

## Ombudsman's Determination

Applicant	Mr R
Scheme	Judicial Pensions and Retirements Act 1993 Scheme ( <b>the Scheme</b> )
Respondents	The Ministry of Justice ( <b>the MoJ</b> ); Xafinity Punter Southall Administration ( <b>XPS</b> )

## Outcome

1. I partly uphold Mr R's complaint and, to put matters right, XPS shall pay Mr R £1,000 in respect of the serious distress and inconvenience which he has suffered.

## Complaint summary

2. Mr R has complained that XPS incorrectly informed him that his children's pension would be paid once his university course commenced.
3. Mr R has argued that his children's pension should be paid in full for his period of study. He has said that he should also be paid interest, associated costs and compensation for the distress and inconvenience caused.

## Background information, including submissions from the parties

4. On 16 July 1999, Mr R's father completed an election form that made Mr R's father a member of the Scheme. This form stated that:  
  
    "...the provisions of Part 1 of the Judicial Pensions and Retirement Act 1993 shall apply to me."
5. On 1 January 2001, Mr R became entitled to a children's pension following the death of his father, who had been a pensioner in the Scheme.
6. The Scheme is governed by the Judicial Pensions and Retirement Act 1993, often referred to as JUPRA (**the Scheme Rules**). Section 7 covers children's pensions and outlines when benefits will be paid (see Appendix). It states that a children's pension should be paid during a "period of childhood" or when the beneficiary is in "full-time education".

7. Section 7(2) limits the definition of full-time education by stating that a person shall not be regarded as eligible unless they have come within this definition at all times since the age of 16. In circumstances where the potential beneficiary has not been in full-time education since the age of 16, HM Treasury has the discretion to decide whether to pay a children's pension when the person returns to full-time education.
8. On 2 July 2013, the Scheme Administrator at the time, Xafinity Paymaster, wrote to Mr R's mother, Mrs R. It said that, due to the change in Mr R's educational establishment (from King's college to Birkbeck University), it required more information on Mr R's circumstances. It explained that this information would be passed to the MoJ to consider whether it could authorise continued payment of Mr R's children's pension.
9. It appears that Mrs R responded and provided details of Mr R's prospective studies.
10. On 25 July 2013, the MoJ wrote to Mrs R and said that it understood that Mr R was commencing a three-year course in computing with Birkbeck University. The MoJ said that, from the information it held, the Birkbeck course was unrelated to previous study undertaken by Mr R. It went on to explain that:

"In general the Scheme Administrators would continue to pay the Child's pension for one continuous course of study only. I also understand that Mr R will be over 30 years of age by the time course with [Birkbeck] is due to be completed. Again, in general the Scheme Administrators would expect full time education to have ceased around the time a Child Pensioner reaches their mid-twenties.

In light of the circumstances payment of the Child's pension to Mr R should normally cease now that he has completed his course at King's College..."

11. On 30 July 2013, Mrs R wrote to the MoJ and said that she would provide a confirmation of study letter from Birkbeck in due course. She also argued that Mr R's age and change of educational establishment/course should not make a difference to his eligibility for a children's pension.
12. On 5 August 2013, the MoJ wrote to Mrs R and acknowledged receipt of the information relating to Mr R's studies at Birkbeck. It confirmed that it would refer the matter to the "Scheme Administrator" for consideration as to whether Mr R's pension should continue to be paid for his new course of study.
13. On 8 August 2013, Mrs R responded to the MoJ and said that it is "entirely unclear on what basis this matter was referred to the MoJ". She argued that the pension could only be stopped if Mr R had married or ceased to be in full-time education.
14. On 16 August 2013, the MoJ responded and said that the matter had been referred to the MoJ because Xafinity Paymaster had notified it of a change in Mr R's educational establishment. It provided a table that outlined the names of the institutions Mr R had studied at, alongside the dates that he was at each institution. It said that its

information was incomplete and asked for details regarding the topics studied and the duration of each course.

15. On 21 August 2013, Mrs R wrote to the MoJ and re-iterated her view that there was no basis for her son's case to be referred to the MoJ due to the change in his educational establishment. She did not provide any of the information that the MoJ had requested.
16. On 30 August 2013, Mrs R wrote to Xafinity Paymaster and complained that Mr R's pension had been suspended.
17. Following this query as to why Mr R's pension had been suspended, neither Mrs R nor Mr R received confirmation of the reason for the suspension. Mr R has since said that this was not an issue as, from this point until 2016, he did not undertake any full-time education.
18. In 2015, XPS (formerly known as PSAL) took over administration of the Scheme. It wrote to Mr R and confirmed that it was aware that he had previously been in receipt of a children's pension and requested that he complete the Continuation of Full Time Education Form to confirm whether he was still in full-time education.
19. On 15 September 2016, Mr R received an offer of full-time education from Queen Mary University of London (**Queen Mary University**). That day, Mr R called XPS to discuss whether a children's pension would be paid if he accepted this offer. Mr R has said that, during this telephone call, XPS confirmed that his pension would be re-instated. XPS has said that it does not hold a record of this call. Following the call, Mr R emailed XPS and confirmed that he would accept his place at Queen Mary University on the basis that his children's pension would be reinstated.
20. On 30 September 2016, XPS responded to Mr R and said that:-
  - In order to re-instate his pension, it required official confirmation from Queen Mary University, on headed paper, that he was a current student, as well as confirmation of the start and preliminary end dates of his course.
  - Back dated payments of the pension would be included in his first month's pension payment once it had received the document.
21. In October 2016, Mr R sent the required documents to XPS. XPS confirmed receipt of the letter and explained that it would contact him shortly regarding the reinstatement of his pension.
22. On 17 October 2016, XPS emailed Mr R and said that it required a hard copy of the confirmation of study letter.
23. On 27 October 2016, XPS wrote to Mr R and requested information about his education between September 2014 and August 2016. It explained that, as he was over the age of 16, he required consent from the MoJ in order for his children's

pension to be paid. This request was repeated on 8 November 2016. Mr R has said that he did not receive either of these letters.

24. On 9 November 2016, XPS emailed Mr R and confirmed receipt of the certificate confirmation of study letter. It said that it returned the confirmation by recorded delivery on 27 October 2016. It also said it would be in contact shortly regarding reinstating his pension.
25. On 14 November 2016, Mr R emailed XPS and said that he had not received the returned confirmation of study letter or confirmation that his pension would be re-instated.
26. On 29 November 2016, XPS wrote to Mr R and said that it did not hold any information regarding his education, between September 2014 and August 2016, and asked him to supply any documentation that detailed his full-time education for this period. XPS said that this evidence would be passed on to the MoJ for its review.
27. On 14 December 2016, Mrs R wrote to XPS and requested that Mr R's children's pension was re-instated as a matter of urgency. She said that XPS had already confirmed that the pension would be reinstated, and Mr R had relied on this confirmation prior to committing to full time study. She argued that it was unlawful for XPS to refuse to reinstate the pension.
28. On 15 May 2017, XPS wrote to Mr R to reiterate its request for information about his education history. It also said that the payment of a children's pension beyond the age of 16 is at the discretion of the MoJ.
29. On 23 June 2017, Mrs R wrote to XPS and said that: -
  - On 15 September 2016, Mr R had called XPS to find out whether his pension would be reinstated before accepting the offer of a place on a course.
  - XPS had said that his pension would be reinstated and confirmed this in writing.
  - As a result, Mr R had accepted the place on the course and became responsible for the associated fees and costs.
  - It appeared the MoJ had authorised XPS to exercise its discretion to reinstate the pension. Therefore, the money should not be withheld.
30. On 23 August 2017, XPS wrote to Mrs R and said that it could only refer the case to the MoJ once it had received information regarding Mr R's education history. It said that this information had previously been requested on several occasions.
31. On 20 November 2018, XPS wrote to Mr R and said that:
  - Xafinity Paymaster had written to his mother in July 2013 and queried his education status. XPS said that this letter made it clear that the information would be forwarded to the MoJ to see whether the children's pension should be re-instated. In 2013, the MoJ decided that the course at Birkbeck was unrelated

to Mr R's original continuing education; so, the children's pension was not payable.

- It incorrectly told him his children's pension would be reinstated. It apologised for this and said that this was because his record had not been reviewed in full.
- Shortly after providing the incorrect information, it explained that his case would need to be referred to the MoJ. Therefore, it was only for a short period of time that Mr R was under the impression that his pension would be reinstated.
- Any potential beneficiary, who was not considered to be in full-time education since the age of 16, would be referred to HM Treasury. If HM Treasury is satisfied that the potential beneficiary's full-time education ought not be regarded as completed, they may decide to reinstate the pension

32. On 13 December 2019, XPS wrote to Mr R and repeated its request for further information about his education. It asked for details of his education since 2013.

33. Mr R has set out his position: -

- He had received a letter from MoJ, dated 5 August 2013, that stated that the "Scheme Administrator" had the responsibility to decide whether the pension should continue. So, he acted reasonably in relying on XPS' confirmation that the children's pension would be paid.

34. XPS made the following additional comments: -

- Mr R's children's pension was suspended in 2013, by Xafinity Paymaster, following a query about a change in educational establishment. It was made clear that once Xafinity Paymaster had received the requested information, it would forward the case to MoJ to review.
- When it took over as Scheme Administrator in 2015, it wrote to Mr R to ask him to confirm whether he was still in full time education. It continued to request this information from both Mr and Mrs R.
- It must administer the Scheme in accordance with the Scheme Rules. As it had not received evidence that Mr R's education had continued between the date the pension ceased and the start date of the new course, it could not be satisfied that his studies were continuous. Until it received evidence that the studies were continuous, the children's pension would not be reinstated.

35. Mr R made the following additional comments:-

- His complaint is that he relied on XPS' confirmation that the pension would be reinstated. As a result, he took up an offer of full-time education.

- The suspension of his children's pension and subsequent correspondence is not relevant to the complaint. He does not dispute that there was a break in payment of the pension.
- He repeated his argument that, on 5 August 2013, the MoJ wrote to him and said that it was the "Scheme Administrator" who would decide whether the pension should continue. Consequently, when he received confirmation of reinstatement from the Administrator, XPS, he believed he could rely on it.

36. The MoJ has also provided comments on the complaint:-

- It said that Mr R's children's pension had been stopped in August 2013, not only due to the change in his educational establishment, but because the nature of his studies had changed. Prior to August 2013 he had been studying law at King's College, whereas when he started at Birkbeck he began to study computing. Since this change, Mr R's children's pension has not been paid.
- Section 7(3) of the Scheme Rules specifies that HM Treasury has the discretion to decide whether a person's education ought to be considered as incomplete. It said that XPS was incorrect to say that the discretion was to be exercised by the MoJ instead of HM Treasury.
- Any request for reinstatement of Mr R's children's pension cannot be considered until he has provided the requested evidence to the MoJ, who will pass the information on to HM Treasury.

### **Adjudicator's Opinion**

37. Mr R's complaint was considered by one of our Adjudicators who concluded that there was maladministration which caused Mr R non-financial loss. The Adjudicator's findings are summarised below:-

- Mr R is only entitled to receive benefits in accordance with the Scheme Rules.
- Section 7(2) of the Scheme Rules clearly states that a person will only be regarded as being in full-time education if they have been in continuous full-time education from the age of 16.
- Section 7(3) says that, if there is a period when the person has not been receiving full-time education, this period can be disregarded if HM Treasury is satisfied that the person's full-time education ought not to be regarded as completed.
- Mr R has complained that he should be paid a children's pension, in accordance with what he was told during the telephone call of 15 September 2016. However, Mr R is only entitled to benefits in accordance with the Scheme Rules.
- HM Treasury has the discretion to decide whether Mr R's education was considered incomplete. If HM Treasury decided that it was incomplete, a

children's pension would be payable. The Adjudicator thought it was reasonable for HM Treasury, via the MoJ, to request further information in order to assess whether it should exercise discretion in Mr R's case. As Mr R has not provided this information, the Adjudicator did not agree that there was a compelling argument for reinstatement of the children's pension.

- Mr R has argued that he has suffered a financial loss because he relied on XPS' confirmation that his children's pension would be re-instated. The Adjudicator explained that, although there had initially been misinformation, an Ombudsman will only provide redress if they believed that it was reasonable for an Applicant to have relied on incorrect information.
- In 2013, Mr R's children's pension had been suspended due to a change in his educational establishment and a change of course. Since then, Mr R had not received a children's pension. Given that Mr R was no longer receiving a children's pension, the Adjudicator said he would have expected Mr R to ask more questions as to why he would become eligible for a children's pension when his studies at Queen Mary's University commenced.
- The Adjudicator also said that the Ombudsman would expect applicants to take steps to mitigate their losses. Mr R has said that he would not have accepted the course at Queen Mary University had he been told that there was a possibility his children's pension would not have been paid. The Adjudicator said that there was no evidence to suggest that Mr R took steps to withdraw his acceptance of his university place. The Adjudicator also said that if Mr R is to successfully argue that he would not have accepted the offer, had he been provided with the correct information from the outset, the Adjudicator was of the view that an Ombudsman would want to see that he made an attempt to withdraw from his course and recoup some of the costs.
- The Adjudicator was satisfied that the relevant sections of the Scheme Rules had been followed and that Mr R had not suffered financial loss as a result of any maladministration. So, any redress was limited to non-financial loss.
- It was clear that XPS provided incorrect information and, in addition, on 30 September 2016, it missed a further opportunity to explain that HM Treasury had the final say on whether the children's pension would be paid.
- The Adjudicator was satisfied that this would have caused significant distress and inconvenience.
- Consequently, the Adjudicator said that XPS should pay Mr R £500 in recognition of the significant distress and inconvenience caused by the maladministration.

38. Mr R did not accept the Adjudicator's Opinion and provided further comments. He said that:-

- XPS has wrongly refused to pay his pension entitlement under the Scheme because it erroneously applied the wrong Scheme Rules. Mr R argued that the respondents have failed to show why JUPRA is applicable.
- The Adjudicator failed to consider a claim for estoppel. He said there was a “sufficiently clear representation” during the phone call of 15 September 2016 and subsequent emails, that his children’s pension would be reinstated for the 2016/2017 academic year. He said that his email of 15 September 2016 showed that he relied on the representation.
- But for the representation he would not have enrolled on the course. He said that his course fees amounted to £12,000 and he borrowed another £12,000 from his mother to cover other associated costs. He said that his intention was to repay his mother using his children’s pension.
- He did not receive the letters dated 27 October 2016 and 8 November 2016, which said that, as he was over the age of 16, he required consent from the MoJ in order for his children’s pension to be paid. So, the first time he was aware that the representation may have been incorrect was when he received the Administrator’s email of 29 November 2016. By which time, he had incurred costs.
- Consequently, XPS, on behalf of the Trustee, is estopped by representation from denying payment of his benefits from the academic year 2016/2017.
- XPS is liable for financial loss arising out of the negligent misstatement.
- The Adjudicator has conflated the issues of causation and mitigation of loss. He also said that if “the advice had not been given, [he] would not have accepted the offer and enrolled onto the course.” He said that it was “reasonably foreseeable” that he would incur course related costs on the back of the advice.
- The question of mitigation is completely irrelevant to the question of causation. Even if he did not take any steps to withdraw, this should not distract from the conclusion that he would have incurred losses.
- The Adjudicator is wrong in a matter of law to suggest that he ought to have mitigated his losses by withdrawing from the course. He argued that it was not up to him to show that he acted reasonably, it is up to XPS to show that he had acted unreasonably.
- He does not understand why he should be expected to show that he took steps to withdraw his acceptance of the course. He had incurred the course fees and taken a loan to pay the additional costs prior to there being any indication that the pension might not be reinstated. Further, he argued that, during his studies, there was no clear representation that the children’s pension would not be paid, so it “cannot be said that it was reasonable to have withdrawn from the course.”



- The maladministration was “particularly harmful and exacerbated by the Administrator’s continued failure to deal with the points raised during 2017”. He argued that an award of £3,000 would be more appropriate in the circumstances of this case.

39. The MoJ and XPS were given an opportunity to review Mr R’s comments and after a delay and several chases by this office the MoJ responded and said:-

- Its records show that Mr R’s father was a member of the Scheme at the time of his death and pension benefits were settled in favour of Mr R and Mrs R in accordance with the Scheme Rules.
- The question of whether Mr R’s children’s pension should be reinstated from September 2016 to September 2017 has not been decided. In order for a referral to be prepared to make a decision, evidence was required from Mr R regarding his full-time education and the gap between 2013 and 2016. To date, no explanation or submission has been received on why HM Treasury should agree for the children’s pension for the period from September 2016 to September 2017 to be reinstated.

40. On 5 April 2021, Mr R provided further comments. He said that:

- The Respondent has been unable to provide evidence to show that his father made an election for the purposes of section 1(1)(d) of the Scheme Rules (see Appendix Two).
- He was under the impression that the Scheme Administrator was XPS/Xafinity. He said that in 2013, his mother was told that his case was being referred back to the “Scheme Administrator”, which, at that point, was PSAL. He also said that letters from Xafinity were signed “Pensions Administrator”. So, when XPS told him that his pension would be reinstated, he relied upon it.
- The letters dated 27 October 2016 and 8 November 2016 were not received. So, he does not accept the MoJ’s argument that he should have known that reinstatement would not be automatic. Regardless, it was inconsistent with the email he received on 9 November 2016. He had accepted his place on the course by this point, so fees and expenses had already been paid.
- The MoJ cannot say that he should have been aware that a referral to the MoJ would have been required because this was the procedure that had taken place in 2013. Mr R said that, in 2013, the referral was made to the MoJ, who then passed it back to the then Scheme Administrator, Xafinity. There was no referral to HM Treasury, so the MoJ cannot argue that he should have expected the case to be referred prior to reinstating the pension.
- He said that from 2001 to 2013, payment of the pension was automatic, provided he was in full-time education, the pension had to be paid. So, he said it was

“perfectly reasonable” for him to accept the advice that his pension would be reinstated.

41. Again, the MoJ and XPS were given the opportunity to review Mr R’s comments. After a significant delay, XPS responded and reiterated that it had written to Mr R regarding his continuing education on numerous occasions since 2013. He has not responded, so it cannot refer the case to the MoJ. There was a further delay before MoJ responded separately and said:

- Mr R’s father was a member of JUPRA at the time of his death and it is from this Scheme that pension benefits were settled in favour of Mr R and Mrs R.
- It provided a copy of a form signed by Mr R’s father’s electing to join the Scheme and a copy of Mrs R’s application for a widow’s pension. The application for a widow’s pension said that benefits would be paid in accordance with the Scheme Rules (specifically JUPRA).
- When it wrote to Mrs R, on 5 August 2013, it administered the Scheme in house, so it was actually the Scheme administrator. Xafinity Paymaster was the payroll administrator, which included pensions payroll. Consequently, Mr R’s reliance upon the 5 August 2013 letter to support his argument that XPS had the authority to reinstate the pension was incorrect.
- Therefore, the decision on whether his pension should continue in 2013 was for the MoJ to decide. The MoJ said that it did not receive any further contact from Mr R or his mother, after 30 August 2013, so the children’s pension was stopped.
- 2013 wasn’t the first time Mr R’s pension had been suspended. On 8 July 2009, Xafinity Paymaster wrote to Mr R and advised that his pension had been suspended pending confirmation of what his intentions were regarding his full-time education. The MoJ said that this showed Mr R that his pension could be stopped at any time.
- The question of Mr R’s children’s pension entitlement changed by the time of his contact with XPS in September 2016. By this point, there had been a gap in payment which meant that Section 7(3) of the Scheme Rules applied. By this point, XPS was the third-party pension administrator for the Scheme. The MoJ argued that Mr R and Mrs R should have been aware that a referral would have been required when he sought reinstatement in 2016. As such, they should have been aware that reinstatement was not something that XPS could have confirmed on the day, via a telephone call.

42. Mr R provided his final submissions. He said that:

- XPS and the MoJ have caused considerable delays. They have only recently provided evidence that his father elected to join the Scheme.

- He would “urge some caution” before the Ombudsman accepts his father’s election for JUPRA to apply. He also commented that there was electronic wording at the top of the document that suggested some form of editing.
- He said that he had raised the matter regarding a lack of evidence with the MoJ and XPS twice before and not received any meaningful response, so he would have expected an explanation for the delay in providing such evidence at this late stage.
- The thrust of XPS and the MoJ’s responses relate to the reasonableness of his actions in the “circumstances of events before and around the time of the representations.” He re-iterated his earlier argument that mitigation of loss is not part of the test for estoppel and with regard to negligent misstatement, the burden is on XPS or the MoJ to allege and prove a failure of mitigation. They have not done so and, as a consequence, it would be wrong to make a finding relating to mitigation.
- He disagreed with the arguments put forward by XPS and the MoJ that he should have been aware that his pension would not have been automatically reinstated because of what had previously happened in 2013.
- He said that it was not reasonable to say that the cessation of the pension, in 2013, made him aware that the 2016 reinstatement would not be automatic. He said that, in 2013, Xafinity and the MoJ enquired as to whether the pension should continue after it had started and whether this should still be the case due to his age and the change in institution. Essentially, in 2013 it was simply a question as to whether the pension should continue and there was no question about whether there had been a gap in full-time education.
- As there was no discussion of a gap in full-time education, there was no mention of Section 7(2) of the Scheme Rules and, as such, the 2013 application was a different proposition to the one made in 2016. Consequently, it cannot be considered a relevant consideration when considering the reasonableness of the actions he took in 2016.
- He also argued that it was reasonable for him to suppose that the decision to reinstate his pension was a matter for XPS, as Scheme administrator.

43. I note the additional points raised by Mr R, but I agree with the Adjudicator’s opinion that there was no financial loss. However, I have reviewed the redress for non-financial injustice, suggested by the Adjudicator, in the light of the significant delays caused by XPS throughout the investigation.

## Ombudsman's decision

44. In a case such as this, the starting point, where incorrect information has been provided, is that the scheme is not bound to follow the incorrect information. A member is only entitled to the benefits provided for under the Scheme Rules.
45. Mr R has questioned whether the Scheme Rules highlighted by XPS and the MoJ (**the Respondents**) are applicable. Throughout the investigation, the Respondents maintained that the Scheme Rules are governed by JUPRA. In its recent submissions, the MoJ provided a copy of an election form, completed by Mr R's father, that confirmed that he wished the JUPRA provisions to apply to his benefits. In addition, the MoJ supplied a form completed by Mrs R in respect to her widow's pension and Mr R's children's pension. This form said that all pensions were to be payable in accordance with JUPRA.
46. Mr R has urged caution before it is accepted that JUPRA applies to his case. He said that he had previously requested evidence, on numerous occasions, to show that JUPRA applied and did not receive a meaningful response until recently. He also commented that there was electronic wording at the top of the document that suggested some form of editing.
47. I find that the submissions provided by the MoJ show that JUPRA are the applicable Scheme Rules. The election form clearly shows that Mr R's father consented to the provisions of JUPRA. Furthermore, it is clear from Mrs R's application for widow's benefits, that any benefits would be paid in accordance with JUPRA. I acknowledge Mr R's comments that his father's election form has been edited to include a title but am satisfied that this was done for ease of reference and there is no evidence to suggest any other aspect of the document was altered.
48. I agree with the Adjudicator's understanding of the Scheme Rules. Section 7(2) clearly states that a person will only be regarded as being in full-time education if they have been in continuous full-time education from the age of 16. Section 7(3) gives HM Treasury the discretion to disregard any break in full-time education if it is satisfied that the person's full-time education ought not to be regarded as completed.
49. As explained in paragraph 44 above, the Scheme is not bound to follow the incorrect information and Mr R is only entitled to the benefits provided for under the Scheme Rules. In this case, Mr R has not provided full information regarding the break in his full-time employment in spite of being requested on a number of occasions and, as a result, HM Treasury has not decided whether it will exercise its discretion to reinstate the children's pension. Mr R has argued that it is not appropriate to engage in relation to the break in education, whilst his complaint about the incorrect information is outstanding.

50. In order to uphold Mr R's complaint for negligent misstatement, I must be satisfied that it was reasonable for him to rely on XPS' representation.
51. Mr R has said that from 2001 to 2013, payment of the children's pension was automatic. Provided he was in full-time education, the pension had to be paid. So, he said it was "perfectly reasonable" for him to accept the advice that his pension would be reinstated.
52. However, the position Mr R would wish me to take is overly simplistic and does not account for correspondence that was issued in 2013. On 25 July 2013, the MoJ wrote to Mrs R, who was acting on Mr R's behalf, to provide information on whether Mr R's children's pension would continue if he were to enrol on a three-year computing course with Birkbeck University. It explained that a children's pension would only be paid during one continuous course of study and that it would have expected for a beneficiary's education to have ceased around the time they reached their mid-twenties. In its summary, the MoJ said that it would expect Mr R's children's pension to have ceased once he had completed his course at King's College.
53. Mr R has said that he decided against the study at Birkbeck University; however, the letter clearly outlines the circumstances when the former administrator would expect a children's pension to be paid. The MoJ said that it would only expect a children's pension to be paid for one continuous course of study and that full time education would have ceased around the time a beneficiary reaches their mid-twenties. By the time Mr R relied on XPS' representation, he was 31 and had been out of full-time education for several years. So, he should have known, or at least been reasonably aware, that he would have been required to submit information, relating to his previous studies and gap in education, in order for his children's pension to be paid.
54. It is also worth noting that, on 16 August 2013, the MoJ requested further information on Mr R's educational history. It provided a table that outlined the names of the institutions Mr R studied at alongside the dates he was at each institution. It said that the information was incomplete and asked for further details regarding the topics studied and the duration of each course. Given that Mrs R had previously been told that a children's pension is usually only paid for one continuous period of study, I find that, until Mr R had provided further details regarding his past studies, he could not have reasonably relied on the representation.
55. Mr R has also argued that the Adjudicator failed to consider an argument of estoppel.
56. A claim of estoppel requires that it was foreseeable that the applicant would rely on the representation and that it was reasonable for them to do so. As explained in paragraphs 51 to 54 above, I do not consider his reliance reasonable. Therefore, I find that XPS is not estopped from going back on its statement that Mr R's children's pension would be put into payment.
57. Mr R has said that the Adjudicator should not have considered his circumstances in 2013 when deciding whether his actions, in 2016, were reasonable. He argued that, in 2013, Xafinity and the MoJ enquired as to whether the pension should continue

and whether this should still be the case due to his age and the change in institution. Essentially, in 2013 there was no question about whether there had been a gap in full-time education. So, it should not be used to consider the reasonableness of his actions in 2016, when the gap was questioned. I do not find this argument compelling. Mr R is right to say that the correspondence in 2013 was not provided to him in the context of a gap in education. However, the correspondence did reference “continuous course of study” and would have applied to Mr R at the time the incorrect information was provided.

58. Mr R has said that he was satisfied that XPS was the correct decision maker in its role as Scheme administrator. He said that this was a reasonable view, so XPS cannot hide behind HM Treasury. I agree with Mr R on this point, given that written correspondence was not clear as to who had the discretion to award the children's pension. Consequently, I can see why he thought that XPS was permitted to make the decision to reinstate his children's pension. However, as I have explained, I can only uphold Mr R's complaint where I find it was reasonable for him to have relied on the incorrect information. I do not, so my findings, on whether it was reasonable for Mr R to have held XPS as the decision maker, are irrelevant.
59. Mr R has said that the Adjudicator has conflated the issues of causation and mitigation of loss. He said that mitigation of loss was not part of the test for estoppel and with regard to negligent misstatement, the burden is on XPS or the MoJ to allege and prove failure of mitigation. They have not done so, and as such it would be wrong for me to make a finding relating to mitigation. I have decided not to make a finding on the mitigation of losses. I do not agree that it was reasonable for Mr R to have relied on the incorrect information. So, it is unnecessary for me to consider whether he should have taken steps to mitigate his loss.
60. I am satisfied that Mr R has not suffered any direct financial loss as a result of the incorrect information. However, it is clear that XPS did provide incorrect information and this amounts to maladministration which has resulted in distress and inconvenience. This has also been exacerbated by XPS' unnecessary and unprofessional delays in providing my office with information relating to this case.
61. Mr R has argued that the distress and inconvenience he has suffered is, “particularly harmful and exacerbated by the Administrator's continued failure to deal with the points raised during 2017.” He has argued that, given the circumstances of his case, an award of £3,000 would be appropriate.
62. I would only make an award of £3,000 in exceptional circumstances, for example in cases where there has been serious detriment to an applicant's health. In this case, I do not find that the distress and inconvenience has been exceptional. I acknowledge the Adjudicator's Opinion that there had been significant distress and inconvenience that warranted an award of £500. However, since the Opinion, XPS has failed to respond to several enquiries from this office within a reasonable time period and so, Mr R has experienced further avoidable delays. I find that there has been serious distress and inconvenience suffered by Mr R which merits an award of £1,000.

## **Directions**

63. Within 28 days of the date of this Determination, XPS shall pay Mr R £1,000 in respect of the serious non-financial injustice that he has suffered.

**Anthony Arter**

Pensions Ombudsman  
19 January 2022

## **Appendix One**

### **Judicial Pensions and Retirement Act 1993**

#### **1 Persons to whom this part applies**

(1) This part applies—...

(d) ...to any person who makes an election under subsection (2) below for this Part to apply to him...

(2) Any person—

(a) who holds qualifying judicial office on the appointed day, and

(b) who held such office at any time before that day,

shall be entitled, in such circumstances as may be prescribed and subject to subsection (5) below, to make an election for this Part to apply to him, if it would not otherwise do so...

#### **7 Children's pension: meaning of "period of childhood and full-time education".**

(1) For the purposes of section 6 above, a person is in his "period of childhood and full-time education" at any time if, and only if, at that time –

(a) he has not attained the age of 16;

(b) he is receiving full-time instruction at any university, college, school or other educational establishment; or

(c) he is undergoing training by any person ("the employer") for any trade, profession or vocation in such circumstances that-

(i) he is required to devote the whole of his time to the training for a period of not less than two years; and

(ii) while he is undergoing the training, the emoluments receivable by him, or payable by the employer in respect of him, do not exceed the maximum allowable remuneration, disregarding for this purpose an emoluments receivable or payable by way of return of any premium paid in respect of the training.

(2) A person shall not be regarded for the purposes of this section as coming within paragraph (b) or (c) of subsection (1) above at any time unless he has come within one or other of those paragraphs at all times since he attained the age of 16.

(3) Where there is a period during which a person comes within neither paragraph (b) nor paragraph (c) of subsection (1) above, then, if the Treasury think fit and are



satisfied that the person's full-time education ought not to be regarded as completed, they may direct either-

(a) that that period shall be disregarded for the purposes of subsection (2) above; or

(b) that the person shall be regarded for the purposes of this section as having come within paragraph (b) or (c) of subsection (1) above throughout that period.