

Ombudsman's Determination

Applicant	Mr Y
Scheme	Teachers' Pension Scheme
Respondents	Bedford Borough Council (the Council) Teachers' Pensions (TP)

Outcome

1. Mr Y's complaint is upheld and to put matters right the Council should submit a fresh retrospective election to TP, requesting that Mr Y's part-time pensionable service should start from 1 September 2004. TP should then exercise its discretion as to whether it should accept the election, and inform Mr Y and the Council of its decision.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr Y's complaint concerns a change to part-time service in September 2004 when although pension contributions were deducted from his salary, the part-time service was not added to his existing pensionable service, because an election ought to have been made when his working hours changed from full time to part time.

Background information, including submissions from the parties

4. Mr Y began his employment with Grange School as a full time Teacher in April 2003. In September 2004, he changed his working hours to part time. Mr Y left his position at Grange School in September 2005 and became a supply teacher.
5. On 14 December 2006, Mr Y received a service record from TP showing how much of his employment was pensionable. The record stated that his part time service between September 2004 and March 2006 was non-pensionable. Mr Y was under the impression that all of his service was pensionable, so called TP to query the statement. He says he was told an election needed to be made in order for his part time contributions from September 2004 onwards to become pensionable.
6. On 22 December 2006, TP received an 'election of membership form'. The section filled in by the Council stated Mr Y's retrospective election would start on 1 December 2006.

7. On 4 January 2007 Mr Y received a letter from TP which said that the effective date of his retrospective election would start from 1 December 2006. Mr Y subsequently called TP again in February 2007 to query his election date. TP no longer hold a recording of this call, however a call note dated 15 February 2007 says that Mr Y was told his service from 1 September 2001 to 31 August 2004 would be amended. In addition, Mr Y says he was told by TP that his retrospective election would start from September 2004, and his service recorded for this period onwards would be reclassified as pensionable.
8. On 16 February 2007 Mr Y received an amended service record from TP containing a revised service statement showing all of his service from September 2001 as pensionable. The correspondence Mr Y received also contained a statement of service, which in small print stated that his effective date of part time election started on 1 December 2006. However, Mr Y did not query this as he says that he was told over the phone by TP that his election date would start from September 2004, which was reflected in the revised service statement.
9. On 10 July 2012 Mr Y received another service statement from TP which again showed his part time service as pensionable.
10. On 17 March 2014, 16 October 2015 and 4 November 2015 TP sent Mr Y further service records. However, this time the records stated that his service between September 2004 and November 2006 was not categorised as pensionable.
11. Mr Y queried the matter with TP, and on 15 December 2015 received a reply explaining that it was not possible to implement a retrospective election to 1 September 2004. This was because prior to 1 January 2007, the Scheme regulations stated an election had to be made for part time employment to be treated as pensionable, and “in order to consider a retrospective election subsequent to an election already made, the matter had to be addressed within six months of the election being accepted”.
12. Mr Y received another letter from TP which stated that it had not received any instruction for a retrospective election to be made prior to 1 December 2006.
13. Mr Y sought the advice of The Pensions Advisory Service (**TPAS**). After a protracted period of correspondence between TPAS, Mr Y and TP, an offer of £250 was made by TP for the replicated service statements which showed Mr Y’s part time contributions are pensionable. However, TP maintained that the effective date of Mr Y’s part time election was 1 December 2006.
14. Mr Y complained to the Department of Education (**DoE**), invoking its Internal Dispute Resolution Procedure (**IDRP**). Mr Y’s complaint was not upheld, a summary of the key points given by the DoE are set out below:-
 - Prior to 1 January 2007 all part time service was not pensionable unless an election had been made. The Council had requested for his retrospective

election to start on 1 December 2006. This was agreed and Mr Y was notified in writing.

- The service statement Mr Y received on 14 February 2007 incorrectly stated his part time service as pensionable. This was rectified following a service update from the Council in 2012.
- TP do not keep a record of employee contributions, so it was not aware that Mr Y's contributions had continued to be deducted when Mr Y changed his working hours to part time.
- Mr Y was offered a refund of his contributions, with interest, for the period where his contributions were deducted and without an election being made.

15. On 29 December 2016 TPAS wrote to the Council asking if it accepted liability for deducting Mr Y's contributions from his pay when a part time election had not been made. It also highlighted that the situation could have been easily avoided had the Council alerted Mr Y to the fact that an election had to be made when he changed his working hours to part time. TPAS said that the Council only backdated Mr Y's election to 1 December 2006, when it should have been backdated it to 1 September 2004, when Mr Y's part time employment began.

16. The Council responded to TPAS on 16 January 2017 saying:

"It is not disputed that an error was made by the now defunct Bedfordshire County Council but I believe it to have been an error made in good faith and as such compensation would not be due, much like the way in which Her Majesty's Revenue and Customs operate.

To add anything over and above what you have already determined would be speculative as the paperwork relating to his employment at The Grange School has been destroyed in line with our retention policy. I can only confirm that prior to January 2007 a part time teacher needed to opt in to the Teachers' Pension Scheme and contributions should not have been deducted.

Whilst it is the responsibility of the employee to check their payslip to ensure accuracy the regulations at the time were confusing for a teacher who had frequent changes to their contractual hours as was the case with Mr Y"

17. Unhappy with the outcome from TP, DoE and the Council, Mr Y brought his complaint to this office.

18. After Mr Y's complaint was brought to this office, the Council confirmed the period where it deducted contributions from Mr Y's pay without an election was between 1 September 2004 and 30 September 2005, and his employee and employer contributions over this period amounted to £1,140.23 and £2,565.67 respectively, and that these contributions have been paid to TP.

19. In the Council's formal response to this office, it said that any questions relating to the maladministration of Mr Y's pension should be directed to Serco as it was:
- “the payroll provider used by Bedfordshire County Council at the time as it is impossible to accept liability on behalf of Bedford Borough Unitary Authority for something over which we had no control or input”.
20. In TP's formal response to this office, it argued that Mr Y should have been aware that there was a discrepancy in his election date as the statement of service he received on 16 February 2007 gave his effective date of part time election as 1 December 2006, contrary to his service record which stated his part time employment from September 2004 was pensionable.
21. The relevant sections of the Scheme regulations can be found in the appendix.

Adjudicator's Opinion

22. Mr Y's complaint was considered by one of our Adjudicators who concluded that further action was required by Bedford Borough Council and TP. The Adjudicator's findings are summarised briefly below:-
- It was the view of the Adjudicator that on the balance of probabilities, when Mr Y called TP in February 2007 he was told that his part time service from September 2004 would be classified as pensionable. This was because the call notes from the time stated that his election date had been discussed, and soon after Mr Y received a service record from TP showing his part time service from 1 September 2004 onwards as pensionable. Mr Y's contributions were also deducted throughout the period in question. Therefore, the Adjudicator believed it was reasonable for Mr Y to believe his part time service for the period in question had been classified as pensionable.
 - The Adjudicator said the Council should have informed Mr Y in 2004 that an election was necessary in order to make his part time service pensionable. The Adjudicator did not agree that the Council had no responsibility because it had restructured from Bedfordshire County Council to Bedford Borough Council. The Council was ultimately Mr Y's employer regardless of whether it restructured and changed from Bedfordshire County Council to Bedford Borough Council. The Adjudicator believed that had the Council made Mr Y aware that an election ought to have been made when he changed his working hours to part time, he would have done so.

- In order to satisfy the Scheme Regulations which were in place at the time in question, the Adjudicator proposed to TP that the Council make a fresh retrospective election with a start date of 1 September 2004. The Adjudicator argued that this would remedy the situation as contributions had already been deducted under Regulation C18 (1), and a fresh election could be made under Regulation B1 (7) (**the Regulation**).

23. The Council and Mr Y accepted the Adjudicator's Opinion, however the Council highlighted that if the contributions in dispute have not been refunded and are still with TP. TP did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. TP provided its 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 TP for completeness, which are set out below:-

- TP say that the Scheme Regulations state that employers must only deduct pension contributions where a person is in pensionable employment. Simply because the Council incorrectly deducted pension contributions from Mr Y's salary did not make these contributions or the period of service pensionable, as no election had been made.
- TP also say that equally, for it to be directed to treat such employment as reckonable service in the calculation of retirement benefits is contrary to the Scheme Regulations.
- TP argued that the correct position is that an election was made on 18 December 2006, but the Council requested retrospection to 1 December 2006 which was agreed under the Regulation. Contributions deducted in respect of the period before this were deducted in respect of employment that was not pensionable, which was not in accordance with the regulations.

Ombudsman's decision

24. As explained, the contributions in dispute in this determination are the ones deducted by the Council without election between 1 September 2004 to 30 September 2005 (**the disputed contributions**).
25. On the balance of probabilities, I find that it was always Mr Y's intention to make the election which was necessary for his part time service to be classified as pensionable. He questioned this issue with TP on each occasion in December 2006 and January 2007 when he received clear correspondence stating his service between March 2004 and September 2006 was not pensionable.
26. Teachers' Pensions have said that the correct position is the disputed contributions are not in respect of pensionable service because the effective date of the election, submitted by the Council, is 1 December 2006. However, it is clear that a mistake has been made by the Council, as it gave a start date of 1 December 2006 and not the date when Mr Y's part time service started on 1 September 2004. This amounts to

maladministration on the part of the Council. To correct the position, I direct that the Council should make a new election and ask TP to exercise its discretion to allow a retrospective election back to 1 September 2004.

27. TP have said that it is contrary to the Scheme Regulations for it to be directed to treat such employment as reckonable service in the calculation of retirement benefits. I have reviewed the relevant Regulations and these are set out in the Appendix. Regulation B1 (7) allows for an election to be made retrospectively at the discretion of TP. The same Regulation also says that the relevant contributions should be paid within 6 weeks of the date of demand if the retrospective election is granted. At one point, TP issued service statements which showed service prior to 1 December 2006 as pensionable, despite there being no effective election in place. That was maladministration and given the conflicting information being presented to him, I do not consider that Mr Y could reasonably have been expected to understand the true position under the Regulations.
28. In this instance Mr Y's contributions have already been deducted by the Council, and it has also passed these and its employer contributions for the period in question to TP. All that is lacking is the formality required to classify the service as pensionable. I therefore direct that on receipt of the election from the Council, TP should exercise its discretion and decide whether or not a retrospective election is agreed. TP should also inform the Council and Mr Y of its decision and whether any outstanding contributions remain payable.
29. Turning to non-financial injustice, TP have offered Mr Y £250 for the service statements it sent showing the disputed contributions as pensionable. Having taken into account all the available evidence, I do not consider that the non-financial injustice suffered by Mr Y was significant and I do not consider that an increased compensation payment is warranted in this case. I will leave it to Mr Y to accept the award if he wishes.
30. I find there is no reason why a new retrospective election cannot be made under the Regulation. Therefore, I uphold Mr Y's complaint.

Directions

31. Within 21 days of this determination, the Council should submit a fresh election with an effective date of 1 September 2004 to TP.
32. Within 21 days of the election being received, TP exercise its discretion to whether it accepts the election. If TP does not accept election, it must explain its reasons.

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33. TP must inform Mr Y of its decision, whether any contributions are required and explain the reasons for this.

Karen Johnston

Deputy Pensions Ombudsman
7 February 2018

Appendix

The TP Regulations 1997

34. The applicable sections of Regulation B1 states:-

“(4) A person who is in part-time employment is not in pensionable employment unless he has at some time made an election for the purposes of this paragraph.

(6) An election for the purpose of this regulation may be made at any time by giving written notice to the Secretary of State and, unless paragraph (7) applies, has effect from the first day of the month after that in which the notice was given.

(7) If however the Secretary of State so specifies, the election shall have effect from a date earlier than that referred to in paragraph (6) provided that the contributions payable under regulations C3A and G8 (7) are paid to the Secretary of State by the date 6 weeks after the date of the demand under regulation C18(4A) or regulation G8(8) as the case may be.”

35. The applicable section of Regulation C18 states:-

“1) The employer of a person in pensionable employment, other than a services education officer, is to deduct from his salary each month-

(a) the contributions payable under regulation C3(1) and any contributions payable under regulation C3(3),

(b) any additional contributions payable in accordance with Part I of Schedule 4 as a result of an election under regulation C4,

(c) any additional contributions payable by virtue of regulation C6 or C11, and

(d) any instalments payable under regulation C16(5)”