

Ombudsman's Determination

Applicant	Mrs N
Scheme	Teachers' Pension Scheme (the Scheme)
Respondents	Teachers' Pensions (TP) North Yorkshire County Council (NYCC)

Outcome

1. Mrs N's complaint against TP and NYCC is partly upheld. To put matters right, Mrs N shall be paid £3,000 in respect of the non-financial injustice she has sustained as a consequence of their maladministration. £2,000 of this payment shall be made by TP and the remaining £1,000 by NYCC.
2. TP was, however, correct to reduce the pension to the level provided for in the Teachers' Pensions Regulations 2010, which govern the Scheme (**the Regulations**) on discovery of the overpayments. The past overpayments of lump sum and pension are recoverable.

Complaint summary

3. Mrs N's complaint concerns the overpayment of her retirement benefits amounting to £15,681.79. TP is seeking to recover the overpayments by monthly deductions from her future pension payments. She has said that its delays in clarifying her service record with NYCC resulted in a much higher total overpayment, than she would have incurred, had it completed its investigations within a reasonable timeframe.

Background information, including submissions from the parties and timeline of events

4. 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.
5. Mrs N was initially represented by Walker Foster Solicitors (**the Representative**) in connection with this dispute.
6. From September 1973 to September 1985, Mrs N taught full time, and she was a member of the Scheme.

7. In January 1995, Mrs N started employment as a teaching assistant. She worked in this role for over 16 years, while also undertaking ad-hoc work as a supply teacher.
8. On 8 May 2012, TP provided Mrs N with a statement of her retirement benefits (**the Statement**). It said that the figures were based on 12 years and 219 days of pensionable service and an average salary of £33,116.13. It quoted a tax-free lump sum of £15,647.37 and an annual pension of £5,215.79. The Statement said:

“Please note: This is an ‘Interim’ award of pension and lump sum only. We are waiting for confirmation of service details from your employer.”
9. TP said that, on the same day, it queried Mrs N’s employment record from 1 April 2007 to 31 March 2009 with her employer, NYCC. It was concerned that the record did not appear to be correct.
10. Later that month, Mrs N retired.
11. No further communications took place between TP and NYCC concerning Mrs N’s service record until January 2017, when TP chased NYCC for a response to its query of 8 May 2012.
12. On 5 January 2017, NYCC notified TP that Mrs N’s service from 1 April 2007 should not have been recorded as pensionable employment under the Scheme.
13. On 8 June 2017, TP contacted NYCC to query the period of Mrs N’s service recorded as full time from 1 April 2009 to 31 March 2010.
14. On 16 June 2017, NYCC confirmed to TP that Mrs N’s service from 1 April 2009 to 31 March 2010 was part time and not pensionable service under the Scheme. It said that during this period she had undertaken irregular work as a supply teacher.
15. TP said that on 5 March 2018, following further investigations, NYCC confirmed that all of Mrs N’s employment with NYCC was part time and not pensionable under the Scheme.
16. In August 2018, TP reduced Mrs N’s pension to the correct level provided for under the Regulations.
17. On 3 September 2018, TP telephoned Mrs N to advise that her pension was incorrect.
18. On 4 September 2018, TP wrote to Mrs N to advise that her benefits had been overpaid by £15,681.79. TP explained that this consisted of an overpayment of her net pension amounting to £9,654 and an overpayment of her tax-free lump sum amounting to £6,027.79. It said that NYCC had notified changes that had affected the calculation of her retirement benefits, including:
 - a reduction in her pensionable service from 12 years and 219 days to 11 years and 219 days;

- a reduction in her average salary for pension purposes from £33,116.13 to £8,456.93;
 - a change in the method of the calculation of her average salary; and
 - a change to the best average salary period that affected the amount of increases payable.
19. TP enclosed a summary of the salary and service information that had been incorrectly recorded as pensionable. TP confirmed that the best average salary period, that it was now using to calculate Mrs N's retirement benefits, was the period ending 8 April 1985. Increases had been applied from this date to the date her benefits had come into payment.
20. A statement of retirement benefits was enclosed showing a tax-free lump sum of £9,619.58 and an annual pension of £1,285.96 as at Mrs N's retirement date. TP asked Mrs N to repay the total amount of the overpayments.
21. On 21 September 2018, Mrs N lodged a formal complaint with TP concerning the overpayment of her retirement benefits. On 2 October 2018, she asked that the complaint be considered under stage one of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). TP provided responses on 4 and 27 October and 21 November 2018.
22. On 10 December 2018, Mrs N raised a complaint with NYCC regarding the changes it had made to her service record. NYCC provided its response on 20 December 2018.
23. On 12 March 2019, the Representative raised a complaint on behalf of Mrs N with the Department for Education (**DfE**) under stage two of the IDRP. The DfE responded on 9 April 2019.
24. During Mrs N's complaints of 21 September and 10 December 2018 and 12 March 2019, and subsequent communications with The Pensions Ombudsman (**TPO**), the parties made the following submissions.

Mrs N's submissions, some of which were made by the Representative

25. She had relied on TP and NYCC to provide correct information. She could not reasonably be expected to know that her retirement benefits were incorrect as she did not have access to the underlying data.
26. While TP said in the Statement that the award was an interim one, this contradicted the following comment in the covering letter:
- "I am pleased to confirm that your pension benefits have been calculated and made ready for payment."
27. Reducing her pension in August 2018 without prior notification, was inappropriate and could have resulted in her being unable to meet her outgoings.

28. TP's telephone call of 3 September 2018 had caused her considerable distress; it was not clear to her whether it was a scam. She was unable to verify the caller as the telephone number was withheld.
29. The Representative contacted TP using the telephone number provided in TP's letter of 4 September 2018. However, the advisor who answered the call was unable to provide further information and had to email the relevant case worker. Furthermore, when Mrs N requested a telephone call on 11 September 2018, the person who contacted Mrs N could not progress the matter.
30. HM Treasury's Managing Public Money Guidelines¹ (**the Guidelines**) state that: "similar cases should be treated consistently". She is aware of the case of a friend where an overpayment of retirement benefits, in a public service scheme, arose in similar circumstances. Her friend was told by her employer, HM Revenue & Customs (**HMRC**), that: "In recognition of the fact that the overpayment is not your fault, and you could not have known that you were receiving an incorrect amount, you will not need to repay any money".
31. She made financial decisions in 2012, that she would not have made, had she not received the overpaid retirement benefits. The payments of pension had contributed to the household monthly budget. The tax-free lump sum was used towards home improvements that were only undertaken due to the extra money.
32. TP should be pursuing NYCC for recovery of the overpayments. She should not be held responsible for the negligence of a third party.
33. TP signposted Mrs N to The Pensions Advisory Service (**TPAS**). TPAS advised that she should take independent financial advice. She has subsequently incurred legal fees in connection with her case, which TP should now reimburse. In addition, she has spent many hours on telephone calls and in correspondence, in an attempt to seek further information, as this was not initially supplied by TP.
34. Recovery of the overpayments would place Mrs N in financial hardship.
35. The sum that TP is seeking to recover should be reduced by the amount of the overpayments Mrs N received from January 2017, the date TP became aware of the error. The remaining sum should be recovered at the rate of £150 per month. Recovery should be made over a period of six years; the same period the overpayments accrued.
36. Mrs N has a limitation defence to TP's claim for recovery of the overpayments.

¹ https://assets.publishing.service.gov.uk/media/65c4a3773f634b001242c6b7/Managing_Public_Money_-_May_2023_2.pdf.

37. She would like a payment of £2,000, for the distress and inconvenience she has suffered in connection with this matter.

TP's submissions

38. It apologised that its letter of 4 September 2018 did not provide a full explanation of how the overpayments had arisen. The letter explained the changes made to Mrs N's pensionable service and average salary. It also said that the last day of her pensionable service was 7 April 1985 rather than 31 March 2010, which had been used in its initial calculations.
39. The retirement award made in 2012, was an interim one because TP was awaiting confirmation of Mrs N's pensionable service with NYCC.
40. In April 2016, the Government introduced a new single tier state pension for individuals who reach their state pension age after 6 April 2016. Pension schemes that were contracted out of the state second pension had a two-year window to check that they were paying the correct amount of guaranteed minimum pension (**GMP**). Where overpayments of retirement benefits were identified in connection with this exercise, the DfE did not seek recovery in most cases. However, the pension would be reduced to the correct level going forward. Managers of other public service schemes adopted a similar approach to the DfE.
41. TP does not have discretion to write off the overpayments of Mrs N's retirement benefits.
42. Before planning her expenditure, Mrs N had the opportunity to query why the average salary used to calculate her pension benefits on service accrued in the 1980s was approximately £30,000 when she actually earned approximately £8,000 at the time.
43. It was Mrs N's decision to appoint solicitors in connection with this matter. TP does not agree that it should reimburse her legal costs.
44. It was willing to recover the overpayments over a period of three years. If this would cause Mrs N financial hardship, she could complete a Statement of Income and Expenditure (**SoIE**) form; it would then consider whether a longer period of recovery would be appropriate.
45. It was prepared to reduce the amount of the total overpayments by £500, as there had been delays in its investigation of Mrs N's case.

The DfE's submissions

46. It acknowledged that it had taken TP over four years to correct Mrs N's retirement benefits. However, it was unfortunate that Mrs N did not notice the error at the time and query it with TP. It would have been apparent to her that her benefits had been calculated using an average salary far in excess of any pensionable salary she had earned in connection with the Scheme.
47. It had to recover the overpayments in line with the Guidelines.

48. It would ask TP to consider whether it should make a distress and inconvenience payment and reconsider Mrs N's request that it reimburse her legal costs.
49. The Scheme's IDRP was designed to be used by a layperson; it did not consider that legal support was required in this case.

NYCC's submissions

50. It acknowledged that the overpayments were due in part to incorrect service information that it had provided to TP.
51. It had no record of receiving or responding to a request from TP in May 2012 for clarification on Mrs N's service.
52. Mrs N was provided with details of the original and corrected service information and a copy of a corrected print out of her pensionable service in the Scheme. It showed 11 years and 219 days of pensionable service accrued before 7 April 1985. During Mrs N's period of irregular employment with NYCC, she did not make a part time election and pension contributions were not deducted from her pay in respect of the Scheme.
53. It was Mrs N's responsibility to check the accuracy of the pension information that was provided by TP.

The Pensions Ombudsman's position on overpayment cases – public service schemes

54. Members of statutory public service occupational schemes (**Public Service Schemes**) who have been told that they are entitled to a higher level of pension benefits than they are entitled to under the scheme regulations often argue that:
 - their pension should not be corrected going forward; and/or
 - all or part of the past overpayments should not be recovered.
55. The PO recognises that as a matter of law and under the Guidelines, if a higher pension is being paid than is provided for under the regulations governing a Public Service Scheme, the manager will generally be required to reduce the pension to the correct level in respect of future payments. Managers can only pay benefits in accordance with the scheme regulations. The PO cannot direct the manager of a Public Service Scheme to pay a benefit the manager has no power to pay.
56. In some circumstances, the applicant may be able to demonstrate that:
 - they had been given inaccurate statements as to their pension entitlement on which it was reasonable for the applicant to rely; and
 - they had suffered a loss as a result of their reliance on those statements.

57. An applicant may then have a claim for financial injustice/damages in negligent misstatement against the party that made the statement for any monetary loss the member has sustained. This does not mean that the overpayment is not recoverable, but the member may be entitled to be compensated for monetary loss which they can set against the claim for overpaid benefits. The measure of loss for negligent misstatement, however, is to seek to put the member in the position they would have been in if the negligent misstatement had not been made. An inaccurate statement of entitlement does not give a member an entitlement to the promised benefit.
58. In relation to past overpayments, in general, money paid in error can be recovered, even if the party responsible for the error has been careless. However, there are circumstances where the recipient may not be required to repay some or all of the overpayments; those circumstances are where a defence against recovery applies.
59. The PO would generally not expect the manager to seek recovery without having first explored with the member whether such a defence is available. The Guidelines and the general law would potentially permit a manager not to seek recovery if there is a valid defence in law to recovery.
60. Managers of Public Service Schemes may have a range of possible recovery methods including the following:
- repayment - making a claim for repayment directly from the member on the grounds of unjust enrichment;
 - set-off - recovering the overpayments by deduction from future payments of pension under the principles of equitable set-off; and/or
 - a statutory right of recovery or statutory set-off if the regulations of the applicable Public Service Scheme provide for this. Not all schemes have such a right of recovery, and the wording of these regulations differ.
61. It is recognised in the Guidelines that there may be various defences to recovery including:
- change of position;
 - estoppel (which can apply in relation to past overpayments);
 - good consideration (effectively a contractual defence);
 - the length of time since the overpayment was made (limitation); and
 - hardship.
62. The PO's position is that section 91 of the Pensions Act 1995 (**the 1995 Act**) does apply when managers seek to exercise a right of equitable set-off or statutory set-off. Accordingly, managers of public service schemes should not commence recovery of any overpayments by exercising the right of set-off where there is a dispute as to the amount or timing of the recovery of the overpayment, without an order of a

‘competent court’.² The PO is not, presently, a competent court for the purposes of section 91 of the 1995 Act.³ It follows that, if the PO determines the overpayments are recoverable, the manager of a Public Service Scheme will still need an order of a competent court before starting to recover the overpayments from future pension payments under any right to set-off. Obtaining an order of a competent court is purely administrative and the County Court (as competent court) does not exercise any judicial function at that stage in the process, so the merits of the case will not be reconsidered.⁴

63. The PO’s view is that generally a period of recovery at least equal to the period over which the overpayment arose is appropriate. There may be circumstances where a shorter period is appropriate, for example where the applicant has invested a lump sum or paid it into a bank account. But there may also be circumstances where a longer period of recovery is appropriate, for example where the proposed period of recovery will cause a member hardship. The PO will generally, where the complaint cannot be resolved without the PO issuing a Determination, specify the rate and amount of recovery in the PO’s directions so that the competent court can authorise the commencement of the recovery process by the managers of the scheme at this rate.
64. In cases where the PO determines that there has been maladministration in making the overpayments, the PO has power to make a reasonable award for any non-financial injustice (distress and inconvenience) sustained in consequence of the maladministration.
65. The above sets out the PO’s views very generally on the recovery of overpayments in relation to Public Service Schemes by reference to the PO’s understanding of the current law. It is for guidance only, but sets the context in which the PO approaches overpayments in Public Service Schemes. Each case will turn on its own facts.

Adjudicator’s Opinion

66. Mrs N’s complaint was considered by one of our Adjudicators who concluded that further action was required by TP and NYCC as their maladministration had caused her serious distress and inconvenience. The Adjudicator’s findings are summarised in paragraphs 67 to 128 below.

Legal Issues arising in this particular case

67. In this particular overpayment case:

² In England and Wales this will normally be the County Court.

³ *Pensions Ombudsman v (1) CMG Pension Trustees Limited and (2) CGI IT UK Limited [2023] EWCA Civ 1258 (CA)* at paragraphs 153-160. However, it was announced in the King’s speech in July 2024 that the law will be changed so that TPO will be treated as a competent court for the purposes of section 91 of the 1995 Act. Once the new legislation is in force this will reverse this aspect of the CMG decision.

⁴ *Pensions Ombudsman v (1) CMG Pension Trustees Limited and (2) CGI IT UK Limited* at paragraph 56.

- Mrs N has accepted that her pension should be reduced to the correct level provided for in the Regulations going forward;
- Mrs N has disputed whether the past overpayments should be recovered, and, to the extent that Mrs N has to repay the overpayments, considers that a longer period of recovery is appropriate;
- Mrs N has argued that, as a consequence of the negligent misstatement by TP, which she relied on in good faith, she has sustained a financial loss; and
- Mrs N has argued that she has sustained non-financial injustice (distress and inconvenience) as a consequence of maladministration by TP and NYCC.

68. TP could potentially seek to recover the overpayments by the following methods:

- repayment on grounds of unjust enrichment;
- setting off the overpayments against future pension payments on grounds of equitable set-off; or
- recovering or setting off the past overpayments against future payments of pension under any recovery or set-off power set out in the Regulations.

69. TP has indicated that it is seeking recovery by setting off the overpayments against future pension payments on grounds of equitable set-off. Consequently, it has been necessary to consider TP's right of recovery under those grounds.

70. Mrs N had not specifically set out any particular legal defences to recovery or set-off. However, in the Adjudicator's view, the following defences needed to be considered to form an opinion on the complaint:

- change of position;
- estoppel;
- limitation (and laches);
- contract; and
- hardship.

Future pension payments

71. Mrs N accepted that TP was obliged to correct the level of pension going forward to the level provided for in the Regulations, on discovery of the overpayments. So, there was no dispute about this issue.

Negligent misstatement claim

72. Mrs N has argued that, as a consequence of being given inaccurate information about her pension entitlement, she made financial decisions that she would not have made had she been aware of the correct level of her benefits. In particular, home improvements that were undertaken in reliance on the inflated tax-free lump sum. She said that she has sustained a financial loss as a result.
73. To succeed in a claim for negligent misstatement, broadly it is necessary to show that:
- the trustees or manager owed the person, to whom the negligent misstatement was allegedly made, a duty of care. (Generally, trustees of trust based schemes and managers of Public Sector Schemes owe a duty of care to beneficiaries);
 - there was a breach of the duty of care (that is the information provided was not correct and could not be made by someone exercising reasonable care);
 - the person to whom the information was provided reasonably relied on the representation and has suffered loss (the “but for” test is satisfied); and
 - the loss suffered was not too remote (it was of the kind falling within the scope of the duty of care).⁵
74. In terms of reliance, the courts have said that the judge had to ask three questions:
- did the appellant rely on the statements;
 - was the reliance reasonable; and
 - would the appellant have acted differently if they had been told the correct position.⁶
75. The aim of any damages for negligent misstatement is to put the applicant in the position they would have been in if the negligent misstatement had not been made. It does not give an applicant an entitlement to the overstated benefit.
76. The applicant would be under a general duty to take reasonable steps to mitigate their loss.
77. In the Adjudicator’s view, TP owed a duty of care to Mrs N in relation to the information provided to her about her retirement benefits.
78. However, the Adjudicator was not of the view that it was reasonable for Mrs N to rely on the information that was provided in the Statement. The Statement included a note

⁵ See *Hagen v ICI Chemicals* [2001] 64 PBLR for a useful discussion of how the principles apply in negligent misstatement cases from [77] to [140]

⁶ *Corsham v Police Commissioners for Essex* [2019] 074 PBLR (042); [p2019] EWHC 1776 (Ch), *Morgan J* at paragraph 173

highlighting that the benefits quoted were in respect of an 'interim' award. It advised that TP was waiting for confirmation of Mrs N's service from her employer.

79. In the Adjudicator's view, the letter sent with the Statement did not suggest a degree of permanency to the figures that overrode the note in the Statement advising that it was an interim award. So, Mrs N had not satisfied the requirement for a negligent misstatement claim to succeed.

80. In the Adjudicator's view, this part of Mrs N's complaint should not be upheld.

Past overpayments

81. Mrs N had been overpaid her pension since it came into payment in May 2012. She had also been overpaid her tax-free lump sum.

Equitable set-off

82. It was necessary to consider whether equitable set-off was available to TP, enabling it to recover the overpayments by deduction from future payments. Equitable recoupment cannot apply to a Statutory Scheme as it is a trust-based remedy relating to the adjustment of accounts in a trust based scheme.

83. Where there has been an overpayment in a Public Service Scheme, it can be said that there are two cross-claims between the member and the manager of the scheme which can be offset. Specifically, the member's pension entitlement is a statutory debt owed to them by the manager and is liable to be offset against the overpayment, which is a debt owed to the manager by the member. So, subject to any defences to the claim which the member may have, it was inequitable that they can insist on their full entitlement under the scheme without allowing the claim for the overpayment to be satisfied.⁷ It follows that the manager may be able to rely on equitable set-off as the basis for recovery.

84. To reach a view on whether equitable set-off was available, the Adjudicator needed to consider whether Mrs N had any valid defences in law to recovery of the overpayments.

Change of position

85. To succeed in a change of position defence, it was generally considered necessary to show:

- good faith - the recipient of the overpayment must be acting in good faith;
- detriment - their circumstances must have changed detrimentally as a result of the overpayment or in anticipation of receiving it. Generally, this meant that the money must have been spent, and the expenditure cannot be legally or practically reversed, or any asset bought with the overpayment cannot be easily sold; and

⁷ *Geldof v Simon Carves Ltd* [2010] EWCA Civ 667 at [20] to [43]

- causation - there must be a causal link between the change of position and receipt of the overpayment (as a minimum it is necessary to show at least that “but for” the mistake the applicant would not have acted as they did).

86. If the above tests were met, it would generally be inequitable for the manager of the scheme to recover the money.
87. Unlike the position in relation to an estoppel defence, it was not necessary for the member to receive an unequivocal representation of entitlement to the overstated benefit for a change of position defence to be available. It was easier to demonstrate a change of position defence than an estoppel defence.

Good faith

88. For the recipient of the overpayment to show that they acted in good faith, it was generally necessary for them to demonstrate that they did not have actual or “Nelsonian knowledge” that they were being overpaid. If the recipient had good reason to believe that they were being overpaid but did not check the position with the manager this would amount to bad faith.⁸ However, just because a reasonable person might have realised that they were being overpaid, does not mean that the recipient of the overpayment was acting in bad faith if they did not realise.⁹ Mere carelessness or negligence was not enough to establish bad faith.
89. Bad faith was not synonymous with dishonesty. It could simply mean that, if the recipient knew or had grounds for believing that the payment had been made in error, but could not be sure and failed to make reasonable enquiries, the defence would not be open to them. In making a judgment as to the recipient’s knowledge of the circumstances, it was not a question of deciding what they should have known; rather, it was a question of what they did know.

Detriment

90. Detriment can normally be demonstrated by the fact that the recipient has spent the money on items they would not otherwise have bought but for the overpayment. However, it was also possible to demonstrate detriment in other ways. For example, by making gifts in some circumstances.
91. It was not always necessary to show on the balance of probabilities that the overpayment had been spent on particular items which the member would not otherwise have bought, or to precisely match the expenditure to particular items.
92. The courts had established in a number of cases that a rise in a defendant’s general standard of living can demonstrate detriment in a change of position or estoppel defence. It had also been confirmed that general household expenditure could give

⁸ See *Webber v Department for Education, Teacher’s Pensions* [2012] EWHC 4225 (Ch) and *Webber v Department of Education* which applied the earlier test in *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC 1425 (Comm) in a pensions context.

⁹ See for example *Abouh Ramah v Abacha* [2006] EWHC Civ 1492 *Armstrong DLW GmbH v Winningham Networks Ltd* [2012] EWHC 10 (Ch) at [110].

rise to an estoppel where the overpayment enabled the defendant to improve the lifestyle of their family in very modest ways.¹⁰ This was the case even if the defendant was not able to point to a particular item of expenditure which they bought as a result of the overpayments.¹¹ However, the defendant was able to demonstrate that their general pattern of expenditure was higher than it would otherwise have been but for the overpayments.

93. As a change of position defence was not limited to cases where funds had been spent on specific identifiable items of expenditure, it may not be right for the court (or for that matter the PO) to apply too demanding a standard of proof when an honest defendant says they have spent an overpayment on improving their lifestyle but cannot produce too detailed accounting.¹²

Causation

94. There also needed to be a causal link between the overpayment and the change of position relied on. The member generally needed to at least show that “but for” the overpayment they would not have spent the money, or increased their standard of living or their circumstances would not have changed in some other way¹³.

Tax-free lump sum and ongoing overpayments of pension

95. On reviewing the evidence, the Adjudicator was not satisfied that Mrs N had acted in good faith. In his view, she had Nelsonian knowledge of the overpayments and failed to check the position with TP.
96. The Adjudicator said this because Mrs N’s payslips from NYCC would have indicated to her that pension contributions were not being deducted from her pay in respect of the Scheme. Furthermore, Mrs N would not have received communications from NYCC indicating her membership of the Scheme. So, as well as being aware that her employment with NYCC was part time, in the Adjudicator’s opinion, Mrs N would also have been aware that her service with NYCC was not pensionable under the Scheme. The Statement showed that an average salary of £33,116.13 had been used in the calculation of her retirement benefits. The Adjudicator said that Mrs N would have been aware at the time that this was in respect of a recent salary and related to a period when she was not in pensionable employment under the Scheme. Consequently, it could not be used to calculate her retirement benefits under the Scheme. The Adjudicator took this view because it was considerably higher than Mrs N’s average salary of £8,456.93 that she earned when she was last in pensionable employment under the Scheme with an earlier employer.
97. Furthermore, the Statement warned Mrs N that the figures that were being put into payment were “an interim award of pension and lump sum only”. It was over six years

¹⁰ See *Scottish Equitable v Derby* [2000] PLR 1 (CA) at [33].

¹¹ *Phillips v Collins v Davis* [2000] 3 All ER case (cited with approval in *Scottish Equitable Derby*).

¹² *National Westminster Bank plc v Somer International UK Limited* [2002]

¹³ *Scottish Equitable v Derby* [2001] 3 All ER 818, *Harrison J* at paragraphs [37]-[41]

before TP provided Mrs N with details of her final benefits following confirmation of her service record with NYCC. However, in the Adjudicator's view, Mrs N was aware at the time that the calculation of her retirement benefits had not been finalised. She could have contacted TP shortly after she retired to request an update on its investigation into her service record.

98. Mrs N said that TP's note on the Statement was at odds with the comment in its covering letter which stated: "I am pleased to confirm that your pension benefits have been calculated and made ready for payment." In the Adjudicator's opinion, there was no conflict between these two statements. The letter was communicating the fact that a benefit calculation had been undertaken and the note then advised that this calculation was an 'interim' calculation.
99. Accordingly, in the Adjudicator's opinion, Mrs N did not have a change of position defence in relation to recovery of any of the overpayments.

Estoppel

100. Broadly, an estoppel defence legally prevents (or 'estops') a party from departing from a statement or promise that it has previously made to another party. In this case, it would prevent TP from going back on what it informed Mrs N regarding her benefit entitlement and recovering the overpayments. There are two types of estoppel that may be relevant here, namely:
- estoppel by representation which can apply where one party has made a false statement or representation to the other; and
 - estoppel by convention, which can apply where both parties have been dealing with each other on a common understanding of fact which turns out to be false.
101. Generally, if an applicant is not acting in good faith for the purposes of a change of position defence, they will also not have an estoppel defence to recovery of an overpayment. In relation to estoppel by representation, in these circumstances it will generally not be reasonable for a member to rely on any representation as to their entitlement to a pension if they had actual or Nelsonian knowledge they might be being overpaid but failed to check the position with the manager. In the current case, it was the Adjudicator's opinion that it was not reasonable for Mrs N to have relied on the Statement, showing the inflated pension and tax-free lump sum, given that she had Nelsonian knowledge that there may be an overpayment but did not check the position. In relation to any estoppel by convention defence, the defence would also fail as there would be no common understanding of the fact of the overpayment if one of the parties knows or has Nelsonian knowledge that they have been overpaid. So, it was the Adjudicator's view that an estoppel by convention defence was also not available here.

Limitation

102. Unlike a claim for repayment of an overpayment on grounds of unjust enrichment, a limitation defence was not available in relation to an equitable set-off claim.¹⁴

Contract

103. The Adjudicator had 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 of a contractual nature. In particular, the Adjudicator could not see that there was any intention on the part of TP to enter into a legal relationship with Mrs N outside of the Regulations.

104. Moreover, any contract to provide a benefit under a Public Service Scheme which was not provided for under the regulations governing the scheme would be void.

Hardship

105. Under the Guidelines, TP should have considered the issue of hardship when determining whether to recover the overpayments and the period of recovery.

106. In particular, the Guidelines state:

“Public sector organisations may waive recovery of overpayments where it is demonstrated that recovery would cause hardship. But hardship should not be confused with inconvenience. Where the recipient has no entitlement, repayment does not in itself amount to hardship, especially if the overpayment was discovered quickly. Acceptable pleas of hardship should be supported by reasonable evidence that the recovery action proposed by the paying organisation would be detrimental to the welfare of the debtor or the debtor's family. Hardship is not necessarily limited to financial hardship; public sector organisations may waive recovery of overpayments where recovery would be detrimental to the mental welfare of the debtor or the debtor's family. Again, such hardship must be demonstrated by evidence.”

107. Mrs N declined TP's request that she complete its SolE form if recovery of the overpayments would cause her hardship. The Adjudicator noted that she had requested a recovery period equating to the period over which the overpayments were made. The option of completing the SolE form was still available to Mrs N. Notwithstanding, it was reasonable to assume in the circumstances that recovery of the overpayments over the extended period that Mrs N had requested was affordable.

Conclusion

108. In the Adjudicator's view, all the overpayments were recoverable by TP under principles of equitable set-off.

¹⁴ See *Cheltenham BV v Laird* [2009] EWHC 1253 (QB) and Derham, the Law of Set-off (4th edition) (2010) at [4.51] to [4.54]

Commencement of set-off

109. It has been accepted by the courts that equitable recoupment is a form of set-off for the purposes of section 91(5).¹⁵ In a case where the amount, or period of, the overpayment is disputed, the trustees of an occupational pension scheme cannot commence recovery without an order of a “competent court”.¹⁶ The same analysis applied in relation to the recovery of overpayments by a manager by way of set-off under a Public Service Scheme. A “dispute” for the purposes of section 91(6) extended to both a dispute about whether the overpayment was recoverable and the amount of each deduction going forward.
110. TPO is not a competent court for the purposes of section 91 of the 1995 Act.¹⁷ The managers of a Public Sector Scheme, like trustees of trust based occupational pension schemes, would be acting in breach of law and could be found responsible for maladministration if they failed to comply with the courts’ guidance.
111. TP would have to apply to the County Court in England and Wales or the Sheriff’s Court in Scotland for an order authorising the commencement of recovery of the overpayments. This was a paper based step and did not involve the competent court revisiting the merits of the Determination.

Period of recovery of overpayments

112. Generally, the PO considered that a period of recovery at least equal to the period the overpayments arose was appropriate. In some circumstances it may be appropriate to depart from this period if, for example, the applicant has invested the overpayment or still holds a significant part of the overpayment in a bank account, or the period of recovery proposed would cause hardship.
113. In the current case, TP had offered Mrs N a recovery plan over a period of three years. Mrs N had suggested a recovery period of over six years, in line with the length of the period she was overpaid.
114. Mrs N’s pension commenced in May 2012. However, it was not until August 2018 that it was paid at the correct level. In the Adjudicator’s view, a recovery period of six years and three months, which was equivalent to the period over which the overpayments occurred, was reasonable. So, a deduction at the rate of £209.09 per month from Mrs N’s pension for 74 months followed by a final deduction of £209.13 was appropriate in the circumstances.
115. The Adjudicator noted that, while Mrs N referred to a recovery period equal to the period over which the overpayments occurred in her submissions, she also referred to monthly deductions being made from her pension at the rate of £150. The

¹⁵ *Burgess v BIC UK* [2018] 054 PBLR (040), Arnold J at [165] and *CMG Pension Trustees v CGI IT UK* [2022] 093 PBLR (056), Leech J at [145]

¹⁶ *CMG Pension Trustees v CGI IT UK* [2022] 093 PBLR (056), Leech J at [102]

¹⁷ *CMG Pension Trustees v CGI IT UK* [2022] 093 PBLR (056), Leech J at [172]. This issue is discussed in TPO’s factsheet on this issue which is available on TPO’s website.

Adjudicator said that, if she considered that monthly deductions of just over £200 would cause her hardship, she was welcome to submit financial evidence by completing the SoLE form.

Distress and inconvenience

116. The PO has power to make reasonable awards for non-financial injustice arising because of maladministration.
117. The Adjudicator's view was that the overpayments had arisen as a consequence of maladministration by NYCC. It provided TP with incorrect submissions that suggested Mrs N was working full time and in pensionable service under the Scheme. This resulted in TP paying Mrs N's benefits from the Scheme at a higher rate than she was entitled to. Mrs N has sustained non-financial injustice as a result.
118. TP said that it wrote to NYCC on 8 May 2012, to query Mrs N's service. However, NYCC maintains that it did not receive this request, and that it was not until January 2017 that Mrs N's service history was questioned by TP. The Adjudicator said that there was insufficient information in the circumstances to conclude, on the balance of probabilities, that NYCC was responsible for the delay in TP clarifying Mrs N's service history.
119. In the Adjudicator's opinion, an award of £500 was appropriate for the non-financial injustice Mrs N has sustained as a consequence of NYCC's maladministration.
120. In the Adjudicator's view, TP has compounded Mrs N's distress and inconvenience. It was aware when it issued the Statement in May 2012, that there was uncertainty over some of the service information NYCC had provided. While TP said it queried this information at the time, it was not until January 2017, when it requested an update, that it came to light that it had not received a response.
121. TP received an initial response from NYCC in January 2017. There were further communications between the parties, which culminated in TP receiving confirmation from NYCC, in March 2018, that all of Mrs N's employment with NYCC was part-time and not pensionable under the Scheme. However, it was not until August 2018 that TP corrected Mrs N's pension, it then notified her of this in September 2018.
122. In the Adjudicator's view, the delays in TP asking NYCC for an update, and the subsequent delays in clarifying Mrs N's service history and notifying her of the overpayments, amounted to maladministration. Had TP completed its enquiries in good time, then the overpayments would have been considerably less than the £15,681.79 it was seeking to recover. So, the situation would have been less stressful for Mrs N.
123. In the Adjudicator's opinion, it was inappropriate for TP to adjust Mrs N's pension to the correct level without first advising her of the adjustment. While the Adjudicator had seen no evidence that Mrs N suffered a financial loss as a result of this, she

should have been given the opportunity to assess her outgoings against her new monthly pension before TP made any adjustments.

124. TP first advised Mrs N of the overpayments in a telephone conversation on 3 September 2018, and then in a subsequent letter of 4 September 2018. The Adjudicator noted that Mrs N said that the telephone call caused her considerable stress as she thought it may be a scam. However, the Adjudicator was not of the view that it was unreasonable for TP to have telephoned Mrs N as it was important that she was made aware of the issue as soon as possible.
125. Mrs N had referred to the communications with TP, where the call handler was not able to progress their enquiries. The Adjudicator said Mrs N's case was complex. So, an immediate response may not have been possible.
126. Regarding the overpayment case which Mrs N said raised similar issues, in the Adjudicator's view, the material facts were very different. He did not agree that TP was required to adopt the same approach when considering Mrs N's complaint. The case in question involved the reconciliation of GMP figures.
127. The Adjudicator said that it was ultimately Mrs N's decision to seek legal advice. He did not agree that TP should reimburse her legal costs. Mrs N had the opportunity to check with TP whether it would pay for her legal advice before she sought advice. The Adjudicator had seen no evidence that she did this.
128. The Adjudicator agreed that an award of £500 was appropriate for the non-financial injustice Mrs N has sustained as a consequence of TP's maladministration. However, rather than the award being offset against the overpayments, Mrs N should have the option of having it paid to her.
129. Mrs N did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mrs N and TP provided their further comments which are summarised below.

Mrs N's additional submissions

130. In relation to the Limitation Act 1980 (**the Limitation Act**), the judge in *Webber v Dept of Education [July 2016]* stated that the cut-off date for limitation purposes for the recovery of overpayments should be the date on which TPO receives the respondent's reply to the complaint. So, TP's claim to recover the overpayments is time barred.
131. The covering letter sent with the Statement confirmed that the retirement benefits "have been calculated using the service and salary information **supplied** to us by your employer [Mrs N's emphasis]." However, on the Statement it said: "This is an 'Interim' award of pension and lump sum only. We are **waiting** for confirmation of service details from your employer [Mrs N's emphasis]." While these statements were contradictory, the first statement confirmed that the service details had been provided to TP, which implied that her benefits had been calculated accurately. The use of the

term 'Interim' in this context is generally understood to mean an initial payment with the possibility of further payments.

132. Mrs N has provided TPO with copies of the annual benefit statements she received for 2009, 2010 and 2011. She has highlighted that the average salary for pension purposes quoted in these statements amount to £29,125.19 in 2009, £31,399.51 in 2010 and £32,842.05 in 2011. Given these figures, which had been provided by TP, she maintains that she had no reason to question the average salary of £33,116.13 that was shown in the Statement.
133. Mrs N has also highlighted that the 2010 and 2011 benefit statements showed pensionable service of 12 years and 219 days in respect of her post as a teacher. So, she had no reason to question the service of 12 years and 219 days that was shown in the Statement. The benefit statements also showed that during the period 1 April 2009 to 31 March 2010, she was in full time employment that was pensionable under the Scheme. The accompanying notes said that:
- "This information has been provided by your employer(s). You must ensure this record is COMPLETE and ACCURATE. Please refer any queries to the appropriate employer."
134. Mrs N has also provided TPO with copies of four payslips (**the Payslips**) she received from NYCC dating from March 2007 to February 2010. The payslips show that pension contributions had been deducted from her pay. The two most recent of these payslips also show "LGPS 5.9%" and a deduction in respect of "added years".
135. In a letter she received from TP, dated 27 October 2018, it said:
- "In May 2012 your retirement benefits were calculated based on the information provided by NYCC, which we deemed to be correct. We did not have any reason to suspect that the period 1 April 2009 to 31 March 2010 was incorrectly coded as full time pensionable employment. It was only confirmed to us in June 2017 that this service was part time non-pensionable and should be removed from your record."
136. If TP had no reason to suspect that the Statement was incorrect, it was unreasonable for it to rely on it being an 'Interim' payment. Further, it was not reasonable to expect that she would have known that the figures were incorrect.
137. She strongly disagreed that TP "warned" her that the figures shown in the Statement were in respect of an interim award of retirement benefits. If TP had major concerns about the validity of the figures at the time, then it should have used more appropriate wording. She was not a pensions expert; she relied on NYCC to have systems in place to issue correct employment information and on TP to issue accurate retirement figures.

138. When she first started teaching, TP did not have a website, and very little information was provided regarding pension related matters. It was only around the time that she retired that this information became more readily available.
139. She does not understand why the Adjudicator did not consider that the necessary elements for a contract existed in her case. She was employed by NYCC for 16 years and it had a legal responsibility to create a contract of employment. The Payslips were proof that she was an employee of NYCC at the time and that she was in pensionable service in respect of that employment.
140. The impact of TP reducing her pension in August 2018, without prior warning, had not been adequately recognised by the Adjudicator. TP's actions were inappropriate, and it did not take into consideration the financial impact this would have on her.
141. The Adjudicator was proposing that her monthly pension from the Scheme, which now amounted to £293.42, should be reduced by £209 a month over a period of just over six years.
142. Regarding TP's telephone call on 3 September 2018, she does not agree that it was reasonable for TP to contact her from a withheld number. An initial written communication, showing the relevant contact numbers at TP for enquiries, would have been the appropriate method to communicate details of the overpayments.
143. Further, TP enclosed a remittance advice with the letter notifying her of the overpayments. It was unreasonable for TP to have assumed that she would accept the information it had provided in the letter, without first making enquiries. Similarly, that she would make the repayment immediately.
144. The Adjudicator had proposed that NYCC and TP pay an overall distress and inconvenience award of £1,000. The award is inadequate; it suggests that she is 94% responsible for the errors that caused the overpayments, which is not the case.
145. She is not prepared to release any information to TPO concerning her personal finances.
146. Mrs N maintains that she did not have Nelsonian knowledge that she was being overpaid and she acted in good faith. So, she has an estoppel by convention defence to the repayment of the overpayments. Further, her case has satisfied the necessary requirements for a negligent misstatement claim.

TP's additional submissions

147. Mrs N's employment with NYCC as a teaching assistant would have been pensionable under the Local Government Pension Scheme (**LGPS**). Any pensionable employment that she undertook as a teacher would have been pensionable under the Scheme. The Payslips show that the pension contributions being deducted from Mrs N's pay were in respect of the LGPS.

148. It is clear from the Payslips that the pension deductions were solely in respect of Mrs N's employment as a teaching assistant. There is no evidence of any Scheme pension contributions being deducted in relation to her post as a supply teacher.

149. I have considered the additional points raised by Mrs N. I agree with the Adjudicator's Opinion apart from the level of the distress and inconvenience awards. I propose that:

- TP caused Mrs N severe distress and inconvenience and an award of £2,000 is appropriate; and
- NYCC caused Mrs N serious distress and inconvenience and an award of £1,000 is appropriate.

150. TP and NYCC were given the opportunity to comment on these proposed levels of award. NYCC accepted the revision. TP repeated some of its earlier arguments and said:-

- The administration of the Scheme was a partnership between it and the employers who were responsible for providing accurate service and salary details. Members also had an important part to play in checking the information they receive. In Mrs N's case, this included the information on the benefit statements and the Statement.
- It had told Mrs N that the benefits she had initially been paid were an interim award. It was open to her to contact TP or NYCC to request an update on the correction of the position.
- While it accepted that the delay in amending Mrs N's benefits to the correct level was unacceptable, it considered an award of £2,000 to be unduly excessive. While it stood by its original offer of £500, in order to bring the matter to a conclusion, it would accept an increase to £1,000.

Ombudsman's decision

151. Mrs N's complaint concerns overpayments of her retirement benefits totalling £15,681.79 that TP is seeking to recover.

Limitation Act

152. Mrs N said that TP's claim to recover the overpayments was time barred under the Limitation Act. In particular, had TP sought to recover the overpayments using the repayment method, the time limits under the Limitation Act would come into play.

153. TP is seeking to recover the overpayments by setting them off against future pension payments. In these circumstances, I find that the Limitation Act does not apply. It follows that a limitation defence is not available to Mrs N. It is possible, however, that a laches defence is available and I have considered this below.

Laches

154. Laches is a general equitable defence which may be available where the party claiming recovery of an overpayment fails to take active steps (“sits”) on their legal rights or delays enforcing them.
155. Laches generally requires knowledge of the relevant facts on the part of the claimant seeking recovery of the overpayment where there was a waiver of the claimant’s rights. However, see the paragraphs below for further consideration of whether this is always the case under the more modern formulation of laches. In addition, laches requires either:
- acquiescence on the part of the claimant; or
 - prejudice or detriment on behalf of the person from whom the overpayment is being reclaimed.
156. In deciding whether laches could be used as a defence, it is necessary to consider the length of the delay and the nature of the acts during the interval (such as change of position or loss of evidence by the manager), which might affect either party and cause a balance of injustice in allowing or not allowing the remedy.¹⁸ More recent cases have established that the court or the PO should not enquire whether the circumstances match previous decisions, but ask whether the claimant’s actions make it inequitable to grant the relief that is sought.¹⁹
157. The Court of Appeal also said²⁰:
- “The question for the court in each case is simply whether, having regard to the delay, its extent, the reasons for it and its consequences, it would be inequitable to grant the claimant the relief he seeks”
158. TP had knowledge of the fact that there may have been overpayments on 8 May 2012. There was then a delay of over six years before TP took steps to seek recovery of the overpayments from Mrs N. During this time, the overpayments continued to be paid. However, as I have concluded in paragraph 166 below, Mrs N had Nelsonian knowledge of the fact that there may have been an overpayment. So, on that basis, I find it is not equitable to then allow a laches defence in these circumstances.

Other defences to recovery

¹⁸ *Lindsay Petroleum Oil & Co v Hurd* (1974) LR PC 221 at [66] as approved in *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cases and applied in *Re Sharpe* [1982] 1 Ch 154

¹⁹ See *Frawley v Neill* [2000] CP Reports 20 The Times April 5 1999 and *Schulman v Hewson* [2002] EWHC 855 (Ch) at [44]. See also *J J Harrison (Properties) Ltd v Harrison* [2001] 1 BCLC 158 which also adopted the more modern formulation in a systematic way looking at the various factors which may or may not make it equitable to allow a laches defence. See also *Patel v Shah* [2005] EWCA Civ 157 where the Court of Appeal endorsed the more modern approach that laches does not require an enquiry about whether the circumstances can be fitted into a preconceived formula derived from old cases, but a broad approach should be taken to ascertain whether it is unconscionable for the party to be permitted to assert his beneficial rights

²⁰ *PO Nedlloyd BV v Arab Metals Co* [2006] EWCA Civ 1717 applied in *Sheffield v Sheffield* [2013] EWHC 3927 (Ch) at [100], [106], [119]

159. One of the key points Mrs N has raised in response to the Adjudicator's Opinion is that she did not have Nelsonian knowledge that she was being overpaid. Mrs N says that she acted in good faith in reliance on the Statement. So, a number of defences to the recovery of the overpayments are available to her.
160. I have reviewed the Statement and covering letter that TP sent Mrs N in May 2012. I do not agree with Mrs N's assertion that the statement in the letter, confirming that NYCC had "supplied" service and salary details, overrode the comment in the Statement advising that TP was "waiting" for confirmation of this information. I consider that the more likely scenario is Mrs N would have assumed that TP had received some service and salary details on which the benefits shown on the Statement were based. However, it had concerns about the accuracy of this information, so it was waiting for confirmation from NYCC.
161. Mrs N has also referred to correspondence that she received from TP in October 2018. Specifically, that it shows that TP accepted that the information provided by NYCC, which it had used to calculate the figures in the Statement, was correct at the time. I do not agree that this is an accurate statement of the situation as TP also said that, on the same day that it issued the Statement, it queried part of Mrs N's employment record with NYCC as it did not appear to be correct. It was not until over four years later, in January 2017, that TP chased NYCC for a response. So, it still had concerns over the accuracy of Mrs N's employment record that it held at that time.
162. Turning to the average salary of £33,116.13 shown in the Statement, that had been used to calculate Mrs N's initial retirement benefits. I note that Mrs N has provided copies of annual benefits statements for 2009, 2010 and 2011, which quoted similar average salary figures, to support her assertion that she had no reason to question the accuracy of the figures shown in the Statement.
163. The benefit statements also provided a summary of Mrs N's pensionable service in the Scheme. The 2010 and 2011 statements both showed that during the period from 1 April 2009 to 31 March 2010, Mrs N was employed full time and that her employment was pensionable under the Scheme. This was the only period of employment that was shown as being pensionable since April 1985.
164. Notwithstanding, the accompanying notes highlighted that the information had been provided by Mrs N's employer, the statements also warned that it was Mrs N's responsibility to check that the information was complete and accurate. I would expect members to read information that is sent to them about their pension benefits, particularly information that is provided close to their retirement. The information displayed in the 2010 and 2011 statements concerning Mrs N's pensionable service would in my view have alerted her to the fact that something was amiss.
165. The Adjudicator suggested that Mrs N's payslips from NYCC would have indicated that she had not paid any pension contributions to the Scheme. So, she should have been aware that her service with NYCC did not count as pensionable service in the Scheme. Mrs N had provided copies of payslips she had received from NYCC from

March 2007 to February 2020. These showed that pension contributions had been deducted from her pay. While two of these payslips indicated that the contributions were in respect of the “Employees pension”, the two more recent payslips showed “LGPS 5.9%”. This evidences the fact that, at the time, Mrs N was paying pension contributions to the LGPS (in relation to her teaching assistant employment) and not to the Scheme (in relation to her post as a supply teacher).

166. I acknowledge that Mrs N is not a pensions expert. That said, on reviewing the evidence, I agree with the Adjudicator’s view that Mrs N had ‘Nelsonian knowledge’ there might be an issue with the accuracy of her retirement benefits, but she failed to make reasonable enquiries at the time.
167. The Adjudicator’s view was that the necessary elements for a contract did not exist in Mrs N’s case. That is, a contract to provide retirement benefits outside of Mrs N’s correct entitlement under the Regulations. I agree with the Adjudicator’s conclusion on this point. I wish to clarify that the Adjudicator was not referring to a contract of employment between Mrs N and NYCC.

The adjustment made to Mrs N’s pension

168. I note that Mrs N considers that the impact of TP reducing her pension, without warning in August 2018, has not been adequately recognised by the Adjudicator in the Opinion.
169. I agree that TP should have given Mrs N prior notice that an adjustment would be made to her pension. Having considered the individual facts of this case, I am satisfied that the overall distress and inconvenience award I have identified below, which takes this into account, is appropriate in the circumstances. Mrs N has not provided any evidence that she incurred a financial loss as a result of TP’s actions, so I do not consider that an award of redress is required in this case.

The period of recovery

170. Regarding any potential adverse impact recovery of the overpayments will have on Mrs N’s household income, I note that Mrs N has declined to provide TPO with information on her household income and expenditure. In cases such as these, the Adjudicator would not be able to assess whether the recovery action being proposed would cause the applicant undue hardship.
171. As a result, the recovery period that the Adjudicator has proposed is the same as the period over which the overpayments arose. I consider this to be a reasonable starting position. As Mrs N has declined to share financial information with TPO, I too am unable to assess whether a longer recovery period would be more appropriate. I would encourage Mrs N to approach TP should she consider that the rate of recovery that I have specified in my directions would cause her financial hardship, and provide it with a completed SolE form.

TP’s telephone call of 3 September 2018 and letter of 4 September 2018

172. While TP's telephone call of 3 September 2018 would have been unexpected, Mrs N would have had the option to ask the caller to provide the information in a letter or email. I note that TP sent her a letter the next day which she received shortly after the telephone call. It is likely that the distress Mrs N experienced at the time would have been largely as a result of the message that TP was communicating about the overpayment of her retirement benefits, rather than the method of communication.
173. I agree that it was heavy handed on the part of TP to have enclosed a remittance advice and assume that Mrs N would be in a position to repay the sum of £15,681.79 in one instalment. That said, I note that TP provided the relevant telephone numbers in its letter of 4 September 2018. Mrs N could have used any of those numbers to contact TP to discuss this further.

Non-financial injustice

174. TPO's awards for distress and inconvenience are intended as an acknowledgement that the applicant has suffered non-financial injustice that is sufficiently serious to merit at least the minimum award of £500. In other words, they are intended to remedy the non-financial injustice that the applicant has genuinely suffered as a result of maladministration on the part of the respondent(s). They are not intended to penalise or punish the respondent(s) for bad behaviour. Awards for non-financial injustice are separate from the awards of redress that I would direct to remedy financial injustice (financial loss) that the applicant has suffered as a consequence of the respondents' maladministration.
175. The Adjudicator's recommendation that NYCC and TP pay Mrs N an overall distress and inconvenience award of £1,000 does not in my view adequately reflect the non-financial injustice that Mrs N has suffered.
176. The incorrect information relating to Mrs N's service and salary that NYCC provided to TP was the original cause of the miscalculation of her retirement benefits. Furthermore, NYCC did not correct the information it had provided until prompted by TP to do so. I find that an award of £1,000 is appropriate in the circumstances.
177. I acknowledge TP's comments that Mrs N had some knowledge that her benefits were not being paid at the correct rate and that she had a responsibility to check information that had been provided to her. However, TP also had concerns that the information it had used to calculate the benefits in the Statement was not correct. Had these concerns been addressed at the time, then Mrs N's benefits could have been corrected shortly after her retirement, and the level of the overpayment that TP was seeking to recover would have been relatively small. While TP and NYCC disagree on whether TP queried Mrs N's employment record in May 2012, I note that TP failed to follow this matter up until January 2017, over four and a half years later. That, in my view, is clearly maladministration of a severe level. TP should have chased NYCC for an answer to its query much sooner. Mrs N's benefits were not then corrected until August 2018, over six years later.

178. While Mrs N was caused some distress and inconvenience by the miscalculation of her benefits, she was warned that the figures in the Statement were an interim payment. I consider that the majority of the distress and inconvenience that Mrs N suffered was as a result of TP's delay in obtaining the correct information from NYCC, which caused the overpayment to increase to £15,681.79. Taking this into account, together with the points made in paragraphs 168 and 169 above, I find that an award of £2,000 from TP is appropriate in the circumstances.

179. I uphold Mrs N's complaint in part.

Directions

180. Within 28 days of the date of this Determination:

- TP shall obtain an order from the County Court before recovering the net overpayments of £15,681.79 at a rate of £209.09 per month over a period of 74 months followed by a final deduction of £209.13;
- TP shall pay Mrs N £2,000, in respect of the non-financial injustice she has sustained as a consequence of its maladministration. This award includes the sum of £500 that it has already offered to Mrs N. Mrs N shall be given the option of having the award paid to her or offset against the total amount of the overpayments that TP is seeking to recover. If she selects the latter option, the figures in the first bullet point of this paragraph shall be reduced accordingly; and
- NYCC shall pay Mrs N £1,000, in respect of the non-financial injustice she has sustained as a consequence of its maladministration.

181. If at a future date Mrs N can demonstrate to the reasonable satisfaction of TP that her financial circumstances have deteriorated, and recovery of the overpayments at the rate I have specified in this Determination will cause hardship, TP shall consider whether it is still appropriate to recover the overpayments at that rate.

Dominic Harris

Pensions Ombudsman
5 September 2025