

## Ombudsman's Determination

Applicant	Mr E
Scheme	Teachers' Pension Scheme ( <b>the Scheme</b> )
Respondent	Teachers' Pensions ( <b>TP</b> )

## Outcome

1. I do not uphold Mr E's complaint and no further action is required by TP.

## Complaint summary

2. Mr E's complaint concerns the fact that TP ceased his widower's pension and asked him to repay £5,891.84 in respect of the pension he received since his remarriage. He says that he was not aware that he needed to notify TP that he had remarried, or that his remarriage would result in his pension ceasing.

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

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. On 31 August 2003, Mr E's wife's (**Mrs E**) service as an active member of the Scheme ended.
5. On 12 March 2013, Mrs E died. At the time, she was in receipt of a pension from the Scheme.
6. On 15 March 2013, TP wrote to Mr E. It said that Mrs E's pension had ceased and that it had enclosed a 'Death Notification and Application for Death Benefits' form (**the Form**) for him to complete. The Form had some notes attached. TP maintains that it also enclosed a 'Survivor and Death Benefits' leaflet (**the Leaflet**).
7. The Leaflet contained five pages of information. Under the heading "Long-term pensions" it stated that:

“This pension is payable for life, provided you have pensionable employment on or after 1 January 2007. If this is not the case the pension will cease if the recipient re-marries, enters into a civil partnership or co-habits.”

8. On 21 March 2013, Mr E completed and signed the Form. The declaration that Mr E had signed said that: “I have read and understand the enclosed literature.”
9. An extract from the Teachers’ Pensions Regulations 2010 as amended (**the Regulations**), which were in force at the time that Mr E’s widower’s pension commenced, can be found in the Appendix.
10. From March 2014 to March 2018, TP said it sent Mr E his annual P60s together with a four page ‘Your Annual Update’ newsletter (**the Newsletters**). The Newsletters contained a message asking members in receipt of a spouse’s pension to notify TP should they remarry. For example, under the heading “Keep us up to date”, the March 2014 newsletter stated that:

“It’s vital that we have your most up to date information on our records, so we can keep you up to date with any changes that may affect your pension.

Please tell us:

[...] If you receive a spouse’s or civil partner’s pension and you re-marry, enter a civil partnership or co-habit;”
11. On 23 March 2016, Mr E re-married.
12. In 2018, TP sent Mr E a remarriage declaration form which he completed, confirming that he had remarried in 2016.
13. On 12 November 2018, TP wrote to Mr E. It said:-
  - His entitlement to a widower’s pension ceased when he remarried.
  - Payment of his pension had continued after his remarriage and, as a result, he had been overpaid by a net amount of £5,891.84.
  - It was obliged to seek recovery of any money paid out of public funds in error. Mr E should arrange repayment of the overpaid sum.
  - A contact number for its finance team had been provided should Mr E find it difficult to repay the overpayment.
14. On 21 November 2018, TP wrote to Mr E. It maintained that the overpayment was outstanding and provided details of how he could repay it.
15. On 26 November 2018, Mr E wrote to TP concerning its requests for repayment of the overpaid sum. He said he considered its email of 21 November 2018 to have been unreasonable as it had been sent so soon after its previous email. He went on to say that he had found no reference to there being a requirement for him to notify

TP of a change in his personal circumstances in the earlier correspondence he had received. Nor had he found reference to the fact that his pension would cease on remarriage. He asked TP to confirm the date it had made him aware of the position.

16. On 20 December 2018, TP responded to Mr E. It said:-

- Where a widow or widower remarries, they would have access to the income of their new spouse. Hence it would be unlikely that they would suffer financial hardship due to the cessation of their pension. This was reflected in the Regulations by the withdrawal of the spouse's pension.
- In 2006, it was decided that a spouse's pension would be payable for life. However, this improvement only applied to beneficiaries of members who had service after 31 December 2006.
- It had relied on beneficiaries notifying it of a change of circumstances. The requirement to notify TP was communicated to beneficiaries at the time that their pension commenced, and in reminders provided with their P60s.
- However, as it was apparent that notifications were not being provided in all instances by beneficiaries, TP introduced an exercise to issue marriage declaration forms for them to complete.

17. On 8 January 2019, Mr E responded to TP. He said:-

- In March 2013, TP had sent him the Form and three pages of notes.
- There had been a number of subsequent communications, none of which supplied the additional information that TP claimed he had been sent. So, he had not been made aware that he had to notify it of a change of circumstances or that his widower's pension would cease on remarriage.
- Taking the 2014 P60 as an example, it stated: "A newsletter is also enclosed: please read this carefully as it should answer any related questions". As he had no questions, he did not read the Newsletters. A reasonable man could not have been expected to have read the Newsletters in full.
- On 26 November 2018, he had asked TP to supply details of correspondence he had been sent detailing the requirement to notify it of a change of circumstances or that his pension would cease on remarriage. It did not respond to this request. So, he made a further request.

18. On 22 January 2019, TP wrote to Mr E. It reiterated that the information was provided in the Newsletters he had been sent with his P60s. It confirmed that the Newsletters had a paragraph noted as being important. The information was also on its website.

19. On 29 January 2019, Mr E responded to TP and said that he wished to raise a formal complaint. He said:-

- He did not agree that there had been an overpayment of his widower's pension.
- The dispute concerned whether he was supplied with information about the need to communicate a change in his marital status. Apart from the information provided in the Newsletters, he had not been notified of this requirement or the fact that his pension would cease on remarriage.
- He did not read the Newsletters, which he considered to be something that a reasonable person would do. He was not asked to read them. So, he was not notified about the potential termination of his pension.
- On arrival in the UK, his new wife was not permitted to perform paid work or receive benefits from the State. So, TP's comments about having access to income from a new spouse did not apply to him.
- He had budgeted for the rest of his life based on the information that TP had provided. So, the withdrawal of the pension had hit him and his wife hard.
- He asked that requests for repayment of the overpayment be suspended while his complaint was being considered and also that his pension be reinstated.

20. On 14 February 2019, TP provided its response to Mr E's complaint which it had considered under stage one of the Scheme's two stage Internal Dispute Resolution Procedure (**IDRP**). It did not uphold his complaint. In summary, it said:-

- At the time that Mr E's pension commenced, it was issuing the Newsletters annually, which included a section entitled "Changes we need to know about". Pensioners were advised that they must notify TP if they remarried and were in receipt of a pension by virtue of being a dependant of a deceased member. Heavy type had been used to emphasise the importance of this message and that failure to comply with it could have a financial impact.
- In 2014, it reviewed its processes and started issuing marriage declaration forms periodically.
- Benefits had to be paid in accordance with the Regulations. These gave it authority to recover overpayments.

21. On 2 July 2019, Mr E asked for his complaint to be considered under stage two of the IDRP.

22. On 30 July 2019, the Department for Education (**DfE**) provided its stage two IDRP response. It did not uphold Mr E's complaint. In summary, it said:-

- Mr E's pension was paid under the terms of the Regulations.
- It had been made clear to Mr E that his pension was contingent on him not remarrying. This information was in the Leaflet which was sent to him with the

death benefit application papers in 2013. The Newsletters had also confirmed this point.

- Mr E's pension would have been stopped in a timely manner if he had followed the instructions provided.
- TP had a responsibility, in line with HM Treasury guidance on managing public money, to cease the payment of his pension and pursue the debt. This was regardless of who was responsible for the situation occurring.

23. On 30 April 2021, TP provided The Pensions Ombudsman (**TPO**) with its formal response to Mr E's complaint.

24. Mr E made the following additional submissions:-

- Prior to 2018, he had not been asked by TP to refer to its website to look for conditions attached to the payment of his pension.
- TP had a duty of care to inform him of the conditions that applied to his pension. Not providing this information amounted to maladministration. If maladministration was proven, then it would be appropriate to reinstate and backdate his pension with interest.
- The commencement of his pension formed a contract between TP and him.
- TP had caused him significant non-financial injustice and financial loss. He had used the pension as part of his financial evidence when applying for a visa for his wife.
- He did not believe that he should be required to make the repayment. However, if repayment was required, a repayment plan spread evenly over a three-year period would be unlikely to cause him financial hardship.

25. TP made the following additional submissions:-

- While there was no reference to the Leaflet in its letter of 15 March 2013, it was standard practice at the time to include it. This was done in order to provide additional information over and above that provided in the notes that accompanied the Form.
- It would be prepared to accept a repayment period of three years.

## **Adjudicator's Opinion**

26. Mr E's complaint was considered by one of our Adjudicators who concluded that no further action was required by TP.

27. The Adjudicator's findings are summarised below:-

- TP agreed that it continued paying Mr E's widower's pension beyond the date when it should have ceased. This was due to TP not being aware that Mr E had remarried. So, there was no dispute that a problem had occurred.
- TP was required to pay benefits from the Scheme in accordance with the Regulations. Regulation 94 applied at the time that Mr E became eligible for his pension. Mrs E was not in pensionable employment after 31 December 2006. So, Mr E's pension ceased to be payable if he remarried.
- In the Adjudicator's view, TP was correct in ceasing Mr E's pension when it became aware, in late 2018, that he had remarried. By this time, Mr E's widower's pension had been overpaid since 23 March 2016. This had resulted in a total overpayment of £5,891.84, which TP asked Mr E to repay.
- Before the Adjudicator considered whether Mr E had any other legal defences available to the recovery of the overpaid pension, he considered whether the Limitation Act 1980 (**the Act**) applied in this case. The Adjudicator explained that the Act can prevent the recovery of an overpayment made more than six years before the claimant, in this case TP, took formal action to recover it.
- The date that formal action was taken by TP was the date it provided TPO with its formal response to the complaint. The formal response was provided on 30 April 2021. The first overpayment occurred in March 2016. So, the Act did not provide Mr E with a defence to recovery because TP made its claim within six years of the date of each overpayment.
- The most common defence against recovery of an overpayment is referred to as "change of position". That is, the recipient has changed their position such that it would be unjust to require them to repay the overpayment; either in whole or in part. Change of position is a defence to a claim in unjust enrichment. The recipient must be able to show on the balance of probabilities that:
  - their circumstances have changed detrimentally;
  - the change of circumstances was caused by receipt of the overpayment; and
  - they are not disqualified from relying on the defence.
- The Adjudicator explained that a change of position defence is not available to an individual who did not act in good faith when changing their position.

28. The Adjudicator went on to consider the good faith test in the context of Mr E's case and made the following comments:-

- To meet the good faith test, Mr E must not have had actual knowledge of the overpayment. The good faith test would not be considered as having been met if the recipient of the overpaid benefits had doubts over their entitlement to the benefits. In other words, the recipient was aware that they might not be entitled to a pension, but then failed to make enquiries of the scheme before spending the

money (the Adjudicator explained that this is often referred to as having “Nelsonian knowledge”). The Adjudicator also explained that this includes situations where someone might suspect that there was something amiss and could have taken simple steps to ascertain the correct position but did not do so. In other words, the recipient of an overpayment cannot turn a blind eye.

- Mr E acknowledged that he received the Newsletters with his P60s on an annual basis. Having reviewed the contents of the Newsletters, the Adjudicator noted that they included wording to alert the reader to a number of changes that TP needed to be made aware of. One of these was for someone in receipt of a spouse’s pension to notify TP when they remarried.
- The Newsletters, at four pages in length, would have taken a relatively short time to read. However, in the Adjudicator’s view, the Newsletters were designed to be of interest to a range of Scheme members and the content was not directed solely at Mr E. For these reasons, he was of the opinion that it could not be assumed with any certainty that Mr E would have read the Newsletters. Indeed, Mr E said that he did not read them.
- This was unfortunate as TP sent the Newsletters out to inform pensioners of conditions that affect their benefits. However, the Adjudicator took the view that the provision of the Newsletters was not, on its own, adequate to ensure that Mr E was aware that he may cease to be eligible for his pension on remarriage.
- TP said that a copy of the Leaflet was enclosed with its letter of 15 March 2013. The Leaflet made it clear that Mr E’s pension would cease on remarriage. Furthermore, the Leaflet contained information specific to Mr E’s circumstances at the time and the Adjudicator took the view that it was reasonable to have expected Mr E to have fully read it.
- The Adjudicator acknowledged that Mr E did not recall receiving the Leaflet, and also that it was not specifically referred to in TP’s letter of 15 March 2013. So, there was some uncertainty over whether Mr E received it. TP maintained that the issuing of the Leaflet to beneficiaries was part of its procedures at the time in order to provide additional information to supplement the information provided with the Form.
- On the balance of probabilities, the Adjudicator took the view that Mr E did receive the Leaflet and that he would have read it. The Adjudicator’s view was that Mr E’s intentions, in continuing to receive his widower’s pension after he had remarried, were honest. However, taking into account the information provided in the Leaflet, it was the Adjudicator’s opinion that Mr E reasonably ought to have been aware that his widower’s pension was not payable for life and that there was a need to inform TP of his remarriage.
- So, the good faith test was not satisfied, and Mr E did not have a change of position defence to the recovery of any part of the overpayment.

29. The Adjudicator then considered the defence of estoppel:-

- The Adjudicator noted that there were three requirements that needed to be satisfied in order to establish estoppel by representation; namely:
  - a clear representation or promise made by the defendant on which it is reasonably foreseeable that the claimant will act;
  - an act on the part of the claimant which was reasonably taken in reliance on the representation or promise; and
  - after the act had been taken, the claimant must be able to show that he/she will suffer detriment if the defendant is not held to the representation or promise.
- The Adjudicator did not consider that Mr E's reliance on the continued payment of his pension was reasonable in the circumstances. Mr E had the requisite information to know that he might not be entitled to the continued payment of his pension. Similarly, because of the knowledge Mr E had at the time, it could not be argued that there was a common assumption between the parties that Mr E should receive the benefit he was receiving in error. The Adjudicator said that this would be necessary to establish a defence of estoppel by convention. Consequently, the Adjudicator did not consider that Mr E had a valid estoppel defence.

30. The Adjudicator said that he had not been able to identify the necessary elements for a contract to exist. In particular, he could not see that there was any intention on the part of TP to enter into a legal relationship with Mr E beyond any entitlement that it considered he may have under the Regulations.

31. In the Adjudicator's view, Mr E did not have any defences available to the recovery of the overpayment of £5,891.84. The fact that TP did not cease his pension in a timely manner was nonetheless very unfortunate. TP's request for the return of the overpayment would likely have caused Mr E distress.

32. However, the Adjudicator noted that TP was unaware of Mr E's remarriage on 23 March 2016 until he notified it in 2018. For this reason, the Adjudicator did not consider it appropriate to recommend that TP make a payment for any distress and inconvenience which Mr E had suffered.

33. Mr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.

34. Mr E provided some further comments in response to the Opinion. In summary he said:-

- He did not receive a copy of the Leaflet and the evidence available supports this. In its responses to him, TP had never said definitively that it sent him the Leaflet. Furthermore, the DfE's statement in its stage two IDR response that the Leaflet



would have been sent to him in March 2013 reflected what it considered should have happened and not necessarily what did happen.

- TP was given ample opportunity to demonstrate that it sent him the Leaflet, and yet it was not mentioned in the three detailed letters of explanation that it had provided. In addition, its letter of 15 March 2013 did not list the Leaflet as an enclosure. This suggested that the practice of issuing the Leaflet highlighted by the DfE was not so well known within TP.
- The Form he completed in March 2013 included three pages of notes. No reference was made to there being a requirement that he notify TP of a change in marital circumstances. Furthermore, while he had been asked to provide additional documentation when applying for his pension, he had not been asked to acknowledge receipt of the Leaflet.
- He maintained good records and had kept all correspondence concerning his pension. The Leaflet was not present. The Adjudicator's comment that, on the balance of probabilities, he had received the Leaflet should be reconsidered in the light of his reputation and honesty.

35. I have considered the additional points raised by Mr E; however they do not change the outcome. I agree with the outcome of the Adjudicator's Opinion, albeit for slightly different reasons.

### **Ombudsman's decision**

36. Mr E's complaint concerns TP's actions to recover an overpayment of pension which has arisen because his widower's pension should have ceased when he remarried.

37. As explained by the Adjudicator, the most common defence against recovery of an overpayment is referred to as "change of position". In order to be eligible for this defence, Mr E would need to meet the good faith test.

38. I wish to make it clear 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 Mr E'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.

39. The burden of proof is on Mr E to show that he acted in good faith in continuing to accept his widower's pension after his remarriage. It is for him to show, on the balance of probabilities, that he was unaware that his pension should have ceased or that he was unaware that he needed to check the position with TP. I recognise that only Mr E can know what his knowledge of the conditions for payment of his pension was at the relevant time. Mr E is, however, providing evidence of what he read (or did not read) several years ago and his memory of events may not be reliable. I also

understand that he was sent newsletters for the period from 2014 to 2018 on multiple occasions. I have to come to a decision, on the balance of probabilities, based on the available relevant evidence. It is, in essence, a judgment call and, in most of the cases I see, it is a finely balanced judgment.

40. In Mr E's case, the information about the conditions for payment of a widower's pension was included in the Newsletters and the Leaflet which TP maintains that it sent him in March 2013. I note Mr E's point that there was no evidence that the Leaflet had been sent to him. Also, that it was not listed as one of the enclosures to TP's letter of 15 March 2013. However, the DfE said that the process for claiming a widower's pension at the time included the issuing of the Leaflet.
41. I accept that individuals might not read all of the information they are sent at what is usually a very stressful time. I consider that Mr E may not have received the Leaflet and, if he did, may not have remembered what was in it when he remarried in 2016.
42. Turning now to consider the Newsletters. In the 2015 newsletter, for example, the request to notify TP appeared as the first item in a list on the third page of the four-page document under a heading of 'Important'.
43. Mr E's position is that not once in the period from 2014 to 2018 did he read any of the Newsletters sent to him with his P60. If that is the case, then, despite the fact that it might be said to be somewhat careless of him to have failed to read these documents, he would satisfy the good faith condition for a change of position defence.
44. I acknowledge that, when asked to complete the 2018 declaration, Mr E promptly and fully disclosed his remarriage. I am sure that, had he been asked to complete a declaration in 2016, he would have done so with the same measure of honesty. However, on the balance of probabilities, I find that Mr E did read one or more of the Newsletters referring to the fact that he did need to notify TP of remarriage.
45. I do not find it credible that Mr E disposed of all of the Newsletters relating to his pension without reading any of them. I also acknowledge that the Newsletters did not go into the detail of the consequences of remarriage, but they made it clear that this was something which Mr E should notify TP about. Mr E has said that he maintained good records and had kept all correspondence concerning his pension so it seems odd that he would have completely ignored pension Newsletters and not read them on any occasion. I find that, on the balance of probabilities, he did read one or more of the Newsletters sent to him. This would have put him on notice that his widower's pension might be affected by his remarriage. At that point he should have taken steps to clarify the position with TP. The fact that he did not do so means that a change of position defence is not now available to him.
46. Similarly, the other defences against the recovery of the overpayment do not apply in this case for the reasons explained by the Adjudicator.

47. While I sympathise with Mr E's position, I do not agree that TP can be held responsible for any distress and inconvenience he has suffered in connection with this matter. TP was not aware that Mr E had remarried until 2018, when he returned the completed remarriage declaration form it had sent him. TP was then obliged to take steps to rectify the situation. Notifying Mr E of the overpayment does not, in and of itself, amount to maladministration.
48. I do not uphold Mr E's complaint.
49. Mr E should now contact TP to discuss a repayment plan in respect of the amount of £5,891.84 that is due to the Scheme.
50. I note that both Mr E and TP have indicated their willingness to accept a repayment plan spread over three years. So, unless both parties choose to agree on an alternative plan, Mr E shall make repayments spread over a three-year period.

**Anthony Arter**

Pensions Ombudsman  
14 December 2022

## Appendix

### Extract from the Teachers' Pensions Regulations 2010 as amended

#### Part 9 Family benefits

##### **"Adult pensions**

- 94.** - (1) This regulation applies on the death of a person (D) if –
- (a) D was in pensionable employment after 31st March 1972, and
  - (b) D had adult pension qualification service of -
    - (i) at least 2 years, where D was in pensionable employment at any time after 5th April 1988, or
    - (ii) at least 5 years, where D was not in pensionable employment after 5th April 1988.
- (2) For the purpose of calculating benefits in respect of a period after D entered further employment, paragraph (1) has effect as if for subparagraph (b) there were substituted –
- “(b) D was qualified for retirement benefits following further employment.”.
- (3) An adult pension is payable to D's surviving adult from the day after the date of D's death.
- (4) Except as otherwise provided in these Regulations, the pension is payable for life.
- (5) D falls within this paragraph if –
- (a) D was not in pensionable employment after 31st December 2006, or
  - (b) D did not pay contributions under regulation C9 of TPR 1997 or regulation 19 (election to pay contributions by a person serving in a reserve force) in respect of a period after that date.
- (6) If D falls within paragraph (5), the pension ceases to be payable if D's surviving adult marries, forms a civil partnership, or lives with another person as if they were husband and wife or civil partners.
- (7) Paragraph (6) does not apply –
- (a) if the Secretary of State determines that paragraph (6) does not apply in the circumstances of the particular case;

- (b) to so much of any pension as is payable in respect of section 9(2B) rights to a widow or widower whose entitlement arose from a death occurring before 5th December 2005 and who forms a civil partnership or lives with another person as if they were civil partners;
- (c) where D dies in service, as a phased retirement pensioner or as a retirement pensioner, during the first 3 months after D's death."