

Ombudsman's Determination

Applicant	Mr Y
Scheme	Teachers' Pension Scheme (the Scheme)
Respondents	Teachers' Pensions (TP), University of Westminster (the University)

Outcome

1. Mr Y's complaint against TP and the University is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) the University should pay Mr Y £1,000 for the severe distress and inconvenience caused to him by its mishandling of his case.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr Y's complaint is that following the University's error in deducting Scheme contributions for the period 25 September 2006 to 30 April 2013 while his late wife, Ms L, was not a member of the Scheme, TP are unjustly not including this period in the calculation of his widowers' pension.

Background information, including submissions from the parties

4. On 23 November 2006, the late Ms L started employment with the University and elected for her employment not to be treated as pensionable by opting out of the Scheme. This election became effective from the date of appointment on 23 September 2006.
5. On 12 December 2006, TP received a completed opt out election from the University. The University had completed Part C of the form, confirming Ms L's date of appointment as 25 September 2006 and stating that pension contributions had not been deducted from her salary.
6. On 16 December 2006, TP sent a letter to Ms L confirming that it has accepted the opt out election with effect from 25 September 2006. The letter further confirmed that

any employment undertaken from that date would not be treated as pensionable service and pensionable contributions should not be deducted after the election date.

7. On 22 February 2013, the University sent Ms L a letter confirming her membership of the Scheme.
8. In May 2016, Ms L died.
9. In August 2016, Mr Y made an application regarding the benefits payable in respect of his late wife.
10. On 17 August 2016, Mr Y received a letter from TP confirming that no further payments are payable as Ms L had opted out of the Scheme on 25 September 2006.
11. On 25 May 2017, Mr Y raised a complaint to TP stating that he was dissatisfied with the service it had provided.
12. On 8 June 2017, TP responded to Mr Y's complaint confirming that it would not uphold his complaint as Ms L elected to opt out of contributing to the Scheme on 25 September 2006. Auto-enrolment regulations require that Ms L was enrolled into the Scheme on 1 May 2013. As such any contributions deducted between these dates were deducted in error. It confirmed that there were no provisions within the Teachers' Pensions Regulations which would allow for the opt out election to be cancelled or for a retrospective election to join the Scheme to be accepted, regardless of the University deducting contributions in error.
13. On 1 December 2017, Mr Y appealed TP's decision confirming that he disagrees with TP to not include his late wife's service between 25 September 2006 and 30 April 2013 in the calculation of his widowers' pension benefits.
14. On 18 December 2017, the Department of Education (**DoE**) responded to Mr Y's complaint. The decision maker said that although Ms L paid pension contributions during the period 25 September 2006 to 30 April 2013, she had elected to opt out of the Scheme demonstrating that it was her wish to not contribute to the Scheme. Therefore, any pension contributions deducted from Ms L's salary between 25 September 2006 and 30 April 2013 were deducted in error by her employer and a repayment of pension contributions for this period is the correct course of action.
15. DoE confirmed that while Ms L did not voluntarily opt back into the Scheme, she should have been automatically enrolled back into the Scheme by her employer. The set date applicable to Ms L was 1 May 2013, therefore Ms L's service from that date was included in the calculation of his widower's pension benefits. The decision maker said that there was no provision in the Teachers' Pensions Regulations which would allow for a retrospective opt in request to be accepted without a Scheme member's consent. As it was Ms L's wish to be opted out of the Scheme, TP cannot include her service between 25 September 2006 and 30 April 2013 in the calculation of his widower's pension benefits. It was held that TP had applied the Teachers' Pensions Regulations correctly and turned down Mr Y's appeal.

Adjudicator's Opinion

16. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by the University and TP. The Adjudicator's findings are summarised briefly below: -
- TP is bound by the Regulations that apply. At the time of Ms L's election to opt out of the Scheme, the Regulations that applied were the Teacher's Pensions Regulations 1997 (**TPR 1997**). If an individual did not wish their employment to be treated as pensionable, they were able, by giving written notice, to make an election under regulation B5 of the TPR 1997. Such an election would take effect from the first day of the month after it was made, unless it was made within three months of the date of appointment to pensionable employment when it would take effect from the date of appointment.
 - There is no provision under the Scheme for an opting out election to be revoked and therefore it continues to be effective until an election for employment to be pensionable is made, or since 2012 the employer reaches its AE staging date.
 - A new AE process was introduced to pension schemes in Autumn 2012. The legislation requires all employers to automatically enrol those aged 22 or over and under state pension age. Where the member has opted out and the employer passes the date on which they are to automatically enrol, they would assess whether the employee was an eligible jobholder, and if so enrol them back in the Scheme. The member can then opt out again they wish, and provided the election is made within 3 months, the effective date will be backdated to the date they re-joined the Scheme.
 - The University has accepted that upon receiving the opt out form it should not have been deducting pension contributions from Ms L.
 - TP was unaware until Ms L's death that the University had deducted pension contributions in error throughout her employment with them up to her date of death. The University's first AE date was 1 May 2013. The University should not have been deducting pension contributions from Ms L and therefore at that time should have identified that Ms L was an eligible jobholder and enrolled her back into the Scheme. TP have accepted that Ms L's employment from 1 May 2013 to 27 May 2016 should have been treated as pensionable. Therefore, the pension contributions deducted for that period have been retained by the Scheme and the widowers' pension benefits paid to Mr Y in respect of Ms L's pensionable employment between these dates reflect this. Mr Y has also received an in-service death grant and three months short term pension on the basis that Ms L was in pensionable service on the date she died.
 - Mr Y says that for the period 25 September 2006 to 30 April 2013, TP should also treat this as pensionable employment as Ms L received pay slips which clearly marked pension contributions had been deducted on each and this further

enforced that Ms L was a member of the Scheme. The opting out election form Ms L completed makes it clear that no further teaching employment will be pensionable until the election is revoked by the applicant submitting an election to opt into the Scheme. The declaration also stated that Ms L was electing for any employment undertaken after the effective date of the election, not to be treated as pensionable employment.

- Further, the letter of acceptance issued by TP to Ms L on 16 December 2006 makes it clear that any employment undertaken from the effective date will not be treated as pensionable service and pension contributions should not be deducted after the election date. As such the Adjudicator was of the opinion that it would have been clear to Ms L that she was opting out and that her employment could not have been treated as pensionable under the Scheme. TP itself does not record individual contributions for each member and it would have received details of Ms L's employment in an annual return of service and salary details up to the end of each financial year from her employer. TP, would therefore have been unaware of the fact that the University had deduced pension contributions and it is reasonable for it to assume that Ms L would have had informed her employer of her opting out election following its letter of 16 December 2006 in order for it to cease deductions.
- The Adjudicator appreciated that Ms L paid pension contributions during the period in question and Mr Y has said that they were always under the impression that she was a member of the Scheme. However, she had elected to opt out of the Scheme on appointment to a position that would otherwise be treated as pensionable and did not elect at any time to rejoin the Scheme. As such it is reasonable to assume that it was her wish to not contribute to the Scheme. Unfortunately, there is no provision in the TPR 1997 which would allow for a retrospective opt in request to be accepted without a Scheme member's consent. As it was Ms L's wish to be opted out of the Scheme, it is the Adjudicator's opinion that TP acted reasonably in insisting that her service between 25 September 2006 and 30 April 2013 should be excluded in the calculation of Mr Y's widowers' pension.
- Given the length of time taken and the way in which the matter has been handled by the University on receipt of the opt out form, the Adjudicator said that an award of £1,000 is warranted in respect of non-financial loss, to reflect the serious distress and inconvenience caused to Mr Y. Ms L completed the opt out form in November 2006, however it was not until August 2016 that it was aware of its error. TP however have confirmed that all contributions deducted from May 2013 to May 2016 will be returned to Mr Y.

17. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr Y for completeness.

Ombudsman's decision

18. Mr Y contends that there is ample evidence that led himself and Ms L to believe she was a member of the Scheme. I have considered the evidence and paperwork issued to Ms L. I am satisfied that both the opt out form and letter of acceptance issued by TP made it clear that Ms L had opted out the Scheme and any employment undertaken from September 2006 would not be treated as pensionable service. As has been explained by the Adjudicator, I find it would have been reasonable for Ms L to have been aware that she had opted out of the Scheme and that payments should not have been deducted from her.
19. Whilst I sympathise with Mr Y's position, I agree with the Adjudicator's opinion. Ms L opted out of the Scheme and did not elect at any time to rejoin the Scheme. TP would have been unaware that the University had deducted pension contributions in error until her death. As such I am bound to uphold the legal and statutory requirements and in this case, I do not find that there is any maladministration on the part of TP.
20. Given the way in which the matter has been handled by the University, I agree with the Adjudicator that the award in respect of non-financial loss should be £1,000, due to the very significant error, which caused Mr Y considerable disappointment.
21. Therefore, I partially uphold Mr Y's complaint.

Directions

22. Within 21 days of the date of this Determination: -
 - The University shall pay Mr Y £1,000 for the severe distress and inconvenience caused to him by its maladministration.

Karen Johnston

Deputy Pensions Ombudsman
8 August 2019