

## Ombudsman's Determination

Applicant	Mrs G
Scheme	Teachers' Pension Scheme ( <b>the Scheme</b> )
Respondents	Teachers' Pensions ( <b>TP</b> )

## Outcome

1. Mrs G's complaint is upheld and to put matters right TP shall return the reclaimed overpayment with interest to Mrs G
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs G's complaint is that TP are unfairly claiming back an overpayment of ill health retirement pension.

## Background information, including submissions from the parties

4. Following a road traffic accident Mrs G took ill health retirement. Initially the pension was paid from 27 March 1993, but the date was subsequently amended to 1 January 1994 to include some part time service. The change resulted in a pension overpayment of £2,351.61.
5. On 29 October 1993 Mrs G signed a declaration that among other things said: "I will inform the Agency and the Paymaster General's Office (TP) if I begin employment in education at any time during my retirement."
6. In Section 7 of the form, entitled 'Future employment', Mrs G ticked the box 'yes' in answer to the question "Will you be employed in a teaching capacity after your retirement date?". Section 7 stated "Further information on the effect of re-employment on pension is given in the Notes. Before you consider becoming re-employed you are advised to obtain Leaflet 192 Pen from the Agency." Leaflet 192 included form TP64, which was to be completed by the pensioner if they became re-employed in teaching.

7. Mrs G returned to teaching (part-time) in January 1994. In June 1998, she was appointed on a temporary fixed term teaching contract, from 1 September 1998 to 31 August 1999, with Hampshire County Council. Mrs G did not complete form TP64.
8. In September 1998 the method of assessing abatement was changed and form TP64 was replaced by a Certificate of Re-employment (**the Certificate**), which re-employed pensioners were required to complete each year and return to TP via their employer who provided their salary details. This information was used to assess whether the pension should be abated. Mrs G was not informed of the change at that time. TP have said this was because Mrs G did not complete a TP64 when she became re-employed - as certificates were issued to those pensioners that had previously completed a TP64.
9. Nevertheless, until 1999 TP monitored Mrs G's service. This stopped when Hampshire County Council did not respond to an enquiry.
10. Mrs G remained in teaching with Hampshire County Council until August 2000. From 2001 onwards she was employed as a part-time teacher by Surrey County Council. Again Mrs G did not inform TP of the change.
11. TP say it first received service information for Mrs G for year 2001/2, in August 2005, and for 2005/6 in two parts, September 2005 to March 2006, in July 2006, and April to August 2005, in June 2010.
12. From April 2008 TP commenced automatically writing to a pensioner where new service was shown on their service record.
13. In July 2010 TP informed Mrs G that her pension had been overpaid by £7,292.22 and requested repayment. The overpayment comprised the aforementioned £2,351.61 (from 1993) plus £4,940.61 – the latter in respect of Mrs G's salary for years 2001/2 and 2005/6 exceeding her Salary of Reference. Mrs G appealed.
14. In July 2013 TP wrote to Mrs G confirming the overpayment, under stage one of the Scheme's two stage internal dispute resolution procedure (**IDRP**), but it appears that their letter was not received as it was reissued on 10 February 2014.
15. On 29 August 2014, following a review of their records, TP again wrote to Mrs G requesting the repayment of £7,292.23. The letter said that if no response was received by 11 September 2014 TP would take that as her acceptance for the recovery of the overpayment from her pension.
16. TP next wrote to Mrs G on 25 September 2014. Among other things TP informed Mrs G that from October 2014 they would commence the recovery of the total sum over 19 months by abating her net monthly pension of £1,061.39 by £364.62.
17. In February 2015 Mrs G wrote to our office. She was informed that it would be necessary for her to complete stage two of the Scheme's IDRP.

18. The Department of Education (DoE) issued an IDRP stage two decision on 31 March 2015. Among other things DoE said.
- At the time Mrs G returned to employment (in 1994) it was accepted that an ill health pensioner could return to part-time work without it affecting their pension providing such employment did not reach 50 per cent or more of a full-time post. If such employment reached 50 per cent then it was customary to consider the pensioner as no longer incapacitated and stop their pension. TP had duly monitored her employment until 1999.
  - Secondary to this monitoring there was a limit (Salary of Reference – the best salary in the three year period immediately before retirement with annual increases as per the pension in payment) on how much Mrs G could earn from her pension and salary. Abatement applied where earnings exceeded the Salary of Reference.
  - Based on the service information now held it was clear that Mrs G's employment, in year 2001/2, had exceeded 50 per cent of a full-time post. If the matter had been considered at that time it was quite possible that her pension would have been stopped and not restarted until she reached age 60 in 2004. In which case the pension paid to her from April 2002 to 15 July 2004 would have been recovered.
  - TP did not appear to have considered this option, but instead had assessed Mrs G's earnings in the two years in question, 2001/2 and 2005/6, under the abatement provisions and concluded that her pension for these years should have been abated by £4,940.61. To this amount TP had added the overpaid pension in 1993/94, of £2,351.61.
  - While they reserved the right to pursue the recovery of the pension paid from April 2002 to 15 July 2004 they were not minded to do so on condition that an agreement to repay the abated pension over a reasonable period could be reached.
  - They would not seek the recovery of the overpaid pension in 1993/4 as the Limitation Act 1980 restricted the recovery of a debt that had been known about for more than six years.
  - The Limitation Act did not apply to the outstanding overpayment of £4,940.61, for the overpayments which occurred in 2001/2002 and 2005/2006, as this debt was first uncovered and repayment requested in 2010.
  - The correct process had been followed by TP therefore Mrs G's appeal was not upheld.
19. Despite DoE's decision, that the overpayment be reduced to £4,940.61, TP continued to August 2015 (inclusive) to abate Mrs G's pension by £364.62.
20. On 26 August 2015 TP wrote to Mrs G. TP said they had recently been informed that the overpayment from 1993/1994 no longer stood.
21. TP duly reduced the abatement of Mrs G's pension to £247.04 from September 2015, and the recovery of £4,940.61 was finalised in December 2015.

22. Mrs G says she was not made aware until recently of the Salary of Reference. She says she was told that she could earn what she would have earned if she had continued in full-time employment less her ill health pension.
23. Among other things TP make the following points.
- Mrs G did not return a completed TP64 when she returned to teaching and as a consequence they were unable to issue her with the Certificate.
  - Aware that some re-employed pensioners were not informing them of their return to teaching, from April 2008 they commenced writing to a pensioner when new service was shown on their service record. Mrs G's case was identified during this process.
  - When Mrs G's earnings were reviewed in July 2010 it became apparent that, in 2001/2, she had been employed at well above 50 per cent of a full-time post. If this had been known at that time, as she was under 60, she would have been asked to attend a medical and based on the resulting report a decision on whether the pension should continue in payment would have been made. If it had been decided to stop her pension, it would have only recommenced from age 60 in 2004.
  - Due to the passage of time it was not possible to follow that procedure so she was assessed under the abatement provisions and the overpayments in years 2001/2 and 2005/6 were discovered.
  - As Mrs G did not repay the debt TP initiated the recovery by deductions from her monthly pension, under regulation 114 of the Teachers' Pensions Regulations 2010 (as amended).
24. Relevant extracts from the Scheme Regulations and the Limitation Act 1980 are provided in the appendix to the Opinion.

### **Adjudicator's Opinion**

25. Mrs G's complaint was considered by one of our Adjudicators who concluded that further action was required by TP. The Adjudicator's findings are summarised briefly below.
- The Limitation Act 1980 provides timescales by which an action must have commenced where a breach of the law may have occurred. Ordinary breaches of contract are actionable for six years after the cause of action accrued as are actions to recover sums recoverable by statute. Section 32(1) of the Limitation Act 1980, entitled "Postponement of limitation period in case of fraud, concealment or mistake" provides that in certain circumstances the six years limitation period does not begin to run until the claimant has discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it.

- The High Court recently considered the case of Webber v Department for Education and another [2016] EWHC 2519 (Ch). The Judge hearing the appeal held that the applicable cut-off date for Limitation Act purposes was the date when TP brought their claim during the course of the Ombudsman's complaints procedure. That date was identified as being the receipt by the Pensions Ombudsman of TP's response to Mr Webber's complaint.
  - While Mrs G did not return a completed TP64 when she returned to teaching, TP were aware that Mrs G had returned to teaching as they monitored her service until 1999. TP stopped because Hampshire County Council did not respond to an enquiry.
  - TP should have chased for Mrs G's service details. If TP's processes had been correct, with due diligence the 2001/2 overpayment would have been identified in 2002 and the 2005/6 overpayment in 2006, rather than both overpayments identified in 2010.
  - On that basis, TP had until 2008 to make its claim for the recovery of the 2001/2 overpayment, and until 2012 to make its claim for the recovery of the 2005/6 overpayment.
  - As TP's formal response to Mrs G's complaint to the Ombudsman was not received until November 2015, its recovery of the total overpaid sum (£4,940.61) was statute barred by virtue of the Limitation Act.
  - TP erroneously included the reclamation of the 1993/4 overpayment in the abatement of Mrs G's pension from August 2014, and continued to deduct £364.62 per month from her net pension after DoE had decided that the overpayment should not be recovered, albeit the total sum recovered by TP did not exceed £4,940.61. Inevitably, the whole matter had caused Mrs G significant distress and inconvenience which merited a payment of £500.
26. 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 overall outcome.

### **Ombudsman's decision**

27. TP say if Mrs G had completed TP64 she would have been informed that she was required to complete an annual Certificate whilst employed in teaching, her pension would have been abated and the situation should not have occurred.
28. Since receiving the Adjudicator's Opinion TP submit that whilst it knew Mrs G had a temporary fixed-term contract with Hampshire County Council up to 31 August 1999, it could not be assumed that it should have known that Mrs G's employment would inevitably continue. Mrs G's employment with Hampshire County Council ended in August 2000 and she was then employed by Surrey County Council from 2001 onwards. TP say that even if it had chased Hampshire County Council in 2002, or

2006, it is likely that either, Hampshire County Council would not have responded, or would not have known that Mrs G was employed by Surrey County Council.

29. I accept that there is some merit in TP's submissions, that even if it had chased Hampshire County Council for Mrs G's employment details, as Mrs G's employer had changed by 2001, when the first overpayment occurred, it is possible that even with reasonable diligence the overpayment may still have occurred.
30. The onus was on Mrs G to notify TP each time she was re-employed in teaching, which she failed to do.
31. However TP say it received some information much later. TP say it first received service information for the year 2001/2, in August 2005. And TP received service information for 2005/2006 in two parts. For the period September 2005 to March 2006, in July 2006, and for the period April 2005 to August 2005, in June 2010.
32. TP therefore rejects the Adjudicator's Opinion that the overpayments are not recoverable from Mrs G. TP goes on to state that the limitation period applies from the date when TP could have reasonably known that Mrs G continued in employment after retirement, which they say is 2010 - at which time they also wrote to Mrs G to notify her.
33. At the time that the overpayments occurred it may not have been TP's practice to write to those pensioners who had new service on their records. Nevertheless, once TP had this information it should not have ignored it. It is clear that by 2005 TP knew that Mrs G had recommenced employment because it had her service details for the year 2001/2002. TP should have asked Mrs G, or her employer, for any information it required (if in fact it needed any further information at that time) to determine whether a pension overpayment had occurred or was likely to occur. If that had happened, with reasonable diligence, the overpayment for 2001/2 would have been identified in August 2005, and the overpayment for 2005/6 would have been identified (at the latest) by July 2006, for essentially the same reasons.
34. It is my view that once TP was in receipt of information (albeit from a source other than form TP64 and/or the Certificate) identifying that Mrs G was in re-employment, TP was then in a position to check if the abatement provisions might apply. TP, being reasonably diligent, should at the time it had the information it did, have taken such steps as necessary to determine Mrs G's position.
35. In *Webber v Department for Education* [2014] EWHC 4240 (Ch), the High Court held that the scheme administrator could with reasonable diligence have discovered the mistaken overpayments earlier than it did because no exceptional or excessive measures were required by TP (based on the information they already held) to identify that unless Mr Webber stopped working he would go over the earnings limit and an abatement would be triggered. There is no suggestion in Mrs G's case that TP needed to take excessive or exceptional measures in order to be able to identify those mistaken overpayments, in either August 2005, or July 2006 (by which time TP

held Mrs G's service information for the periods which Mrs G was overpaid). There has been no suggestion that TP needed additional information to have added to TP's knowledge on this point.

36. TP submit that the more recent case of *Webber v Department for Education and another* [2016] EWHC 2519 (Ch) is entirely different to Mrs G's case. TP do not develop this submission further.
37. However, it is my view that the *Webber* case is very relevant in so much as it determined the cut-off date in overpayment complaints made to my office. That date has now been identified as being the receipt, by The Pensions Ombudsman, of the respondent's reply to the applicant's complaint.
38. TP's formal response to Mrs G's complaint was received by my office in November 2015. For the reasons set out above, in my view TP should, with reasonable diligence, have identified the 2001/2002 overpayment by August 2005 and the 2005/6 overpayment by July 2006.
39. TP had six years from August 2005 to recover the 2001/2002 overpayment (so until August 2011), and six years from July 2006 (so until 2012), to make its claim for recovery of the 2005/2006 overpayment. Following the decision in *Webber v Department for Education and another* [2016] EWHC 2519 (Ch), as TP did not make its claim until November 2015 (when TPO received TP's response), its claim is now statute barred by virtue of the Limitation Act.
40. Therefore, I uphold Mrs G's complaint.
41. On the question of compensation for distress and inconvenience, TP say that Mrs G has contributed significantly to this by failing to comply with instructions from TP. TP say Mrs G has benefited from receiving £2,351.61 in pension when she was still employed, subsequently having this period included in the calculation of an enhanced pension and then receiving the pension while being actively engaged in paid employment as a teacher.
42. The Limitation Act does not apply to claims of maladministration. But a complaint about an overpayment at its heart is a claim for restitution and so the Limitation Act does apply. Although TP are not able to recover the money from Mrs G, Mrs G's complaint does not succeed in substance; rather TP's claim fails on a procedural technicality. This is because, it is a well-established principle of law that the Limitation Act bars the remedy TP are seeking, but does not extinguish TP's right. I have made no findings of any maladministration. It is therefore my view that as a matter of public policy it would be quite wrong to award Mrs G compensation for distress and inconvenience.

**Directions**

43. To put matters right within 21 days of the finalised Opinion TP shall refund to Mrs G £4,940.61, with simple interest added, at the base rate declared from time to time by the reference banks, from the date each monthly amount was abated from Mrs G's ill health pension to the date of repayment to Mrs G.

**Anthony Arter**

Pensions Ombudsman  
21 February 2017



## **Appendix**

### **The Teachers' Pensions Regulations 1997**

44. Rule E14 'Abatement of retirement pension during further employment' says:

"(1) This regulation applies while a person who has become entitled to payment of a teacher's pension is employed-

(a) in pensionable employment, comparable British service, or employment which would have been pensionable employment but for-

(i) his having made an election under regulation B5 (election for employment not to be pensionable),

(ii) his having attained the age of 70, or

(iii) regulation B4(2)(a) (employment not pensionable).

(b) in part-time employment in a capacity described in paragraphs 1 to 9 of Schedule 2 .

(2) If the person is concurrently both in employment falling within paragraph (1)(a) and in employment falling within paragraph (1)(b), this regulation applies only in respect of the former.

(3) Where this regulation applies, the annual rate of the pension is reduced-

(a) If A equals or exceeds  $(C + D - E)$ , to zero, and

(b) in any other case, and subject to paragraph (4), by the amount (if any) which is necessary to secure that  $(A + B)$  does not exceed  $(C + D - E)$ , where-

A is the initial annual rate of the person's salary in the employment,

B is the reduced annual rate of the pension as increased under the Pensions (Increase) Act 1971 disregarding any actuarial reduction required by regulation E5(3),

C is, or where his previous pensionable employment was part-time is the full-time equivalent of, the highest annual rate of contributable salary that was payable to him during the 3 years ending immediately before he became entitled to payment of the pension, or, if applicable, the highest annual rate of contributable salary that was payable to him during the 3 years ending immediately before he ceased to be employed in any pensionable employment entered into by him after he became entitled to payment of the pension, whichever is the greater.

D is the amount (if any) by which, immediately before the first day of the employment, C would have been increased if it had been the annual rate of an official pension, within the meaning of section 5(1) of the Pensions (Increase) Act

1971 beginning, and first qualifying for increases under that Act, on the same date as the pension, and

E is any part of the pension allocated under regulation E11.

(4) Where regulation E5(3) applies the amount (if any) by which the annual rate of the pension is to be reduced under paragraph (3)(b) shall be the amount (if any) referred to in that sub-paragraph multiplied by the appropriate factor.”

### **Teachers’ Pensions Regulations 2010 (as amended)**

45. Regulation 114 ‘Cessation, etc of benefits where no entitlement’ says:

“(1) This regulation applies where after paying a benefit the Secretary of State determines that there was no entitlement to the benefit or there is no longer an entitlement to the benefit.

(2) The Secretary of State may-

(a) cease to pay the benefit;

(b) withhold the whole or any part of the benefit;

(c) in the case of a payment made when there was no entitlement to the benefit, recover any such payment.”

### **Limitation Act 1980**

46. As relevant this says:

“S32 (1)

Subject to subsection (3) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a **mistake**;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or **could with reasonable diligence have discovered it**. References in this subsection to the defendant include references to the defendant’s agent and to any person through whom the defendant claims and his agent.”

