

Ombudsman's Determination

Applicant	Mrs Elizabeth Lomax
Scheme	Teachers' Pension Scheme (the Scheme)
Respondent	Teachers' Pensions (TP)

Complaint summary

Mrs Lomax complains that TP, the administrators of the Scheme, are seeking to recover outstanding unpaid employee pension contributions from her (inclusive of interest). Mrs Lomax argues that she should not be required to pay the outstanding unpaid employee pension contributions or the interest that has accrued as a consequence of her failure to pay them to date. Mrs Lomax also complains that she has suffered distress and inconvenience as a consequence of TP's maladministration.

Summary of the Ombudsman's determination and reasons

The complaint is upheld against TP because Mrs Lomax has a limitation defence. TP knew of the extent of the outstanding unpaid employee contributions in 2001 and 2002 and failed to recover them within the period prescribed by the Limitation Act 1980. Any action to recover the amount is, therefore, and in my view, now time-barred.

Detailed Determination

Material Facts

1. On 21 March 1988 Mrs Lomax made an election for all her subsequent part-time employment as a teacher to be pensionable employment under the Scheme. This election was accepted with effect from 1 April 1988.
2. Mrs Lomax's employer, York City Council (**YCC**), failed to pay employer contributions to the Scheme and also to deduct employee contributions from Mrs Lomax's salary for the period 1 September 2000 to 31 March 2001.
3. On 9 September 2001 YCC wrote to TP to advise that they had not paid or deducted contributions for the period 1 September 2000 to 31 March 2001 and asked TP to calculate the outstanding amounts. Although TP was apparently unaware of this at that time, it was actually YCC's responsibility to record Mrs Lomax's contributions. However, TP duly calculated the outstanding amounts and invoiced both YCC and Mrs Lomax for the outstanding employer and employee contributions (respectively).
4. The letter to Mrs Lomax (in her previous name - Ms Carter) was sent to the address held on TP's file. This was 7 Ploughmans Close. The address had been provided by the General Teaching Council in a bulk exercise in 1999 and had, according to TP, been reconfirmed by them in 2001. Mrs Lomax actually lived at 5 Ploughmans Close (although she had previously lived at 7 Ploughmans Close, but had left that address in 2000). YCC paid the arrears but nothing was received from Mrs Lomax.
5. On 18 April 2002 YCC again wrote to TP to advise that it had not paid employer contributions and not deducted employee contributions for the period 1 April 2001 to 31 August 2001. The letter from YCC gave Mrs Lomax's address as 5 Ploughmans Close (so, the correct address). On 2 May 2002 TP invoiced both YCC and Mrs Lomax. The invoice to Mrs Lomax was sent to 7 Ploughmans Close. Again, YCC paid the arrears but nothing was received from Mrs Lomax.
6. On 19 February 2004 and 21 March 2006 TP wrote to Mrs Lomax at 7 Ploughmans Close to seek payment of the unpaid employee contributions for the total period (i.e. 1 September 2000 to 31 August 2001) plus interest, but received no reply.
7. Mrs Lomax applied for her benefits to be paid from 1 September 2012. When the benefit calculations were made, the period of service from 1 September 2000 to 31 August 2001 was included in the reckonable service used to determine Mrs Lomax's retirement benefits.
8. TP sent Mrs Lomax a statement dated 16 August 2012 which, under the lump sum figure said "Less Outstanding Contributions £0.00". (TP had, it seems, subsequently ascertained Mrs Lomax's correct address.)

9. During a subsequent quality assurance check the fact that employee contributions were still outstanding for the period of service from 1 September 2000 to 31 August 2001 was discovered by TP. The discovery was made by TP on 1 September 2012 and a statement was issued on 13 September 2012 which asked for repayment of the outstanding unpaid employee contributions. This statement was sent to Mrs Lomax by TP on 21 January 2013. In their covering letter TP requested immediate payment of the arrears of employee contributions plus interest. The total sought was £1,076.23. Of the total, the outstanding unpaid employee contributions amounted to £695.54 and the remaining £380.69 represented interest.

Summary of Mrs Lomax's position

10. She failed to notice that employee contributions had not been deducted from her salary in the period from 1 September 2000 to 31 August 2001.
11. She did not receive any of TP's letters asking her to pay the outstanding unpaid employee contributions. As a consequence of YCC's failure to deduct employee contributions from her salary in the period from 1 September 2000 to 31 August 2001 and TP's subsequent failure to inform her that they were outstanding, she only became aware that she owed outstanding employee contributions on receipt of TP's letter dated 21 January 2013.
12. TP should apologise for failing to contact her to inform her that she owed the outstanding unpaid employee contributions until 21 January 2013 and for incorrectly informing her that she did not owe any amount in respect of unpaid employee contributions in the statement dated 16 August 2012. Mrs Lomax also wants TP to acknowledge the stress and anxiety that that these mistakes have caused her.
13. TP should remove the interest they have charged on the arrears. The imposition of interest on her outstanding unpaid employee contributions is "...fundamentally unjust, unreasonable, and...unlawful". In accordance with TPR 1997 and TPR 2010 interest is only payable after a demand has been issued, which only occurred on 21 January 2013.
14. She should be compensated by TP by a matching amount because of the change of circumstances that has resulted as a consequence of their errors. She relied on the misleading information in the statement of 16 August 2012 and made financial decisions in the period between 16 August 2012 and when she became aware of the true position (i.e. 21 January 2013) which she would not have made had TP not given her the misleading information. Particular financial decisions that she made in the period between TP's incorrectly informing her that no employee contributions remained outstanding (i.e. 16 August 2012) and the date she was informed of the true position (i.e. 21 January 2013) include agreeing to fund her daughter on a four year university course (with a year to be spent in the USA), taking three holidays (in the UK, the USA & Canada and Italy) and payment of loans and credit card bills.

Summary of TP's position

15. TP accept that they wrote to Mrs Lomax at the incorrect address and have apologised for this. TP acknowledge that the information in the statement dated 16 August 2012 was incorrect and did not reflect the true position. TP also acknowledge that the true position was only communicated to Mrs Lomax in the letter (and attached statement) sent to her on 21 January 2013.
16. TP maintain that Mrs Lomax must pay her outstanding unpaid employee contributions. They say that the statutory authorities make it clear that Mrs Lomax must repay the contributions, plus interest, and that TP have the power to deduct the amount of Mrs Lomax's outstanding unpaid employee contributions from her pension benefits in payment.
17. TP suggest that there was a "clear possibility" that Mrs Lomax was passed the letters seeking recovery of the contributions from her neighbour (at 7 Ploughmans Close). TP therefore suggest that Mrs Lomax may have known that she owed outstanding unpaid employee contributions.
18. TP ask why Mrs Lomax has not included YCC in her complaint as it was YCC's failure to deduct the contributions which Teachers' Pensions say caused the problem.
19. In an effort to bring the matter to a conclusion, TP offered to pay the interest accrued on the arrears if Mrs Lomax agreed to pay the outstanding unpaid employee contributions. Mrs Lomax did not accept this offer.
20. TP say, in respect of Mrs Lomax's limitation defence, that they sought to exercise reasonable diligence but that it was "frustrated in its efforts by the clear failures" of Mrs Lomax and YCC to inform TP of Mrs Lomax's change of address.

Conclusions

21. It is not in dispute that Mrs Lomax did not make employee contributions to the Scheme in the period 1 September 2000 to 31 August 2001.
22. During that time, Mrs Lomax was a member of the Scheme, accruing benefit under it. She was liable to pay contributions even though they were not deducted.
23. TP have powers - set out in the regulations governing the Scheme - to recover the outstanding unpaid employee contributions from Mrs Lomax even though she was not at fault. The effect of them is she was due to pay the outstanding unpaid employee contributions on receipt of a written demand, and if they remained unpaid they could be deducted from her benefits.
24. However, TP's power to recover the outstanding unpaid employee contributions is subject to the law on limitation. The Limitation Act 1980 governs time limits for

bringing different types of claims in the courts. Section 9(1) of the Limitation Act 1980 says:

“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.”

25. The six year limitation period applies in these circumstances as Mrs Lomax had an obligation under the regulations governing the Scheme to make contributions to it and TP had a right, conferred on them by the regulations governing the Scheme, to recover Mrs Lomax's outstanding unpaid employee contributions.
26. For the purposes of limitation the time limit starts running from the point at which the cause of action accrued. That is, in these circumstances, the point when TP became aware that Mrs Lomax had unpaid outstanding employee contributions. TP were aware that employee (and employer) contributions had not been paid in the period from 1 September 2000 to 31 March 2001 on receipt of YCC's letter of 9 September 2001. Further, TP were aware that employee (and employer) contributions had not been paid in the period from 1 April 2001 to 31 August 2001 on receipt of YCC's letter of 18 April 2002. TP therefore had six years from 9 September 2001 and 18 April 2002 (respectively) to recover Mrs Lomax's unpaid outstanding employee contributions. TP did not write to Mrs Lomax at a correct address until 2013, well outside the six year period.
27. TP's suggestion that Mrs Lomax may have known that she had not paid employee contributions - because she was passed TP's demands for payment by her neighbour (at 7 Ploughman's Close) - is not supported by any evidence that she did. It follows that TP's suggestion has no effect on the operation of the limitation defence; in accordance with section 9(1) of the Limitation Act 1980, TP had six years (from 9 September 2001 and 18 April 2002 (respectively)) to recover the sum but failed to do so.
28. Similarly, TP's suggestion that they exercised reasonable diligence in their attempts to recover the employee contributions (but were "frustrated in its efforts by the clear failures" of Mrs Lomax and YCC to inform them of Mrs Lomax's change of address) does not have an effect on the operation of the limitation defence. Again, TP had six years (from 9 September 2001 and 18 April 2002 (respectively)) to recover the sum but failed to do so.
29. So Mrs Lomax can rely on a limitation defence. Any claim brought by TP in court to recover the outstanding unpaid employee contributions would, in my view, be time-barred. It follows that Mrs Lomax's complaint is upheld and she is not required to repay the unpaid outstanding employee contributions or any interest that has accrued on them.
30. TP have pointed that there is a power to offset unpaid contributions from benefits. It is not a power that they have sought to exercise thus far. They were requesting

direct repayment, against which Mrs Lomax has a defence if it is regarded as a debt arising under statute. Although the question is hypothetical, use of discretion to obtain repayment by offset of a sum that could not be obtained by Court action would in my view be likely to be maladministration - at the least.

31. TP should not have made any demands for repayment after the expiration of the relevant limitation periods. Their inappropriate efforts will have undoubtedly caused Mrs Lomax to suffer distress and inconvenience.

Directions

32. TP are to cease all efforts to recover the outstanding unpaid employee contributions and interest.
33. Within 28 days of the date of this Determination TP are to pay Mrs Lomax £100 for the distress and inconvenience that their attempted recovery of her outstanding unpaid employee contributions (and interest) has caused her.

Tony King

Pensions Ombudsman
16 March 2015