

Ombudsman's Determination

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

Outcome

1. I do not uphold Mr S's complaint and no further action is required by Teachers' Pensions.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S's complaint against Teachers' Pensions is about an overpayment in respect of his widower's pension.

Background information, including submissions from the parties

4. Mrs S, Mr S's late wife, was a teacher and a member of the Scheme.
5. In December 2000, Mrs S sadly passed away. Following this, Teachers' Pensions (**TP**) contacted Mr S and informed him that he was eligible to receive a pension as Mrs S's surviving spouse.
6. Payment of widower's pensions was governed by the Teachers Superannuation (Consolidated) Regulations 1988, replaced by the Teachers' Pension Regulations 1997 (as amended) (**the Regulations**). The relevant sections of the Regulations are reproduced in full in the Appendix to this Opinion. The relevant part states: -

"E30—(1) A pension under regulation E26 payable to a surviving spouse or a nominated beneficiary ("an adult pension") is to be paid—

(3) Unless the Secretary of State determines otherwise in the particular case, and subject always to regulation E1(3)(c) and (d) (guaranteed minimum pension for surviving spouse), an adult pension is not payable during or after any marriage or period of cohabitation outside marriage."

7. In around January 2001, Mr S would have been issued with a Bereavement Pack, including: Application Form; Notes for Guidance; and Leaflet 450 (**the Leaflet**). He would have completed the forms to start receiving the widower's pension, and his benefits would have come into payment shortly thereafter.
8. In June 2001, Mr S remarried, to Mrs A.
9. In February 2003, Mr S's marriage to Mrs A was legally dissolved.
10. In September 2005, Mr S remarried again, to Mrs D.
11. On 1 February 2006, a publishing business was incorporated with Mr S being named as sole director.
12. In 2007, Mr S contacted TP as he required an annual tax statement after becoming self-employed following redundancy. In his letter to TP of 2 June 2016, Mr S stated: "... I was forced out of full time employment early in 2007".
13. In around 2008, Mr S started studying for a Master's degree in Creative Writing.
14. In November 2008, Mr S updated his address with TP. He says that, from this time, he received annual correspondence from TP including newsletters and P60 forms.
15. In 2012, Mr S and Mrs D started a community magazine. In his letter to TP dated 2 June 2016, Mr S described the circumstances as follows: -

"I have re-educated myself during the years since my wife died and as a result now edit a local community magazine with a view to the role providing me with an income in the not too distant future. The magazine my wife and I produce commenced in 2012, and is now just about paying its way. My wife has loaned the business £40,000 since inception and although making a trading profit now, won't pay any dividend to me until that is repaid..."
16. In 2014, TP started writing to recipients of widow's and widower's pensions (**the marriage exercise**). This was because some members were not making TP aware of changes such as remarriage and cohabitation.
17. In March 2016, Mr S received a questionnaire from TP. In April 2016, Mr S sent back his completed questionnaire, in which he confirmed he had remarried in 2005. He did not mention the 2001 marriage at that time, however.
18. In May 2016, Mr S received a letter from TP. It advised him that he had received an overpayment of £40,869.52, as he had not informed TP of his remarriage.
19. In June 2016, Mr S complained to TP. He said he was confused as he thought that benefits were payable for life. And he did not understand why it took TP 15 years to ask him about his marital status. Finally, he asked how the overpayment had come about, and what were his options for repaying it.

20. On 16 June 2016, TP wrote to Mr S under the Scheme's internal dispute resolution procedure (**IDRP**). The key points were: -
- TP did not issue individual letters to widows and widowers; the onus was on recipients to inform TP if their circumstances changed.
 - The rules of the Scheme, as they applied at the time, stated widower's pension benefits cease upon remarriage or cohabitation.
 - Mr S would have received newsletters, with a P60 form, over the years, requesting that he inform TP of changes such as remarriage or cohabitation.
21. Between June and August 2016, Mr S and TP corresponded further about a possible repayment plan. Mr S offered to repay £200 a month. TP turned this down.
22. In September 2016, Mr S referred his complaint to this Office. He also appealed to the Department for Education (**DfE**). In October 2016, the DfE wrote to Mr S under the IDRP. The key points were: -
- Mr S would have received a Bereavement Pack in 2001, after informing TP that Mrs S had passed away. This would have included a leaflet explaining the circumstances where the widower's pensions would stop. He would also have received annual newsletters containing important information about the widower's pension, including the fact it would stop if he cohabited or remarried.
 - TP was required, under the Regulations, to recover overpayments. This was to ensure it safeguarded public funds, regardless of the cause of the overpayment. TP had acted correctly in this regard.
 - The onus was on individuals receiving benefits to inform TP of changes in their circumstances. TP carried out an exercise in 2014 as members were not doing this.
 - If immediate repayment was not possible, Mr S should contact TP about a reasonable repayment plan.
23. In November 2016, TP sent its formal response to the complaint. It made the following key points: -
- TP held no addresses for Mr S between March 2006 and November 2008. But, there was nothing to indicate he did not receive the 2005 newsletter in 2005, or the newsletters sent between 2009 and 2016.
 - Mr S's marriage certificate showed that he was married to his new wife (Mrs D) from the same address, indicating that they had been cohabiting prior to marriage.
 - It also indicated that Mr S's previous marriage had been dissolved. So, TP needed to know when he began cohabiting with Mrs D. And, whether he had been married to someone else after Mrs S died. TP would then recalculate the overpayment.

Adjudicator's Opinion

24. Mr S's complaint was considered by one of our Adjudicators, who concluded that no further action was required by TP. The Adjudicator's findings are summarised briefly below: -

- After Mr S referred his complaint to this Office, TP re-calculated the overpayment to take account of (1) a period of cohabitation with Mrs D prior to Mr S's marriage to her in September 2005, and (2) another marriage that took place between 2001 and 2003.
- Under the Regulations, Mr S was not permitted to receive a widower's pension if he cohabited or re-married. The Leaflet would have been sent at the time the widower's pension was set up, explaining that he should inform it in the event of such changes.
- Mr S said he was not informed that he needed to tell TP about these changes. But, the Adjudicator said, on the balance of probabilities Mr S would have been issued with the Leaflet. Although the Bereavement Pack appeared to have been issued by Mr S's then employer, not TP, there was no reason that the Leaflet would not have been included. So, it was more likely than not that Mr S was made aware of his responsibilities.
- Mr S moved house in 2002 and 2005, but did not inform TP of his new address. Also, whilst he contacted TP about a tax statement in 2007, he did not formally update his address. Nor did he tell TP he had remarried. He did not give TP his new address until November 2008. So, it had no way of knowing where he was residing. After that, TP sent him P60 forms and Pensioner Newsletters every year. The Pensioner Newsletters stated he should inform TP of remarriage and cohabitation, but he took no action.
- Whilst there was some doubt about whether the full Bereavement Pack, including the Leaflet, was issued to Mr S in 2001, it was more likely than not it was, because it was standard practice. And, there was no reason Mr S's employer would have removed it. In any case, TP attempted to issue Mr S with Pensioner Newsletters every year, which would have told him about changes it needed to know about. But, TP was unable to do so because Mr S did not update his address until 2008. Finally, it was not disputed that TP had issued Pensioner Newsletters to Mr S's correct address from 2009. So, Mr S ought reasonably to have reviewed and acted upon them, but he did not do so.
- Under the Limitation Act 1980 (**the Act**), TP would usually have six years to recover any overpayments. But, this could potentially be extended where the overpayment was the result of a mistake. In the Adjudicator's opinion, even with "reasonable diligence" TP could not have discovered the overpayment until receipt of Mr S's completed questionnaire in April 2016. So, it had no way of knowing until then Mr S had remarried. Since TP had sought recovery of the overpayment in November 2016, within six years of April 2016, the whole overpayment was recoverable under the Act.

- To successfully argue a “change of position”, Mr S had to demonstrate (1) that he had received the overpayment in good faith, (2) that he had relied on the level of overpayments when making relevant financial decisions and (3) that he changed his lifestyle accordingly in a manner that was irreversible. However, the change of position defence did not apply in Mr S’s case, as he knew, or ought to have known, he should inform TP of cohabitation or remarriage.
25. TP accepted the Adjudicator’s Opinion, but Mr S did not and the complaint was passed to me to consider. Mr S, via his legal representatives, provided some further comments which do not change the outcome. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman’s decision

26. After Mr S’s complaint was referred to this Office, TP recalculated the overpayment to take into account a remarriage it was not previously aware of. Mr S has complained under, and completed, the Scheme’s IDRP, but only regarding the original overpayment of £41,869.52. Similarly the complaint which he brought to this office and which has been investigated was limited to TP’s right to recover that amount. The circumstances which have given rise to the additional claim have not been considered at IDRP and were not part of the complaint which Mr S brought to the office. I consider it would be premature to make any findings about TP’s right to recover sums in excess of £41,869.52 before Mr S has had the benefit of making any points he may wish to take to IDRP and having those issues investigated if he then chooses to bring a further complaint.
27. I am not satisfied that Mr S can establish a change of position defence in respect of the overpayments which arose since his cohabitation and marriage in 2005.
28. TP has not been able to demonstrate that Mr S received the full Bereavement Pack. Its letter of November 2016 states: -
- “[Mr S] was provided with Form 22 by Worcestershire County Council when [Mrs S] died; we therefore do not know if [Mr S] was provided, as he should have been, with the full Bereavement Pack, which contained Leaflet 450...”
29. Ideally, TP would be able to demonstrate that the full Bereavement Pack, and Leaflet, was sent to Mr S in 2001. However, on the balance of probabilities, I find that it was in fact sent. TP has been able to provide two documents which have been shared with Mr S as part of the Adjudicator’s investigation. First, there is a letter from Worcestershire County Council dated 6 December 2000, which states: -
- “Form 22 has been issued to [Mr S] and arrangements are being made to pay him a short term pension for the period 6th December 2000 to 5th March 2001. I will arrange for Form 22 and the appropriate certificates to be forwarded to you directly”.

30. Second, there is a document entitled “Application for Death Benefits” (also known as Form 22). This proves Mr S completed, signed and returned Form 22 on or around 30 January 2001. In the absence of definitive evidence that the Leaflet was sent to Mr S, given that this leaflet ordinarily forms part of the Bereavement Pack, I find on the balance of probabilities, that Mr S would have been provided with the information he needed. As such, he knew, or ought to have known, that he should inform TP in the event he cohabited or remarried.
31. In any case, over the subsequent years TP sent, or attempted to send, information to Mr S in the form of the Pensioner Newsletters. Mr S resided at various addresses over the years, but did not inform TP of his new address until 2008. To some extent, this is understandable. He does not seem to have resided in one place for a significant period of time. However, because Mr S did not tell TP where he was residing, TP was unable to send him the newsletters. And there is no dispute that Mr S received the newsletters from 2009 onwards. As such, he was made aware of his responsibilities as a recipient of a widower’s pension. I have considered carefully Mr S’s assertion that the pension terms with regards to cohabitation and remarriage were not made sufficiently clear. But, I do not agree. These leaflets contain important information. Therefore, they should always be reviewed carefully in case they contain any information which needs to be acted upon. I find that the specific notifications in relation to cohabitation and remarriage were reasonably clear. In general, I find that, by issuing these leaflets over the years, TP made reasonable efforts to inform Mr S about the changes he needed to make it aware of.
32. Mr S argues the fact TP carried out the marriage exercise, means it failed to make sufficiently clear to members that their benefits would stop in the event of cohabitation or remarriage. He says if TP had made this clear, there would have been no overpayments. I do not agree. I find TP’s decision to carry out the exercise proves only that members were not updating it; it does not prove they were not updating because they did not know, for lack of information, that they were required to do so.
33. Mr S says he received the payments in good faith and has changed his position in reliance on them in the following ways: -
- He started a business in 2006 and became self-employed in 2007, and was assisted by way of a £40,000 loan from Mrs D.
 - He bought a house in 2006 as a tenant in common with Mrs D. His monthly mortgage payments are about £400.
 - He studied for a two-year Master’s degree, in October 2007, at a cost of approximately £6,000 a year.

34. In summary, Mr S says he has changed his position in reliance on the widower's pension, by taking out a mortgage, setting up a business and studying a Master's degree. I have considered carefully Mr S's change of position defence. But, I do not agree that he is entitled to keep the overpayment as a result of a change of position. This is for the following reasons.
35. To successfully argue a change of position as a defence to recovery in an overpayment case, three things must be shown: -
1. The recipient of the overpayment must have been unaware the overpayment had been made (i.e. the recipient must have received the overpayment in "good faith");
 2. There must be a causal link between the change of position and receipt of the overpayment (i.e. but for the mistake, the recipient would not have acted as he did);
 3. The action taken by the recipient must be irreversible.
36. If all of the above criteria are met, then the result is that it would be inequitable for the party owed (in this case, TP) to seek recovery of the overpayment. In terms of the first test, I accept that Mr S had good faith. Whilst it may be that he ought to have known that cohabitation or remarriage would result in his receiving payments he was not entitled to, nonetheless I do not find he actually knew there was a possibility of an overpayment but did nothing about it. In other words, there is no sign that he turned a "blind eye" to a potential overpayment in the hope that it would go unnoticed.
37. However, I do not find that the second test is met. I do not think Mr S can show that, but for the mistake (TP's mistake in overpaying him) he would not have studied for a Master's degree, and set up a business and bought a house with Mrs D. First, this is because he has told us he was made redundant in 2007. It is therefore certain he would have had to seek alternative employment, and it is likely he would have become self-employed, for reasons I shall go onto explain. Second, he took out a loan, rather than using savings, to set up the business. Third, he has told us he edits a local magazine as a result of re-educating himself; and, that the purpose of doing so was to provide him with an income. In addition, the magazine is registered with Companies House as a private limited company (rather than a not-for-profit) with Mr S being sole director. So, I find it is more likely than not Mr S would always have taken this action (i.e. educating himself in writing, to run his own business in relation to writing) even if TP had not caused an overpayment. Finally, after marrying Mrs D, I find it is more likely than not Mr S would always have bought a house with her.
38. As the second test is not met, there is no need for me to consider the third.
39. Therefore, I do not uphold Mr S's complaint.

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40. It is my expectation that TP and Mr S will now enter into sensible discussions about how the overpayment should be repaid, taking into account the length of time over which the debt has arisen, and the affordability of repayments. For the avoidance of doubt, discussions shall only relate to the original overpayment of £40,869.52, recovery of any further sums to be subject to the right to be given formal notice of requirement to repay with notice of any rights to review and appeal.

Karen Johnston

Deputy Pensions Ombudsman
16 March 2018