

## Ombudsman's Determination

<b>Applicant</b>	Mrs N
<b>Scheme</b>	Teachers' Pension Scheme (TPS)
<b>Respondent</b>	Teachers' Pensions (TP)

### Complaint Summary

1. Mrs N is complaining that TP have refused to allow her to commute her pension for a higher lump sum, and disputes whether or not the lump sum application form was completed fully.

### Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against TP because Mrs N's application form to commute her pension for a higher lump sum did not contain a completed declaration. Having treated an incomplete form as a completed declaration amounts to maladministration.
3. My reasons for reaching this view are explained in more detail below.

### Detailed Determination

#### Material facts

4. The relevant regulations (The Teachers' Pensions Regulations 2010) (**the Regulations**) are attached in the Appendix.
5. Mrs N made the decision to retire in 2014. As part of her preparation for retirement, she sought advice from an independent financial advisor (**IFA**) in July 2014 and was advised to commute her pension for a higher lump sum payment. This was because if she took her benefits without commuting, her annual pension would bring her into the higher tax bracket of 40%.
6. Mrs N says she decided to act on this advice, but whilst completing the relevant paperwork ("Application for retirement benefits: Actuarially adjusted") (**the Application**), Mrs N's husband was diagnosed as terminally ill. On 4 September 2014, Mrs N submitted the Application.

7. In the section relating to commutation, the Application says:

**“Section 5: Lump sum choices**

**1. Members of the scheme prior to January 2007 and with pensionable service on or after this date**

You will automatically receive a lump sum of three times your annual pension and have the option to take an **additional** lump sum by giving up part of your annual pension. **Do you wish to do this?**

Yes    No

If yes, please indicate how much annual pension you are giving up, either the maximum or a specific amount, and from which source:

**Normal retirement pension**

Maximum allowed or specific amount

**Additional pension**

Maximum amount or specific amount

If yes, have you consulted the lump sum calculator on our website?

Yes    No

Once your application is received by us, your decision is irrevocable.”

8. Mrs N did not circle “Yes” or “No” to the question as to whether or not she wished to take an additional lump sum. Under “Additional pension”, she wrote “NO!” and on the section about the decision being irrevocable, she wrote and circled “N/A”. She crossed out the rest of the page. The Application was also submitted to TP without a signature.
9. On 10 September 2014, TP returned the last page of the Application to Mrs N as it was unsigned. TP did not return the incomplete section 5. Mrs N signed and returned the last page of the form on 16 September 2014 (this was received by TP on 19 September 2014). In signing the form, Mrs N declared:
- “I have read the Notes and I understand that the lump sum choices I have made are irrevocable.”
10. Mrs N’s husband passed away on 20 December 2014.

11. Mrs N's benefits were calculated on 31 December 2014 with a tax free cash lump sum of three times her annual pension and this was paid to her shortly thereafter.
12. Mrs N called TP on 26 January 2015 to confirm that she had wanted to commute her pension, but, due to her husband's illness, she had not correctly completed the form. TP spoke to her on the following day and confirmed that, as the benefits were in payment, she could no longer commute her pension for a higher lump sum.
13. Mrs N (via her IFA) raised a complaint with TP under the TPS' internal dispute resolution procedure (**IDRP**). Her complaint was not upheld under either stage of the IDRP. As Mrs N remained dissatisfied with the response to her complaint, she complained to the Pensions Advisory Service and subsequently this service.

### **Summary of Mrs N's position**

14. Mrs N's IFA disagrees with TP and believes it ought to have sent back Section 5 of the Application when it returned the last page for signature, and not have assumed that Mrs N did not want to commute her pension for an additional lump sum. TP should also have taken into account Mrs N's personal situation at the time and understood that she was under severe stress and trauma. Mrs N says:

"I suppose the only thing that gives TP the discretion to change the way I'm paid is that fact that they have made a unilateral decision to pay the pension on the basis of an incomplete form. There is also the issue that I was sent only the final page to sign. Had I seen the rest of the document, I would have made clear how much I wanted to commute as pension."

### **Summary of TP's position**

15. TP have stated that the Regulations require the member to elect to make the commutation, they must specify how much they wish to commute, and that the amount must be paid at the same time as the benefits are due to be paid.
16. As part of the investigation into Mrs N's complaint, TP submitted:

"Although Mrs N did not complete the 'Yes' or 'No' box in the appropriate section or specify the pension in place of which the lump sum was to be received, she did complete other parts of question 1 of that section. She did write 'NO!' in the Additional pension section and 'N/A' across the words '*Once your application is received by us, your decision is irrevocable*'. Therefore TP accepted the lack of information regarding making an election to commute, or the amount of pension she wished to give up together with the additional annotations she did make as indicating that she did not want to commute any of her pension."

## Conclusions

17. In order to determine this complaint, I must consider whether the Application was complete or incomplete, and whether the decision of TP to treat it as a completed Application amounts to maladministration. I must also consider whether this has caused Mrs N a financial and/or non-financial loss.
18. I agree with Mrs N that the Application was only partially completed. She did not indicate either “Yes” or “No” to the question about whether she wanted to commute her pension for an additional lump sum, nor did she indicate how much she wished to commute (either the maximum or a specified amount). As TP was required to contact Mrs N regarding the lack of signature on the Application, and because of the nature of the declaration which accompanied that signature, it would have been reasonable, in my view, for a prudent administrator to have raised the ambiguity with Section 5 of the Application with Mrs N. They should have asked her to complete the ‘yes’ or ‘no’ option unequivocally before accepting her application. By failing to select ‘yes’ or ‘no’ she made no lump sum choice and there was therefore no election which was capable of becoming irrevocable when she signed the form.
19. My view is that TP did not receive a completed Application. I find that processing the partially completed form without requiring her to fill out section 5 properly amounts to maladministration. To put Mrs N back in the position she ought to have been in, she should now be provided with the opportunity to complete the Application afresh, and commute her annual pension for a higher lump sum of her choice.
20. In relation to any unauthorised payments that may result from this, Section 241(2) of the Finance Act 2004 states:

“(2) An unauthorised payment is exempt from being scheme chargeable if -

... (c) it is made to comply with an order of a court or a person or body with power to order the making of the payment;

(d) it is made on the ground that a court or any such person or body is likely to order the making of the payment (or would be were it asked to do so)”
21. Therefore, as I am making a determination that has the effect of requiring an additional lump sum be paid to Mrs N 12 months after the original payment of the lump sum, and because my directions are enforceable in the same manner as judgments of the County Court, under the Finance Act 2004 the payment should be considered an authorised payment and not subject to additional tax charges.
22. TP have already been asked to submit information in relation to the effect of a new Application:

“If Mrs N had commuted the maximum amount of pension to lump sum, the additional lump sum due to be paid would amount to £110,411.65. Mrs N’s initial

annual rate of pension would reduce to £37,641.10 and the gross overpayment of pension from 1 January 2015 to 7 March 2017 would amount to £20,161.67.

When Teachers' Pensions (TP) calculate an overpayment of pension, we also make a tax adjustment to the pension payments which in this case amounts to £7,562.11 and reduces the overpayment of pension to the net amount of £12,599.56. TP's normal course of action would be to deduct the net overpayment from the additional lump sum and pay the difference of £97,812.09 to Mrs N. Therefore, in effect no additional tax liability would have been incurred as TP would make the appropriate adjustments with HMRC to ensure that only the correct amount of tax that would have been deducted is taken into account with HMRC."

23. In relation to any non-financial injustice, I make no award to Mrs N despite upholding the complaint. It must be recognised that Mrs N contributed to the position she now finds herself in, in that she did not fully complete the Application originally.

### **Directions**

24. Within 21 days of the date of this decision, TP should issue Mrs N with a new Application for her to complete.
25. Within 21 days of receipt of the new Application, TP are to recalculate and pay Mrs N the additional lump sum (less the overpayment of pension, and tax adjustment, as described by TP in paragraph 22).

**Karen Johnston**

Deputy Pensions Ombudsman  
11 May 2017

## **Appendix**

### **The Teachers' Pensions Regulations 2010**

#### **Part 7**

#### **Regulation 60**

(5) Except as otherwise provided in these Regulations, the pension is payable for life.

#### **Part 11**

#### **107 Payment or benefits on application to Secretary of State**

- (1) Benefits under these Regulations are payable by the Secretary of State.
- (2) Despite any provision in these Regulations according to which a benefit becomes payable at any time, no benefit is to be paid unless paragraphs (3) to (5) have been complied with.
- (3) A written application for payment must be made to the Secretary of State.
- (4) The applicant must provide the Secretary of State with such relevant information in the applicant's possession or which the applicant can reasonably be expected to obtain as the Secretary of State may specify in writing.

#### **116 Election to receive lump sum in place of part of pension**

- (1) A person who was in pensionable employment on or after 1 January 2007 may elect to receive a lump sum in place of-
  - (a) part of any phased retirement pension, or
  - (b) part of one or more of-
    - (i) any retirement pension,
    - (ii) any additional retirement pension, or
    - (iii) any total incapacity pension

...

- (7) The notice under paragraph (1) or (4) must –
  - (a) be given at the same time as the person makes an application under regulation 107 for the pension, and
  - (b) specify the amount of the lump sum which the person wishes to receive and, where appropriate, the pension in place of which the lump sum is to be received.