Ombudsman's Determination

Applicant Mr Paul Cavanagh

Scheme Teachers' Pension Scheme

Respondent Teachers' Pensions (**TP**)

Complaint summary

Mr Cavanagh objects to TP wishing to recover an overpayment from the estate of Mrs Cavanagh, Mr Cavanagh's mother, and

Mr Cavanagh disagrees with the calculation of interest and pension increases applied by TP to his mother's pension.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against TP. Interest and increases have been correctly calculated, and the overpayment is recoverable by TP.

Detailed Determination

1. Mrs Cavanagh, who was born in March 1919, was a teacher and a member of the Teachers' Superannuation Scheme (**TSS**) (as the Scheme was then known) between 1 September 1940 and 30 September 1956 and between 1 September 1963 and 31 August 1966. Her total membership, or "reckonable service", was just over 16 years.

2. From 1 September 1966 until the end of her teaching career on 2 June 1967, Mrs Cavanagh was a part time employee. TP say that there was no arrangement whereby part time teachers could be members of the TSS before 1 December 1967, so the part time period of employment could not count towards Mrs Cavanagh's pension.

3. When Mrs Cavanagh's employment as a teacher ended in 1967 the criteria for qualification for a pension were that the member was 60 years old and had "been employed in reckonable service… for a total of not less than thirty years, of which not less than ten years was reckonable service". Because Mrs Cavanagh's total service was under 30 years, under the regulations she would not have qualified for a pension when she reached age 60 in 1979. She could have applied for a refund of her contributions then or later, but there is no evidence that she did so.

4. The Teachers' Superannuation Regulations 1976 (the 1976 Regulations) changed the criteria, removing the 30 year service requirement. So, due to a change that took place many years after she had stopped teaching work, Mrs Cavanagh qualified for a pension at age 60.

5. Mrs Cavanagh reached that age on 6 March 1979 but did not apply for retirement benefits. Mr Cavanagh says that she believed that she had no entitlement and recalls discussion on the subject with his late father.

6. Mrs Cavanagh died in June 2010, having lived at the same address since she stopped working as a teacher in 1967. (There is a letter on TP's file to her from the then West Riding County Council which shows the correct address.)

7. Mr Cavanagh was granted Probate on 20 October 2010 and is the sole beneficiary of the estate. The estate has not yet been wound up.

8. Through the Pension Tracing Service Mr Cavanagh contacted TP, who told him that benefits were due.

9. A lump sum would have been due at age 60. TP calculated it as 3/80th of Mrs Cavanagh's average salary for all her pensionable service. They said it was £841.59 in 1966. It was then increased for the period before payment was due by a factor of 3.3489, becoming £2,818.41. The factor of 3.3489% is derived from tables produced

by the Treasury following the 1978 review. Because it was paid more than a year after it was due, an “unauthorised payment charge” of 40% arose under the Finance Act 2004, bringing it to £1,691.05. Interest was calculated from 1 October 1996 on the gross sum of £2,818.41 amounting to £2,482.50.

10. The basic pension was £261.42 in 1966. After increase by the same factor as the lump sum (3.3489) for the period of deferment it was £875.47 per annum. It was then subject to increases every year in line with pensions increase orders, and TP calculated the total gross unpaid pension as £75,193.74, from which tax of £35,453.03 was deducted using the “emergency” code (though it was suggested that Mr Cavanagh might contact HMRC for this to be reviewed). Interest was calculated from 1 October 1996 on the gross arrears, amounting to £13,503.71.

11. After payment, TP realised that the calculation of the lump sum was wrong. It had been based on a fraction of 3/80ths of final pay for all of Mrs Cavanagh’s service, whereas for service before 30 September 1956, the lump sum should have been calculated as 1/30th of pay for each year.

12. They also realised that they had omitted what is known as a “second bite” increase on the lump sum. They say that at the time that it became due in 1979, increases were effective in November each year. The lump sum was due in March 1979 and would have been increased as provided for up to the 1978 order (which was the 3.3489 referred to above) and then she would have received a proportion of the 1979 increase. That proportion had been omitted from the calculation. Taking those errors into account, and including the effect on the interest, there had been an overpayment of £85.19 plus £125.07 interest, a total of £210.86.

Summary of Mr Cavanagh’s position

13. Mr Cavanagh has four heads of complaint, as follows.

- **Mrs Cavanagh should have been told of her entitlement**: TP did not inform Mrs Cavanagh that the regulations had changed in 1976, leaving his mother without her pension for 31 years from her retirement date. He points to legal precedent (in particular *Scally v Southern Health Board*).

- **The increase factor***:* rather than the 1978 the factor of 3.3489, a factor of 3.4778 should have been used because Mrs Cavanagh’s entitlement arose in 1979, not 1978.

- **Interest***:* Interest should have been paid for the whole period from March 1979, not just from 1 October 1996*.*

- **The overpayment***:* Mr Cavanagh says that he has spent the money on repaying his mortgage and so should not have to repay the overpaid £210.86.

Summary of TP's position

14. TP's position can be summarised as follows.

- Mrs Cavanagh's paper file was destroyed so they cannot say why she did not apply for retirement benefits. TP during the 1980s and 1990s did check their records to see which members had not applied for retirement benefits and contacted them.

- The Pension Increase Order 1979, allowed for a "second bite" to be paid on the lump sum. It was effective from November 1979, but the second bite would be paid to the lump sum paid from December 1978 to November 1979. Had Mrs Cavanagh retired in March 1979, the first increase would have been based on the 1978 Pension Increase Order and the second bite would have been based on the period from December 1978 to March 1979. So 17.5% was the pension increase, multiplied by 3 months divided by 12, gave an additional increase of 4.375% as the second bite.

- There was no provision prior to October 1996 to pay interest on late payments. The provision was created in the Teachers Superannuation (Amendment) Regulations 1996, which came into force on 1 October 1996.

Relevant legislation

15. Legislation relevant to the first three heads of complaint is set out below.

Mrs Cavanagh should have been told of her entitlement

16. Regulation 71 of the 1976 Regulations, which applied when Mrs Cavanagh reached age 60 said:

> "All benefits shall be paid by the Secretary of State; but no allowance or gratuity shall be paid except on application made in writing, supported by such particulars as he may require, to the Secretary of State."

Increases

17. The Pension Increase (Annual Review) Order 1978 said:

> "Whereas the Minister for the Civil Service has, in accordance with the provisions of section 2 of the Pensions (Increase) Act 1971…reviewed the

rates of the official pensions against the rise in the cost of living during the review period…"

(Pensions under the Scheme are official pensions within Schedule 2, section 17 of the Pensions (Increase) Act.)

18. The Pensions Increase (Review) Order 1979 said:

"Whereas by virtue of section 23 of the Social Security Pensions Act (1975) a direction has been given under section 124 of the Social Security Act 1975 by the Secretary of State for Social Services that the sums mentioned in section 23(1)(b) are to be increased…

Increase in certain lump sums

4. In respect of any lump sum or instalment of a lump sum which became payable before 12th November 1979 but after 1st December 1978 there may be paid an increase of 17.5 per cent, multiplied by A/B where

(a) A is the number of complete months in the period between the beginning date for the lump sum or, if later, 1st December 1978 and the date on which it became payable; and

(b) B is 12."

19. The explanatory note to the 1979 Order said:

"This Order is the first made under section 59 of the Social Security Pensions Act 1975… In previous years the orders were made under section 2 of the Pensions (Increases) Act 1971…but this provision has now been repealed…"

20. The Social Security Act 1975, Section 124 "Power to increase rates of benefit" says:

"(1) The Secretary of State may by order increase any of the sums…[relevant pension schemes stated]."

21. The Social Security Pensions Act 1975, Section 23 "Increase of long-term benefits" says:

"(1) Subject to subsections (4) and (5) [earnings and date in force] below, the provisions of sections 124 to 126 of the principal Act [Social Security Act 1975] (power and duty to increase rates of benefit under the Act) shall apply also to…

(b) the sums which are the additional components in the rates of long-term benefits [retirement pension]"

22. And Section 59, “Increase of official pensions” says:

“(1) Where by virtue of section 23 above a direction is given that the sums mentioned in subsection (1)(b) of that section are to be increased by a specified percentage the Minister for Civil Service shall by order provide that the annual rate of an official pension may…be increased in respect of any period on or after the date on which the direction takes effect

…

(b) if the pension began during the base period [period coming to an end with the new direction beginning], by that percentage multiplied by A/B where A is the number of complete months in the period between the beginning of the pension and the end of the base period and B is the number of complete months in the base period.”

Interest

23. The Regulations providing for pensions to teachers in force when the benefits were ultimately paid were the Teachers’ Pensions Regulations 2010. They provide for interest on late payment of benefits in Regulation 112.

24. Those regulations replaced the Teachers’ Pensions Regulation 1997 (which were in force when Mrs Cavanagh died). They also contained a provision for interest. In turn those regulations were a consolidation of the Teachers Superannuation Consolidation Regulations 1988 and amendments to those regulations.

25. The Teachers Superannuation Consolidation Regulations 1988 did not originally provide for interest on late payment. Neither did the preceding regulations. However, the Teachers’ Superannuation (Amendment) Regulations 1996 amended the Teachers Superannuation Consolidation Regulations 1988, coming into force on 1 October 1996). They said:

“17. After regulation 31 there shall be inserted the following regulation —

Interest on late payment of certain benefits

E31A. (1) Where all or any part of the benefits payable under this Part other than a pension payable under regulation E23 is not paid within one month of the due date the Secretary of State shall pay to the person to whom the benefit is payable interest on the amount remaining unpaid calculated at the appropriate rate on a day to day basis from the due date to the date of payment, and compounded with three-monthly rests.”

(2) For the purposes of paragraph (1) the due date, where a benefit consists of a single payment, is —

(a) the date on which the person becomes entitled to the benefit, where the benefit consists of a single payment other than a death grant referred to in paragraph (b); or.

(b) the day after the date on which the Secretary of State has become satisfied that the grant may be paid under regulation E19 or E20, where the benefit is a death grant payable under either of those regulations.

(3) For the purposes of paragraph (1) the due date, in a case where a benefit does not consist of a single payment, is —

(a) the material date referred to in regulation E31(8) in the case of the payment referred to in regulation E31(6); or

(b) the date referred to in regulation E31(4) in relation to each payment in the case of any other monthly payment.

26. The effect of (3) is that for benefits that are not single payments (for example, pensions) the due date is relevant the anniversary of the birth date, in this case Mrs Cavanagh's 60th birthday. By applying paragraph (1), the due date for the lump sum on retirement would also have been her 60th birthday, because that was when entitlement arose.

27. The later regulations contained effectively the same definitions of the due date.

Conclusions

Mrs Cavanagh should have been told of her entitlement

28. It is, by present standards of practice, remarkable that Mrs Cavanagh could have been, in effect, given an entitlement in 1976 that she did not know about and that no-one took any steps to tell her about. However, I must be careful not to judge administrative practice almost 40 years ago by today's standards. There was no legislation requiring that active members or those with a deferred entitlement be sent statements until the 1980s. Some schemes did provide annual statements - and most would have given a member who left the scheme a statement at that point (though not annually thereafter). Neither would have covered Mrs Cavanagh's circumstances, though.

29. There was no overriding provision requiring Mrs Cavanagh to be contacted. The case law to which Mr Cavanagh points actually dealt with an employer's obligations. TP had not been Mrs Cavanagh's employer – and their obligations would have differed. Also, the case was decided in 1992.

30. Having a letter on file that noted Mrs Cavanagh's address is not the same as having her address as part of the record. I agree that, had there been an obligation to try to find the whereabouts of people in Mrs Cavanagh's unusual situation, then perhaps the file should have been inspected to see what it revealed, but as I have said, I do not think there was such an obligation.

31. However, TP say that in the 1980's they did contact members who did not apply for retirement benefits. At this distance of time it is impossible to say whether they wrote to Mrs Cavanagh then and what happened. I cannot find that they were at fault based on no evidence.

32. I do, however, I think that Mrs Cavanagh could have been expected to know that she had paid contributions that were refundable if no benefit was due. Although she would have known that her later part-time service did not qualify for benefits, she would not have expected the contributions that she had paid would be kept if she was to have no benefit at all for the time she had paid them. There would have been information about the Scheme and its benefits available at the time. So it would have been reasonable for TP to expect that she, and others in her position, would either have extinguished any benefits before 1976 by taking a refund or would have applied for the refund after 1976 and discovered about the entitlement.

33. So I do not find that TP are liable for Mrs Cavanagh not knowing about her entitlement.

The increase factor

34. Had Mrs Cavanagh retired at 60 in March 1979, she would have had the lump sum payment increased in line with the 1978 Pension Increases Order. The 1979 Increase Order came into force in November 1979.

35. When the 1979 Order was published, an additional increase known as "second bite" was made to cover the period of December 1978 to March 1979. Paragraph 4 of the Order describes the calculation.

36. Mr Cavanagh disagrees with the methodology, but it is what is provided for and TP have correctly calculated the increase, therefore.

Interest

37. Interest has been added from October 1996 and not from March 1979, as Mr Cavanagh wants. TP say that as the regulations came into force from October 1996, interest is added from this date to the date of settlement.

38. The starting point is that legislation is assumed not to be retrospective unless it expressly says that it is. So, for example, the introduction of an interest provision in October 1996 would certainly not require that people who before October 1996 had received delayed payments were due interest. At the time the payment was made the provision simply did not exist.

39. However, in Mrs Cavanagh's case the payment was to be made after October 1996, when the interest provision did exist. Regulation E31A says that interest is to be paid from the due date – and the due date is, by application of E31A(2) and (3), Mrs Cavanagh's 60th birthday. That remained the case under later regulations. So on the face of it, the Teachers' Pensions Consolidation Regulations 1988 as amended by the Teachers' Superannuation (Amendment) Regulations 1996 would require interest to be added for the whole period of delay, as would subsequent regulations.

40. But I do not think it does, for three reasons.

41. First, Regulation E31A says "Where all or any part of the benefits payable … **is** not paid …" (my emphasis). The use of "is" clearly suggests the present and future – not the past[1].

42. Second, there must be a presumption (as an extension of the presumption that legislation is not normally retrospective) that there is not an intention to create an immediate but uncertain liability. If it had been retrospective, the Scheme would have been immediately liable for an unknown amount of interest on any payments outstanding at that date.

43. Third – and this is in some ways another view of the second point – it would produce an unfair result, being that a person who received late payment the day before the Regulation E31A became effective would receive no interest at all, whereas an identically positioned person paid a day later would receive interest on the whole amount.

44. I find that the statutory interest was calculated correctly.

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[1] ""Is" with an active participle generally connotes present time … But with a perfect participle "is" sometimes connotes future time. Thus the disqualifications imposed by the Bankruptcy Act 1883… where a debtor "is adjudged bankrupt", applied only to persons adjudged bankrupt under that Act" – Stroud's Judicial Dictionary of Words and Phrases.

45. I also find that apart from the statutory interest, there was no more general requirement to pay interest. Had TP been at fault than they would have been liable for any resulting losses, such as the loss of use of the money. But for the reasons that I have explained, I do not think that they were at fault.

Overpayment

46. TP made an error in using the incorrect rate of 3/80ths for service prior to October 1956, which has now been corrected. The error resulted in an overpayment of £210.26 including interest.

47. Mr Cavanagh says that it should not be recovered because he has used it to reduce his mortgage. Strictly that is a loss that he has suffered personally as a beneficiary of Mrs Cavanagh's estate – and I cannot take a complaint from him in that capacity. (The complaint I am considering is made on behalf of the estate, not Mr Cavanagh himself.) But anyway, a reduction in Mr Cavanagh's debt does not amount to his having spent the money irrecoverably, because he could in theory simply borrow the money and be back in the same position as if no overpayment had been made.

48. The estate itself took no steps relying on the £210.36 such that it would make inequitable for the sum to be recovered.

49. I do not uphold the complaints.

Tony King

Pensions Ombudsman
20 March 2015