental change of circumstances enabling Ms S to establish a change of position defence.

- 29.11 Ms S had explained that she had also used the money she had received to travel with her partner. She had explained that, because of her partner's poor health, they had chosen to travel first class and upgrade the hotels they had stayed in. For a change of position defence, there was no absolute requirement for the money to have been spent on extraordinary items, such as a holiday. The requirement was for there to be a causal link between the expenditure and receipt of the overpayment. In other words, the money had to have been spent on something which Ms S would not otherwise have bought but for receiving the overpayment.
- 29.12 Ms S had provided copies of her bank statements for the period September 2014 to December 2015. It was not possible to see from the statements whether Ms S had incurred expenditure on travel which she would not otherwise have done. The Adjudicator acknowledged that there were items related to the kind of travel which Ms S had described but these did not appear to be extraordinary in the context of her other spending. It was difficult to base a change of position defence on this expenditure in the circumstances. Ms S had also explained that she had travelled to America to visit her brother in October 2014 and to Canada to see her sons in 2015. The Adjudicator acknowledged that there were items in her bank statements which appeared to relate to these trips. It was difficult, however, to say that Ms S would not have made these trips but for having been overpaid her retirement benefits.
- 29.13 Finally, Ms S had identified expenditure on home improvements; namely, double glazing (£2,205.42) and a front door (£1,178.72) amounting to £3,384.14. Home improvements could be considered for the purposes of a change of position defence. The Adjudicator acknowledged that there was a counterargument to the effect that the individual had the benefit of any improvements. This benefit was, however, somewhat nebulous unless the individual was selling the property. Again, Ms S would have to be able to show that this was expenditure she would not have incurred but for receiving the overpayment. In the Adjudicator's view, on the balance of probabilities, Ms S was unlikely to have incurred this expenditure but for having received the overpayment. She explained that she was basing this view on the fact that, at the time of these purchases, the balance in Ms S' account would have been significantly lower had she not been overpaid. It was not obvious that these were purchases made of necessity and, therefore, Ms S was

unlikely to have spent these sums but for the overpayment. On that basis, Ms S had a change of position defence to the recovery of £3,384.14 of the overpayment.

- 29.14 There were other defences to the recovery of an overpayment; for example, estoppel and contract. These arose less often in pension cases but would be considered if the circumstances of the case suggested that it was appropriate to do so.
- 29.15 Estoppel was a legal principle which provided that, if one person caused another to believe a particular set of facts or circumstances to be true, either by statement or action, they should not be allowed to draw back from the statement or action if to do so would be unjust or unconscionable. The requirements for an estoppel defence were similar to those for a change of position defence. However, the claimant had to be able to demonstrate that they relied to their detriment either:
- on a clear and unequivocal statement (representation); or
 - on a mutual assumption of facts or law (convention).
- 29.16 It must also have been reasonable for the claimant to have relied on the statement or action upon which they base their estoppel defence. Where there had been an overpayment of retirement benefits, the effect of an estoppel was that the payer would be held to the incorrect payment in its entirety.
- 29.17 The NEU had suggested that Ms S might have an estoppel defence on the basis of the telephone conversation she had had with Teachers' Pensions' Helpline in 2014 and subsequent annual updates and P60s.
- 29.18 The Adjudicator acknowledged that Ms S had received reassurance, in the 2014 telephone conversation, that the amounts being paid to her were correct. However, Ms S had been told that the figures quoted were based upon a deduction of just nine years and 114 days for her previous partial retirements. She had been aware that her partial retirements had been based on service amounting to 18 years and 82 days. In view of the doubts around the deduction of previously used service, it was a moot point whether it would be considered reasonable for Ms S to have relied on this telephone conversation. The subsequent updates and P60s had been based on the same flawed calculation and, therefore, subject to the same level of doubt.
- 29.19 Given that the result of an estoppel defence would be that Ms S would be allowed to retain £37,968.06 more than she was entitled to under the TPS regulations, it needed to be tested robustly. The Courts had spoken of the most important element as being able to show that it would be unconscionable (extremely or shockingly unfair) to allow the party to go back on their statement or action. The Adjudicator acknowledged the NEU's point

that, when compared to overall TPS expenditure, £37,968.06 was not a significant amount. However, it would mean, in effect, that Ms S would be given the benefit of 8 years and 333 days extra service. This represented nearly a quarter of her actual service and a not inconsiderable enhancement to her actual entitlement. It seemed unlikely that it would be considered unconscionable for her to be asked to repay the extra payment she had received in error. It was the Adjudicator's opinion that an estoppel defence was unlikely to succeed in the circumstances.

- 29.20 With regard to the establishment of a contract between Teachers' Pensions and Ms S to provide the higher benefits, the Adjudicator said she had been unable 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 Ms S had given consideration. Contract law was based upon the principle of reciprocity and consideration was something of value, however small, given in exchange for the promise made under the contract. The Adjudicator also said she could not see that there was any intention on the part of Teachers' Pensions to enter into legal relations with Ms S beyond her entitlement under the TPS Regulations. In any event, a contract based upon mistake was unlikely to be enforceable.
- 29.21 Because Teachers' Pensions was seeking to recover the overpayment by means of repayment, it was necessary to consider whether the Limitation Act 1980 (the **Limitation Act**) has any bearing on the extent to which it may be recovered.
- 29.22 The Limitation Act provided timescales by which an action had to commence where there has been a breach of the law. Action to recover an overpayment was considered to be a "restitutionary" claim. Essentially, Teachers' Pensions was seeking a remedy to unjust enrichment by asking Ms S to reimburse the TPS. Such claims were historically based upon forms of action found in contract law and the Limitation Act could apply. Section 5 of the Limitation Act required a claim to be brought within six years of the "cause of action"; that is, the overpayment.
- 29.23 The Courts had decided that the cut-off date for the purposes of the Limitation Act, for cases before the Pensions Ombudsman, was the date on which TPO received a response to a complaint. In Ms S' case, TPO had received Teachers' Pensions' response to her complaint on 25 October 2019. This was within six years of the date of the first overpayment in September 2014. Teachers' Pensions' action to recover the overpayment of £37,968.06 was not affected by the Limitation Act.
- 29.24 Clearly, the payment of incorrect benefits constituted maladministration on Teachers' Pensions' part. However, in order to uphold Ms S' complaint, the Pensions Ombudsman had also to find that she had sustained injustice as a

consequence of the maladministration. This could include non-financial injustice; commonly referred to as distress and inconvenience.

29.25 Teachers' Pensions had acknowledged that its error had caused Ms S distress and inconvenience. It had offered Ms S £1,000 as redress for this. In the Adjudicator's view, the Pensions Ombudsman was likely to find that this was suitable redress for the distress and inconvenience Ms S had sustained. He was unlikely to direct Teachers' Pensions to pay Ms S a higher amount. However, Ms S should be offered the option to have the £1,000 offset against the amount being recovered, rather than having it automatically deducted. It would, of course, reduce the burden of repayments going forward if she did opt for offset.

29.26 The Adjudicator suggested that Teachers' Pensions should recalculate the amount it was seeking to recover to take account of the change of position defence Ms S had. It should also ask her if she wished to have the £1,000 it had offered for distress and inconvenience offset against the remainder. Teachers' Pensions should then come to an agreement with Ms S for her to repay the remainder of the overpayment based on her income and expenditure. In order for it to do so, Ms S would need to complete the form which Teachers' Pensions had provided for her.

30. Teachers' Pensions confirmed that it accepted the Adjudicator's Opinion and the suggested remedies. However, Ms S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The NEU, on Ms S' behalf, has pointed out that, although the delay in notifying Ms S that there had been an overpayment did not affect the amount of overpayment relating to her lump sum, the overpayment of her pension was higher than it might otherwise have been. The NEU suggests that this should be taken into account when determining how much Ms S should be required to repay. I have considered this argument but I find that it does not change the outcome. I agree with the Adjudicator's Opinion.

Ombudsman's decision

31. The starting point when someone has been paid retirement benefits to which they are not entitled has to be that the scheme is able to seek to recover those payments. It is then a matter of deciding whether the recipient of the incorrect payments is able to show that they have a legal defence against recovery; in whole or in part.

32. My Adjudicator went through each of the potential defences which might be available to Ms S. I agree with her analysis of the defences.

33. The defence most likely to apply when incorrect retirement benefits have been paid is the change of position defence discussed in paragraphs 29.3 to 29.13. In order for a change of position defence to be available to Ms S, she must satisfy the requirement to have acted in good faith when she accepted the overpaid retirement benefits. I would reiterate that not acting in good faith, in this context, is not the same as acting

dishonestly. It simply means that, if someone suspected that there may have been an error and could have taken simple steps to ascertain the correct position but did not do so, a change of position defence would not be available to them. In other words, the recipient of an overpayment cannot turn a blind eye to any doubts they might have, however small, as to the possibility of there having been an error.

34. In Ms S' case, it is clear that she was quite aware of how partial retirement worked. She informed Teachers' Pensions' call handler that her total service was "something like 38 years" and she had already taken "about 18 years". These figures are a reasonable representation of what had happened and indicate that Ms S had a good grasp of her pension history. The call handler responded by saying that she had taken nine years and 114 days from Ms S' total service of 37 years and 215 days. In response, Ms S said Teachers' Pensions had "paid out" eight years and nine years. She queried whether Teachers' Pensions had only paid out nine years and 114 days and then appeared to accept what she had been told about just nine years being subtracted from her total service.
35. I have to say that deciding whether Ms S satisfies the requirement to have acted in good faith has been an exceedingly difficult judgment. On the one hand, Ms S clearly knew that she had already received retirement benefits relating to "about 18 years" of her pensionable service; on the other hand, she was reassured that the calculation had been checked by someone working for Teachers' Pensions. I have concluded that the strength of the reassurance offered by the call handler was sufficient to address any doubts Ms S had about the veracity of the figures she had received. I accept that she was acting in good faith when she received the overpayments.
36. Ms S would also have to satisfy the remaining conditions for a change of position defence; namely:-
 - Her circumstances have changed detrimentally; and
 - The change of circumstances has been caused by receipt of the overpayment.
37. I agree with my Adjudicator's analysis of Ms S' change of circumstances. I find that she has a change of position defence to the recovery of £3,384.14 relating to her expenditure on home improvements.
38. With regard to the potential defences of estoppel and contract. I do not find that Ms S has shown that the required conditions enabling her to rely on either of these defences exist. This is essentially for the reasons discussed in paragraphs 29.15 to 29.20.
39. The NEU has pointed out that the delay in addressing the overpayment of Ms S' retirement benefits will have meant that the overpayment of her pension was higher than it need be. It suggests that this should be taken into account when determining how much Ms S should be required to repay. Whilst the delay amounts to maladministration, it does not alter the fact that Ms S is required to repay any money

to which she was not entitled unless, and to the extent, she can show she has a legal defence against recovery.

40. Teachers' Pensions has recognised that the delay in dealing with the overpayment of Ms S' retirement benefits amounted to maladministration on its part and that this will have caused Ms S distress, anxiety and inconvenience. It has offered £1,000 in recognition of this. I find this to be appropriate in the circumstances.
41. Therefore, I uphold Ms S' complaint to the extent that she has a change of position defence to the recovery of £3,384.14.

Directions

42. Within 28 days of the date of this Determination, Teachers' Pensions shall recalculate the amount of the overpayment it is seeking to recover taking into account Ms S' partial change of position defence. It shall ask her if she wishes to have the £1,000 it has offered for distress and inconvenience offset against the remainder.
43. Teachers' Pensions shall then come to an agreement with Ms S for her to repay the remainder of the overpayment based on her income and expenditure. In order for Teachers' Pensions to make allowance for Ms S' circumstances, Ms S should complete the form which Teachers' Pensions has provided for her.

Anthony Arter
Pensions Ombudsman

30 June 2022

Appendix 1

The Teachers' Pensions Regulations 2010 (SI2010/990) (as amended)

44. Paragraph 13 of Schedule 7 provides:

“13 General

A Case does not apply to reckonable service taken into account in the calculation of a phased retirement pension except where the phased retirement pension has ceased to be payable under regulation 59 (cessation of phased retirement pension).”

45. Regulation 114 provides:

“114 Cessation, etc of benefits where no entitlement

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

(2) The Secretary of State may -

(a) cease to pay the benefit;

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

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

Appendix 2

Transcript of telephone conversation on 1 September 2014

46. Ms S called the Teachers' Pensions Helpline on 1 September 2014. She informed the call handler that the "calculations" she had received were wrong and no money had gone into her bank account. The call handler asked Ms S what she thought was wrong with the calculations. Ms S said she believed the average salary to be correct but the pensionable service could not be correct. The call handler confirmed that Ms S had already taken a proportion of her service because she had taken phased retirement. Ms S responded that the total service should be "something like 38 years" and she had already had "about 18 years".
47. Teachers' Pensions' call handler said she would find out what service was being "paid out". She put Ms S on hold. When the call handler returned, she said she had spoken to the Benefits Team and confirmed that payment would be made that day. Ms S asked about the figures. The call handler said they had paid out nine years and 114 days. She said she had taken this from Ms S' full service length of 37 years and 215 days and the fact that they had paid out 28 years and 101 days was correct. In response, Ms S said:
- "... so it isn't that you paid out 8 and 9 you have just paid out 9 ok."
48. Ms S then queried the amount of her annual pension, which she quoted as £19,712. The call handler said this would be paid on top of what Ms S was already being paid and that her full annual pension would be £31,027.
49. Ms S queried the amount of the lump sum. She said it could not be £59,000. The call handler said the lump sum was three times the annual pension, so the figure of £59,000 was correct. She said she had double-checked the calculations.