

Ombudsman's Determination

Applicant	Mr N
Scheme	Teachers' Pension Scheme (the Scheme)
Respondent	Teachers' Pensions (TP)

Complaint Summary

1. Mr N's complaint concerns the overpayment of retirement benefits that TP is seeking to recover.
2. Mr N:
 - 2.1. accepts that his pension should be reduced going forward; but
 - 2.2. considers the past overpayments should not be recovered as the overpayments should have been discovered earlier or, if the Pensions Ombudsman (**the PO**) concludes that the overpayment should be recovered, the period of recovery should be longer than currently proposed.
3. Moreover, Mr N believes he has sustained non-financial injustice (distress and inconvenience) as a result of the failure to identify the overpayment earlier and as a result of the tone of the correspondence relating to the recovery of the overpayment.

Summary of the Ombudsman's Determination and reasons

4. The complaint is upheld in part, in that Mr N sustained non-financial injustice (distress and inconvenience) as a result of the failure to identify the overpayment earlier, together with the content and tone of the correspondence relating to the recovery of the overpayment.
5. The overpayment is however recoverable as a matter of law. Of the total net overpayment of £22,216.89, only £9,595.77 is recoverable as a lump sum on grounds of unjust enrichment and/or under Regulation 114 of the Teachers' Pensions Regulations 2010 (**the 2010 Regulations**). This is because Mr N has a limitation defence to claims for recovery as a lump sum. The remaining £12,621.12 is however recoverable in instalments by way of equitable set off against future pension payments.

6. The overpayments are recoverable in the manner and at the rate set out in my directions.

Detailed Determination

Material facts

7. The sequence of events is not in dispute, so I have only set out the key points. I acknowledge there were other exchanges of information between all the parties.
8. On 15 April 1996, Mr N stopped employment and received Premature Retirement (PR) benefits from TP, which included a pension at an initial rate of £4,489.85 per year.
9. On 1 November 1996, Mr N entered full-time re-employment which was pensionable under the Scheme. Under the regulations applicable at the time, in these circumstances his PR benefits were subject to partial abatement.
10. On 19 August 1997, TP wrote to Mr N setting out the abatement position and the amount of pension he was due which was initially reduced to £1,356.00 per year. This was, under the regulations applicable to Mr N at the time, paid in addition to the salary from his new employment.
11. TP said that:

“Your pension has been calculated as follows:

(a)	Salary of reference (uprated to include increases where applicable)	£21,252
(b)	Less re-employment salary	£19,896
	Pension payable	£1,356
		If (b) exceeds (a) then pension is suspended

Please let me know immediately if your starting salary has changed (e.g. due to a salary increase). A change in your salary of reference and/or starting salary will require the above assessment to be recalculated.

Your pension, if it is reduced or suspended, will be restored to its original rate when your full-time re-employment ends. When you cease full-time employment you should complete the enclosed Form TP99A. Our Benefits section will re-assess the amount of pension payable and advise you direct.

...

Under the new regulations, which are effective from 1 April 1997, if you accept a new full-time re-employment contract after this date, you will no longer be allowed to contribute to the teacher's [sic] superannuation scheme. The assessment of re-employment against your pension remains unchanged and if you are re-employed on a full-time basis, then your pension may be affected.

If you would like more details of the effect of re-employment on teachers [sic] pensions, please ask for Leaflet 192."

12. On 29 April 1999, TP wrote to Mr N as follows:

"Thank you for the completed Certificate of Re-Employment. I apologise that we have not responded sooner.

The new abatement arrangements were introduced with the intention of providing maximum flexibility for retired teachers wishing to undertake re-employment. The way in which the former arrangements worked resulted in unfair treatment of those who undertook short spells of full-time re-employment compared with those who worked on regular part-time contracts.

However, it was never the intention that the new abatement provisions should disadvantage teachers who had already entered into a teaching commitment. It has been agreed that those re-employed teachers who were in post on 31 August 1998, the day before the new arrangements became effective, should continue to be treated as if the new regulations had not come into operation for as long as they remain in the same post and subject to the same contract. Teachers' pensions will therefore continue to assess your pension under the former arrangement until your current employment terminates.

If your circumstances change during the tax year i.e. 6 April 99 to 5 April 2000, please contact Pensioner Services immediately at the above address. Failure to do so may result in the unnecessary suspension of your annual pension which you may have to repay promptly."

13. Until 16 September 2005, Mr N continued in full-time re-employment and continued to be paid the abated pension. He then applied for further pension benefits arising from the re-employment. Mr N did not submit the required TP99A form (which is referred to the 19 August 1997 letter) but submitted a form electing further employment provision. He signed the declaration saying:

"I understand that in the event of a change in my pension entitlement any overpayment of pension would have to be refunded."

14. The form Mr N submitted was accepted by TP as his application for fresh pension benefits and was to be paid based on his current PR benefits with the addition of the benefits arising from his pensionable re-employment.

15. The calculation of Mr N's pension benefits was subsequently revised to take account of the pensionable service carried out after his PR. This was referred to as a fresh award and superseded the original calculation.
16. TP has confirmed, in a letter dated 28 April 2020, that the applicable regulation under which the new replacement benefits are granted is Regulation E15 of the Teachers' Pensions Regulations 1997 (**the 1997 Regulations**) (see Appendix 1).
17. On 4 October 2005, TP sent Mr N a Statement of Retirement Benefits with the addition of pension arising from his pensionable re-employment. His new pension was £9,199.05 per year.
18. The covering letter to the Statement of Retirement Benefits said:

"I am pleased to enclose a statement which shows details of the new allowances payable to you under the Teachers' Pensions Regulations following your re-employment in pensionable service.

New instructions regarding your revised annual pension have been sent to Pensioner Services, but date of payment will remain the same. The revised lump sum will be credited to your bank account on the date shown on the statement.

Pensioner Services will pay the greater of the following alternatives-

 - (a) This award notified on the statement, or
 - (b) Your original award, recalculated to include the additional service, together with the increases to which you are entitled under the Pensions (Increase) Acts."
 19. The accompanying Statement of Teachers' Fresh Retirement Benefits included, in the personal details section, a statement that his Pensionable Service was 25 Years 283 Days and stated that the Pension Payable was £9,199.05 per year.
 20. TP put this pension into payment. However, it failed to stop the abated PR benefit pension, which was already in payment, which it should have done under Regulation E15 of the 1997 Regulations when his new retirement benefits came into payment. Regulation E15 provides, specifically, that on cessation of the further employment the member ceases to be entitled to the payment of the first pension and becomes entitled to the payment of retirement benefits (combined benefits) calculated by reference to the total of his reckonable service in the further employment and the reckonable service taken into account in calculating the first pension (see Appendix 1).
 21. So, from 4 October 2005 until 2019, Mr N was receiving a pension in excess of his entitlement, but there was no communication between Mr N and TP regarding this issue, other than the usual tax adjustments notifications, changes of address or bank details.
 22. On 15 July 2019, following the review of Mr N's Guaranteed Minimum Pension (**GMP**), TP wrote to him and said:

“I am writing to inform you that, unfortunately, an overpayment of your retirement benefits amounting to £22,097.69¹ net has occurred. When you applied for your benefits based on a 11 [sic] your service payable from 17 September 2005, your premature pension benefits should have ceased. Unfortunately, this did not happen therefore your pension has been overpaid. Teachers’ Pensions are obliged to recover all overpayments incorrectly paid from public funds for whatever the reason the overpayment occurred and as such I must ask you to repay the amount of £22,097.69.”

23. Mr N complained to TP. He requested all his files including an explanation of why and when the error occurred. He said:-

23.1. He was upset by the content of the letter of 15 July 2019 which asked for a significant amount of money to be repaid. He found this “unreasonable and irresponsible way of dealing with an error”, particularly that he was an elderly person.

23.2. The letter contained a number of grammatical errors which contributed to it not making much sense. There was no explanation on how the error had happened.

23.3. As the error occurred 14 years ago, he wanted to know why it had not been discovered earlier.

24. On 21 August 2019, TP sent Mr N a response under stage one of the Internal Dispute Resolution Procedure (**IDRP**), which said in summary:-

24.1. It was sorry that the manner in which Mr N was informed about the overpayment had caused him additional distress. This was not its intention, and the feedback would be used when reviewing the service it had provided.

24.2. Mr N claimed PR benefits then returned to full-time re-employment. His annual PR pension was abated because of this. When he left service in 2005, the new rate of pension took account of all his service, and the abated PR pension should have been stopped. It was deeply regrettable that due to an administrative oversight this was not the case.

24.3. A payslip was also issued to Mr N when the fresh award came into payment. This showed how the annual rate of pension of £1,694.64 had changed to £10,893.72. The £1,694.64 was the abated pension plus index-linking. This had been added to the new rate of £9,199.05 to give a total of £10,893.72. Payslips were usually issued automatically and not something an administrator would have access to.

¹ The figure is inconsistent with the later figures provided.

- 24.4. From that point, it had no reason to review his payroll record unless an enquiry had been raised regarding the amount in payment. However, the GMP reconciliation exercise prompted an investigation in 2019.
- 24.5. Where an overpayment was discovered, it was obliged to recover it all regardless of how it may have occurred. So, when the overpayment was discovered, it had to correct Mr N's entitlement and stop the overpayment.
- 24.6. It referred to the guidelines on overpayments issued by HM Treasury, in 'Managing Public Money' (Annex 4.11) (**the Treasury Guidelines**), which was available through the following link:
- https://assets.publishing.service.gov.uk/media/65c4a3773f634b001242c6b7/Managing_Public_Money_-_May_2023_2.pdf (see Annex 4.11 - overpayments).
- 24.7. It acknowledged that the overpayment amount was very large and welcomed a dialogue with the aim of agreeing a way forward in respect of how it could be paid. It enclosed an income and expenditure questionnaire to assist with establishing a mutually agreeable repayment plan.
25. In response, Mr N raised further complaint points in August 2019, that said in summary:-
- 25.1. He could not locate a copy of the letter or payslip from October 2005.
- 25.2. He wanted to know who was responsible for inputting data that the payslip showed which led to the overpayment.
- 25.3. He referred to the reduction relating to a GMP adjustment, which has led to a reduction in his income of £50. He did not understand how this reduction had affected his pension, but he was not disputing the reduction. He simply had to trust that this was now correct.
- 25.4. The second reduction related to a reduction in his pension of £150. He was not disputing this reduction, but he was disputing that he now must repay the overpayment.
- 25.5. As there was an administrative oversight on TP's part, it should take the responsibility for the error. He believed that every time there was a tax adjustment to his pension, TP should have revisited his pension and discovered the error.
- 25.6. He believed that there was no "adequate administration policy in place", otherwise such a basic administrative oversight would have surely been spotted.
- 25.7. The tone of TP's correspondence was unacceptable, and he asked that it liaise with those involved in the drafting of it.

- 25.8. He was 75 years old and lived by himself. He was happy to supply records of his medical evidence to show his health has been affected by this situation. He has developed stress and anxiety and suffered with gastrointestinal bleeding that necessitated emergency admission to hospital on one occasion.
- 25.9. He was not asking for the reduction to be reversed as he accepted that there was an error, and he was not entitled to the money. However, he asked that “leniency is given as the repayment of the past sum of £22,000.”
- 25.10. He sold his house upon retiring and now living in a rented property. He did not have a security of property ownership or have significantly enough capital to cope well with rental increases.
26. On 19 December 2019, the Department of Education (**DoE**) sent Mr N a stage two IDRP response that said in summary:-
- 26.1. It understood Mr N’s frustration regarding the overpayment, in that the error was not discovered earlier.
- 26.2. TP was willing to make an offer of £1,000 in recognition of the distress caused by its error and the level of service provided. This award could be offset against the outstanding overpayment.
- 26.3. While it understood Mr N’s frustration and empathised with his situation, TP was correct in confirming that, as he had been paid benefits that he was not entitled to, and in line with the Treasury Guidelines, any overpayment should be reclaimed regardless how it may have come about.
- 26.4. TP confirmed that it was happy to discuss the repayment further with him and it [DoE] would urge him to contact TP as soon as possible, especially if repayment of the money would cause him hardship, either financially or health wise.

Summary of TP’s position

27. TP submitted:-
- 27.1. That the error could not have been discovered with reasonable diligence in the normal course of its business, until the specific case arose in 2019 which triggered an investigation.
- 27.2. It was of the view that Mr N should have been aware of the overpayment from the information that was issued to him at the time of his retirement in April 1996. These were letters issued following his re-employment in November 1996, and the Statement of Retiring Benefits in 2005 saying that his abated PR benefits would not continue to be paid once the fresh award of benefits based on his PR benefits with the addition of the benefits arising his pensionable re-employment was put into payment.

- 27.3. Furthermore, Mr N was warned that if there was an overpayment of pension he would be asked to repay it.
- 27.4. It should have been apparent from the Statement of Retirement Benefits that the fresh award of benefits calculation included the pension based on Mr N's PR. This was because the PR benefits were based on the service of 16 years 329 days and the fresh award was based on 25 years 284 days.
- 27.5. So, it believed, Mr N should have been aware that the pension he was receiving was more than the amount that was due to him. Mr N could have highlighted to TP that he was still receiving his abated PR benefits and at least queried it with TP.
- 27.6. Mr N signed the declaration stating that he understood the implications of a change of his circumstances.
- 27.7. Without the income and expenditure, it could not conduct a realistic assessment of Mr N's financial position. It was unable to establish the appropriate legal basis for recovery until this information is provided.
- 27.8. In previous TP overpayment cases TPO accepted that overpayments were potentially recoverable:-
 - 27.8.1. By way of repayment under principles of unjust enrichment.
 - 27.8.2. By way of equitable set-off against future pension payments.
 - 27.8.3. Under Regulation 114 of the 2010 Regulations
- 27.9. Once Mr N has provided income and expenditure, it would consider the method of recovery of the overpayment with a view to either repayment, equitable set-off or a combination of these, subject to any defences Mr N is able to establish and the avoidance of financial hardship.
- 27.10. It was allowed to use a combination of options as determined in the previous PO's Determination (*PO-25403*). So, it would take account of Mr N's financial circumstances, including limitation defences insofar as it related to the repayment option.
- 27.11. In the absence of income and expenditure questionnaire, it would propose the following method of recovery:
- 27.12. An upfront lump sum of £10,000.00 with the remaining balance of £12,621.12 recovered over 60 months under the equitable set off arrangements which would realise monthly deductions of approximately £202.00, 23% of his pension; or
- 27.13. On the principle that the recovery period should be at least equivalent to the period over which the overpayment accrued, recovery over the accrual period

of 14 years 8 months would realise monthly payments of approximately £126.00 which is 14% of his pension.

28. TP provided details of the overpayments which are set out in Appendix 2.

Summary of Mr N's position

29. Mr N submitted:-

- 29.1. That he should not complete the required income and expenditure questionnaire. However, he provided his bank statements.
- 29.2. If he were to repay the money, he might be able to use his investment account for £10,000 and 60 payments of £202 from his monthly pension.
- 29.3. He would also like TP to provide further information regarding his GMP entitlement.
- 29.4. Since this situation occurred, he restarted smoking and was drinking more alcohol.
- 29.5. He did not recall receiving correspondence regarding the implications of re-employment or payslip in 1997 or 2005.
- 29.6. He contacted his employer when he finished working in 2005 about filling out a form to apply for pension which he later completed and submitted. He believed if the form was incorrect, TP should have contacted him about it. He did not contact TP regarding this matter.

Conclusions

Legal issues arising in this particular case.

30. Mr N:-

- 30.1. Accepts that his pension should be reduced to the correct level going forward;
 - 30.2. Disputes whether the past overpayments should be recovered, and/or, was not able to reach agreement as to an appropriate recovery plan with TP.
 - 30.3. Contends that he has sustained non-financial injustice (distress and inconvenience) as a consequence of maladministration by TP in allowing the overpayments to occur and the manner in which TP sought to recover the overpayments (particularly in terms of 'tone', given it was TP's mistake).
31. The Scheme is administered by TP on behalf of the DoE. TP has specific administrative responsibilities, including paying pension benefits in accordance with the regulations that govern the Scheme.
32. Mr N was receiving a pension in excess of his entitlement from 2005 to 2019. TP is seeking recovery of those overpayments, as detailed in Appendix 2.

33. TP, potentially, could seek to recover the overpayments by the following methods:-
- 33.1. Repayment on the grounds of unjust enrichment.
 - 33.2. Setting off the overpayment against future pension payments on the grounds of equitable set-off.
 - 33.3. Recovering the past overpayments using its powers of recovery set out in Regulation 114 of the 2010 Regulations.²
34. TP has indicated that it is seeking recovery by way of repayment and/or set-off and under Regulation 114. So, it is necessary to consider TP's right of recovery under all of these grounds.
35. Mr N has not specifically set out any particular legal defences to recovery or set-off, but contests in general terms whether the overpayments should be recoverable.

Repayment Claim on Grounds of Unjust Enrichment – Past Overpayments

36. In relation to any claim to recover overpayments on grounds of unjust enrichment I need to consider the following possible defences:-
- 36.1. Change of position.
 - 36.2. Estoppel.
 - 36.3. Contract.
 - 36.4. Limitation.
 - 36.5. Hardship.

Change of position

37. To succeed in a change of position defence, it is generally considered necessary to show:-
- 37.1. **Good faith** – The recipient of the overpayment must be acting in good faith.
 - 37.2. **Detriment** – Their circumstances must have changed detrimentally as a result of the overpayment or in anticipation of receiving it. Generally, this means that the money has to have been spent and the expenditure cannot be legally or practically reversed, or any asset bought with the overpayment sold.
 - 37.3. **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).

² The 1997 Regulations were revoked by the 2010 Regulations but there are saving provisions in Schedule 13 to the 2010 Regulations.

38. If the above tests are met, it will generally be inequitable for the manager of the scheme to recover the money.
39. Unlike the position in relation to an estoppel by representation defence, it is 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.

Good faith

40. To demonstrate that the recipient acted in bad faith it is generally necessary to show that the recipient of an overpayment had actual or "Nelsonian knowledge" that he was overpaid. If the recipient had good reason to believe that he was being overpaid but did not check the position with the trustees or managers, this will amount to bad faith. Mere carelessness or negligence is not enough to establish bad faith.
41. It is important to note that 'bad faith' is not synonymous with dishonesty. It can 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, the defence would not be open to them. In making a judgment as to the recipient's knowledge of the circumstances in which his pension should cease, it is not a question of deciding what he should have known; rather, it is a question of what he did know.

Detriment

42. Detriment can normally be demonstrated by the fact that the recipient spent the money on items they would not otherwise have bought but for the overpayment. However, it is also possible to demonstrate detriment by making gifts in some circumstances.
43. It is not always necessary to show on the balance of probabilities that the overpayment was spent on particular items which the member would not otherwise have bought or to precisely match the expenditure to particular items, if as a result of the overpayment the member increases their standard of living above what it would otherwise have been over a number of years.

Causation

44. There also needs to be a causal link between the overpayment and the change of position relied on. The member generally at least needs to 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 way (*Scottish Equitable v Derby* [2001] 3 All ER 818)).

Applying the law to the facts – change of position

45. In the current case, the key issue is whether Mr N was acting in good faith. As noted above it is not essential that Mr N had actual knowledge that he was not entitled to the pension benefits – 'Nelsonian knowledge' may suffice to show lack of good faith.

Did Mr N appreciate that something was not quite right and there was a possibility he might be overpaid but did not check?

46. I do not consider, as TP contended in its submissions, that the fact Mr N was told in 1997 that he needed to fill in the enclosed Form TP99A has any real bearing on the issue or Mr N would necessarily appreciate that he was being overpaid. I cannot see how Mr N can reasonably be expected to have detailed knowledge of the types of forms TP used. Mr N found a form to complete applying for a pension, which he completed, and which was accepted by TP as an application to take a pension under Regulation E15.
47. The key issue is whether anything in the communication he received in 2005 is sufficient to make him aware something might be wrong which he then did not check with TP.
48. The communication in 2005 has to be read in the context of Mr N's situation at the time – for example, that he was in receipt of a small abated pension which he would have known from previous correspondence would need to be reviewed and potentially increased at the point of retirement. It is not reasonable to expect that Mr N would have detailed knowledge of the 1997 Regulations, or the pre-1997 Regulations, position in relation to transitional protection for pre-31 August 1998 members. The Teachers' Pension Regulations are difficult to follow even for a pension professional. However, it is reasonable to expect Mr N to have read any communication issued to him about his pension at the point of retirement in 2005, given the importance of the retirement decision to most pensioners. The covering letter said (as noted previously):
- “I am pleased to enclose a statement which shows details of the new allowances payable to you under the Teachers' Pension Regulations following your re-employment in pensionable service.
- New instructions regarding your revised annual pension have been sent to Pensioner Services, but date of payment will remain the same. The revised lump sum will be credited to your bank account on the date shown on the statement.
- Pensioner Services will pay the greater of the following alternatives-
- (a) This award notified on the statement, or
- (b) Your original award, recalculated to include the additional service, together with the increases to which you are entitled under the Pensions (Increase) Acts”
49. This does indicate that the pension would be the greater of the award notified on the statement (for example a pension of £9,199.05) and the original award, recalculated to include additional service together with the increases.
50. I am satisfied that at the point of retirement Mr N would have read the retirement statement and was likely to be expecting the payment of a pension of £9,199.05 in accordance with the Retirement Statement. Mr N was however not paid an award of

£9,199.05 when it came into payment, but a pension of £10,893.72. It also appears that Mr N did not receive two separate payments which might have indicated his original abated pension was continuing but received a single higher payment.

51. It would have been possible for the original revalued award to have exceeded the new award (as the announcement issued to him in 2005 did say that the greater of two benefits could be paid). However, you would then have expected Mr N to have been told if a larger pension was going to be payable and why. I am satisfied in the circumstances that Mr N would have been aware that something might not be quite right (when he started being paid £10,893.72, instead of £9,199.05 as referred to in the Statement of Entitlement) which he should have checked with TP. In other words, he had Nelsonian knowledge of the potential overpayment, and a change of position defence cannot apply.
52. So, I do not need to go onto to consider whether Mr N can demonstrate detriment and the detriment was caused by the overpayment given my conclusion on good faith.

Estoppel

53. Broadly, an estoppel defence 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 the Manager from going back on what they informed the Applicant regarding his pension entitlement and recovering the overpayments. There are two types of estoppel that may be relevant here, namely:
- 53.1. estoppel by representation - which can apply where one party has made a false statement or representation to the other; and
- 53.2. estoppel by convention - which can apply where both parties have been dealing with each other on an understanding of fact which turns out to be false.
54. In relation to an occupational pension scheme, a member may receive a series of estimates or statements of the member's pension before and immediately following retirement and then at regular intervals each year or month during the period of payment of the pension until the discovery of the overpayment (for example, when the member receives pension increase notifications, P60s and monthly payslips). Members may also spend significant sums immediately following or shortly following retirement. It may be necessary, depending on the facts, to consider whether an estoppel by representation may arise in relation to each of the payments and in relation to each item of expenditure.
55. The requirements for an estoppel by representation defence to succeed were set out in the case of *Steria v Hutchinson* [2006] 64 PBLR (Steria). Neuberger LJ stated:
- "If one had to identify a single factor which a claimant in an estoppel case has to establish in order to obtain some relief from the court it would be unconscionability..."

56. The above formulation is a useful general guiding principle. However, the question of “unconscionability” can in many cases be an issue in which the views of reasonable people can differ on whether the complainant has a valid claim. Similarly, views can differ on how that claim should be satisfied. Neuberger LJ considered that it might be appropriate to have some more specific principles.
57. In the case of estoppel by representation, or promissory estoppel, Neuberger LJ considered that it was very unlikely that a complainant would be able to satisfy the test of unconscionability unless the complainant could satisfy the three classic requirements. Broadly:
- 57.1. a clear representation or promise made by the defendant on upon which it is reasonably foreseeable that the complainant will act;
 - 57.2. an act on the part of the complainant which was reasonably taken in reliance on the representation or promise; and
 - 57.3. after the act was taken, the complainant is able to show that he will suffer detriment if the defendant is not held to the representation or promise.
58. In the current situation it is reasonably foreseeable that Mr N would act on the Retirement Statement – the fact that there was a general caveat that overpayments might be recovered if there is an overpayment is not sufficient to negate that (it is not, for example, a caveat that the statement should not be relied upon or that the overriding regulations may prevail if the figures are wrong). It is also reasonably foreseeable he would act on the statement of his entitlement as set out in subsequent payslips and might spend more money than he might otherwise have done but for the overpayment, by raising his standard of living over and above what it might otherwise have been.
59. I do not consider however, given my conclusions on the issue of good faith, that it would be equitable in all the circumstances to find an estoppel in this case.
60. I also do not consider that an estoppel by convention could arise here.

Contract

61. I was not able to identify the necessary elements for a contract to exist; that is, offer, acceptance, consideration and an intention to enter into legal relations. In particular, I cannot see that there was any intention on the part of TP to enter into a legal relationship with the Mr N outside of the Regulations governing the Scheme.

Limitation

62. Broadly, a limitation period is a time limit within which certain legal proceedings must be brought after the date of accrual of the cause of action. The relevant limitation periods are set out in the Limitation Act 1980 (**the Limitation Act**). These limitation periods do not apply directly to complaints that are accepted by TPO for investigation. However, I should not find when making a Determination that an overpayment is

recoverable, as a matter of law, if the applicant could succeed in a Limitation Act defence.

63. The time limit for seeking recovery of past overpayments through repayment, under principles of unjust enrichment, is generally six years from the date the cause of action accrued. The date the cause of action accrued will generally be the date each overpayment of pension or lump sum was made. So, depending on the facts, it is possible that a scheme trustee or manager may only be able to recover some of the overpayments if the member can demonstrate that a limitation defence applies.
64. However, this six year time limit can be extended where an overpayment is made on grounds of mistake. Section 32(1) of the Limitation Act provides that the period of limitation shall not begin to run until the “plaintiff [the person seeking to recover the overpayment] has discovered the...mistake (as the case may be) or could with reasonable diligence have discovered it”.
65. The case of *Webber v Department for Education* [2016] 102 PBLR (024) however established that time stops running for limitation period purposes when TPO receives the trustees or managers' formal response to the member's complaint. Separate limitation periods can apply in relation to any lump sum overpayment and each instalment of overpaid pension.
66. There is case law which has considered what is meant by reasonable diligence for the purposes of section 32(1) of the Limitation Act. If the manager or trustees want to rely on section 32(1), they must show that they could not have discovered the relevant fraud, concealment or mistake earlier than they did without taking exceptional measures that it could not reasonably have been expected to take. In *Paragon Finance v DB Thakerar & Co (A firm)* [1999] 1 All ER 400 at 418, Millett LJ (as he then was) said:

“The question is not whether the plaintiffs should have discovered the fraud sooner: but whether they could with reasonable diligence have done so. The burden of proof is upon them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take...the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by reasonable but not excessive sense of urgency.”

67. But in *Law Society v Sephton* [2004] EWCA Civ 1627 [2005] QB 1013, Neuberger LJ (with whom on this issue Kay and Carnwarth LJs agreed) said that Millett LJ's construction of section 32(1) showed that there must be an assumption that the claimant desires to discover whether or not there had been a fraud committed against him. Not to make such an assumption would rob the word “could” in the section of much of its significance. Moreover:

“the concept of “reasonable diligence” carries with it “the notion of a desire to know, and indeed, to investigate.”

68. In the current case TP contends that it could not have discovered the overpayment until it carried out the checks in relation to the GMP issue as it does not have direct access to and knowledge of the payments under the payroll system. TP contends that it could not have discovered the overpayment if it acted with reasonable diligence until it carried out the checks on the GMP.
69. TP is, however, responsible for administering the payroll system, ensuring that the correct payments are made under the Scheme and the correct PAYE tax is deducted from these payments. Also, I would expect that any competent firm of administrators would have a procedure in place to verify calculations before pensions are put into payment with a view to identifying mistakes of this type (i.e. this was not an error where an underlying formula or incorrect factor was baked into the calculation, rather a 'simple' administrative failure where the abated pension was not stopped). I consider that if TP had adequate checks in place to verify that the pension was calculated correctly in the first place it would have discovered that there was an error at the time or shortly after the pension was put into payment. So, I consider that the cut-off date for limitation purposes is six years before the date TP formally responded to the complaint received by TPO, which was on 1 May 2020, as it should have discovered the claim earlier if it acted with reasonable diligence.
70. So, Mr N has a limitation defence to any claim to recover the overpayments on grounds of unjust enrichment to the extent that they proceed the cut-off date. On the basis of the figures in Appendix 2 this would mean that only £9,595.77 (net) of the overpayments are recoverable on grounds of unjust enrichment. The remaining £12,621.12 (net) of the overpayments are not recoverable on grounds of unjust enrichment.

Hardship

71. Under the Treasury Guidelines, the Manager should consider the issue of hardship when determining whether to recover an overpayment and the period of recovery (see Appendix 3).

72. The Treasury Guidelines note in particular:

“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.”

73. The difficulty TP had in the circumstances is that Mr N declined to fill in the Statement of Means and Expenditure, although he provided payslips to TPO. I do recognise that without a completed Statement of Means and Expenditure, resulting from the choice made by Mr N, it will be difficult to consider the issue of hardship.
74. On the current information in the bank statements, I do not consider that hardship would preclude TP from recovering all of the overpayment, but it may be relevant to the period of recovery.

Equitable set-off

75. It is next necessary to consider whether equitable set-off is available to the manager of the Scheme enabling it to recover the overpayments by deduction from future payments.
76. Equitable recoupment cannot apply to the Scheme, as it is not constituted as a trust. However, a similar remedy of equitable set-off may apply. Where there was an overpayment in a statutory scheme, it can be said that there are two cross-claims between the member and manager of the scheme which can be offset (*Geldof v Simon Carves Ltd* [2010] EWCA Civ 667 at [20]-[43]). Specifically, Mr N's pension entitlement is a statutory debt owed to him by the Scheme and is liable to be offset against the overpayment, which is a debt owed to the Scheme by Mr N. So, subject to any defences to the claim which Mr N may have, it is inequitable that he can insist on his full entitlement under the Scheme without allowing the claim for the overpayment to be satisfied. It follows that TP can rely on equitable set-off as the basis for recovery.
77. I still need to consider what defences to equitable set-off may be available to Mr N.
78. I consider that for the reasons previously given a defence of change of position, estoppel or contract would not be available to a claim to recover the money on grounds of unjust enrichment. On the basis of existing case law, in a similar manner to equitable recoupment, where the courts have held that a limitation defence is not available, a limitation defence would not be available to a claim to recover overpayments by way of equitable set-off. 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].
79. Accordingly, TP has a right to recover all of the overpayments by setting them off against future pension payments under principles of equitable set-off over the period specified below.

Statutory right of recovery

80. Under the Regulations (as amended), TP has authority to recover overpayments of pension under Regulation 114 which provides as follows:

“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.”

81. In the case of Regulation 114(2)(c) it is doubtful whether this power gives TP a right to recover past overpayments by setting them off against future pension payments. Regulation 114 can be compared and contrasted with Regulation 64D which gives a statutory right of abatement in addition to any right of recovery under Regulation 114 - implying that Regulation 114 does not give any such a right. In my view the reference to “recover any such payment” is not wide enough to cover set-off. However, Regulation 114 would appear to give TP a freestanding statutory right of recovery of overpayments directly from the member in addition to any right under the common law on grounds of unjust enrichment.
82. Potentially, however, most of the defences listed in the Treasury Guidelines may still apply including change of position, estoppel and contract. However, for the reasons already discussed they are not applicable in the current case.
83. Unlike the position in relation to equitable set-off, however, a limitation defence could apply in relation to a statutory power of recovery. This is because a limitation defence is potentially applicable to the right of recovery under a statutory power of recovery (see section 9 of the Limitation Act). Under section 9 an action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.
84. The six-year limitation period can again be extended if the overpayments were not discovered or could not have been discovered by the manager acting with reasonable diligence (section 32 of the Limitation Act).
85. As a result, a limitation defence is again available to the overpayments which built up before 1 May 2014 for the same reasons as discussed in paragraphs 62-70 above.

Commencement of set-off

86. TP cannot commence recovery of overpayments by way of set-off without an order of a competent court, and it has recently been confirmed that I am not a competent court for these purposes.
87. This does not however preclude me from issuing a Determination on whether an overpayment is recoverable in full or in part and specifying the appropriate period of recovery.

88. It is then necessary for TP to apply to the County Court for an order authorising the commencement of recovery of the overpayments. This however is a paper-based step and does not involve the County Court revisiting the merits of the Determination. Please see the attached TPO factsheet on this issue.

Period of recovery of overpayments

89. Generally, I consider that, as a rule of thumb, a period of recovery at least equal to the period the overpayment arose is appropriate. In some circumstances it may be appropriate to depart from this period, if, for example, the applicant invested the overpayment or still holds a significant part of the overpayment in a bank account or the period of recovery proposed will cause real hardship.
90. We are hampered in the current situation in assessing what a reasonable period of recovery is by virtue of the fact Mr N refused to complete the TP's Statement of Means and Expenditure. Mr N however provided me with bank statements which do show that he is in receipt of a State Pension as well as his TPS pension, and also has a credit balance in his Nationwide Account of about £13,000 in September 2022. Mr N also indicated that he may be able to afford to pay £10,000 out of money held in a savings account.
91. TP has currently proposed that, in the absence of a Statement of Means and Expenditure:
- 91.1. An upfront lump sum of £10,000.00 with the remaining balance of £12,097.69 recovered over 60 months under the equitable set off arrangements which would realise monthly deductions of approximately £202.00, 23% of his pension; or
- 91.2. If the principle is applied that the recovery period should be at least equivalent to the period over which the overpayment accrued, recovery over the accrual period of 14 years 8 months would realise monthly payments of approximately £126.00 which is 14% of his pension.
92. Mr N's bank statements do not indicate that he has any other source of income other than his State Pension and his TPS pension. Mr N indicated that he may be able to afford to pay up to £10,000 upfront out of his savings and repay the remainder over a period of 60 months. This would permit recovery at a rate which is much higher than I would normally permit and would allow recovery of more money than TP would be able to recover if it brought a claim for repayment on grounds of unjust enrichment or Regulation 114 through the courts, given that Mr N would have a limitation defence to any such claims.
93. I consider in the circumstances, that Mr N shall repay the sum of £9,595.77 to TP upfront and, subject to section 91(6) of the Pensions Act 1995 (**the 1995 Act**), the remaining £12,621.12 of the overpayments which pre-dated 1 May 2014 over a period of 14 years 8 months by way of set-off against his future pension payments for example a deduction of £73.69 a calendar month.

Award for non-financial injustice for maladministration

94. Mr N undoubtedly sustained injustice as a consequence of TP's maladministration in 2005, when it added the original PR pension to his new entitlement, instead of paying the better of the PR pension increased to its original level and the new pension award. The incorrect payments then continued for 14 years, and as a result Mr N sustained serious distress and inconvenience when he was notified out of the blue that TP was seeking to recover the overpayments, and as a result of the steps TP took to make the recovery.
95. I also agree with Mr N that the approach taken by TP in seeking to recover the overpayments showed a lack of sensitivity - and indeed was quite aggressive given that the overpayment was due to TP's mistake. If you look at the original letters seeking recovery, there is no apology for this mistake or acknowledgement of fault. Instead, TP just states that it is "obliged to recover all overpayments incorrectly paid from public funds for whatever the reason the overpayment occurred and as such I must ask you to repay the amount of £22,216.89." It is, in my view, similar to a letter that might be sent by a debt collector in relation to an unpaid debt.
96. Furthermore, the statement in the letter is not legally correct. Under Regulation 114 and the Treasury Guidelines, TP has discretion whether to seek recovery, and in considering the exercise of that discretion it should consider whether Mr N has any possible defences in law to recovery, which it did not do at this stage in the process. TP must genuinely exercise this discretion and not blindly and automatically seek recovery come what may.
97. At IDR stage one TP did apologise, but again stated categorically that, where an overpayment was discovered, it was obliged to recover it all regardless of how it may have occurred without further explanation.
98. The DOE's response at stage two IDR showed much greater empathy, but again was not strictly correct in saying that "While it understood Mr N's frustration and empathised his situation, TP was correct in confirming that as he had been paid benefits that he was not entitled to, and in line with the 'Managing Public Money' Guidelines, any overpayment should be reclaimed regardless of how it may have come about." That is again not quite what the Treasury Guidelines say. The position is more nuanced.
99. Later in the complaints process, TP did explore to some extent what defences may apply before concluding that they did not. TP effectively concluded that Mr N did not act in good faith by not contacting them in 2005, and also that no limitation defence applied. However, as noted previously, I would expect the potential defences to have been explored during the IDR (not only once the matter reaches TPO), so that all the issues in dispute have been identified before the IDR process is completed. If TP contends that no defences were available, and both sought and examined evidence on this from the member, this then enables me to determine whether this is correct or not.

100. I appreciate that Mr N's unwillingness to engage with TP by providing a Statement of Means and Expenditure did not assist the process and prolonged this dispute - and so Mr N contributed to subsequent delays. I would expect a member to co-operate with managers in this situation and provide the requested information, so a proper assessment may be made as to an appropriate period of recovery which I can then review if the member does not accept this.
101. The DoE made an offer to pay £1,000 for the distress and inconvenience sustained at stage two IDRPs.
102. In the circumstances, I consider that an award of £1,000 was appropriate for the distress and inconvenience caused given the length of time it took TP to identify the mistake and the level of distress this caused. Additionally, I consider a further award of £500 is appropriate for the content and tone of the early correspondence with Mr N, notably the lack of empathy and lack of apology for the original mistake at the time Mr N was first notified of the overpayment, the failure to properly follow the Treasury Guidelines and properly explore the available defences to recovery early enough in the process.

Decision

103. I determine that TP was entitled to reduce Mr N's pension to the correct level.
104. I determine that the total net overpayment of £22,097.69 are recoverable as a matter of law from Mr N using the equitable set-off route against future pension payments. However, only £9,595.12 of this amount is recoverable on grounds of unjust enrichment and/or under Regulation 114 of the 2010 Regulations.

Directions

105. TP may recover £9,595.12 of the net overpayment directly from Mr N (by way of a lump sum repayment) on grounds of unjust enrichment and/or under Regulation 114 of the 2010 Regulations. I would hope that Mr N will pay the money without the need for any formal enforcement steps.
106. I direct that TP may, subject to obtaining an order of a competent court for the purposes of section 91(6) the 1995 Act, recover the remaining net overpayments of £12,621.12 at the rate of £73.69 per calendar month by reducing Mr N's future pension by this amount each calendar month under principles of equitable set-off.
107. I direct that, if at a future date Mr N can demonstrate to the satisfaction of TP that his financial circumstances deteriorated and recovery of the remaining overpayments at that rate will cause hardship, TP should consider whether it is still appropriate to recover the overpayments at that rate.
108. I direct that any additional amounts repaid by Mr N directly to TP to meet the remaining overpayment liability of £12,621.12 (in full or in part) shall be treated as being paid towards discharging Mr N's liability towards repaying the remaining overpayment of £12,621.12 (to the extent still outstanding).

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109. I direct that within 28 days of the date of this Determination TP shall, unless Mr N agrees that this amount should be applied towards meeting part of the payment of £9,595.12 which is otherwise due to TP, pay to Mr N the sum of £1,500 for the serious distress and inconvenience sustained by Mr N as a consequence of maladministration by TP.

Dominic Harris

Pensions Ombudsman

24 April 2024

Appendix 1

Teachers' Pensions Scheme Regulations 1997

1. Regulation E15, 'Retirement benefits on cessation of further employment', provides:

"This regulation applies to a person who-

Became entitled to the payment of a teachers' pension ("the first pension"),

(b) was subsequently in pensionable employment otherwise than by virtue of an election under regulation B7 (the further employment) and

(c) Has ceased to be in the further employment.

Subject to paragraph (3), if the first pension was not enhanced under regulation E8 (enhancement of retirement benefits in case of incapacity), the person_

Cases to be entitled to payment of the first pension, and

Becomes entitled to the payment of retirement benefits ("combined benefits") calculated, subject to paragraph (8) by reference to the total of his reckonable service in the further employment and the reckonable service taken into account in calculating the first pension" [original emphasis]

Appendix 2

Schedule of Overpayments

TP has confirmed that the overpayments accrued six years prior to the date of Teachers' Pensions' (TP's) formal response dated 1 May 2020, as of 30 April 2014 amounts to £15,868.19 gross with tax of £3,247.07 leaving a net balance of £12,621.12.

The overpayment Mr Norton accrued from the date of TP's formal response dated 1 May 2020, amounts to £11,845.48 gross with tax of £2,249.71 leaving a net balance of £9,595.77.

tax year	Gross overpayment
2005/06	£164.10
2006/07	£1,736.91
2007/08	£1,798.44
2008/09	£1,868.58
2009/10	£1,952.47
2010/11	£1,956.84
2011/12	£2,012.71
2012/13	£2,114.81
2013/14	£2,165.86
To 30/04/2014	£97.47
From 01/05/2014	£2,126.27
2015/16	£2,252.71
2016/17	£2,254.43
2017/18	£2,275.29
2018/19	£2,340.32
2019/20	£596.46

Appendix 3

HM Treasury's 'Managing Public Money' (the Treasury Guidelines)

1. Annex 4.11, 'Overpayments', says:

"In principle public sector organisations should always pursue recovery of overpayments, irrespective of how they came to be made. In practice, however, there will be both practical and legal limits to how cases should be handled. So each case should be dealt with on its merits."

2. The Treasury Guidelines then consider the factors a public authority should have regard to in deciding whether to pursue recovery of an overpayment. It states, at A4.11.2:

"When deciding on appropriate action, taking legal advice, organisations should consider:

- the type of overpayment
- whether the recipient accepted the money in good or bad faith;
- the cost-effectiveness of recovery action (either in house or using external companies). Advice that a particular course of action appears to offer good value may not be conclusive since it may not take account of the wider public interest
- any relevant personal circumstances of the payee, including defences against recovery
- the length of time since the payment in question was made; and
- the need to deal equitably with overpayments to a group of people in similar circumstances."

3. The Treasury Guidelines then consider the question of whether the individual has acted in good faith and various other defences to recovery including defences which may be claimed against recovery, namely:

- the length of time since the overpayment was made;
- change of position;
- estoppel;
- good consideration [this is effectively the same as a contractual defence]; and
- hardship.

4. On 'good faith' the Treasury Guidelines say:

"A4.11.5 The decision on how far recovery of an overpayment should be pursued in a particular case will be influenced by whether the recipient has acted in good or bad faith:

- where recipients of overpayments have acted in good faith, e.g. genuinely believing that the payment was right, they may be able to use this as a defence (though good faith alone is not a sufficient defence);
- where recipients of overpayments have acted in bad faith, recovery of the full amount overpaid should always be sought.

A4.11.6 Recipients may be inferred to have acted in bad faith if they have wilfully suppressed material facts or otherwise failed to give timely, accurate and complete information affecting the amount payable. Other cases, e.g. those involving recipients' carelessness, may require judgement. And some cases may involve such obvious error, e.g. where an amount stated is very different from that paid, that no recipient could reasonably claim to have acted in good faith.

A4.11.7 In forming a judgement about whether payments have been received in good faith, due allowance should be made for:

- the complexity of some entitlements, e.g. to pay or benefits;
- how far the payment depended on changes in the recipient's circumstances of which he or she was obliged to tell the payer;
- the extent to which generic information was readily available to help recipients understand what was likely to be due."

5. On 'hardship' the Treasury Guidelines say at A4.11.19:

"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."

