

## Ombudsman's Determination

Applicant	Dr N
Scheme	Teachers' Pension Scheme ( <b>the Scheme</b> )
Respondent	Teachers' Pensions ( <b>TP</b> )

## Outcome

1. I do not uphold Dr N's complaint and no further action is required by TP.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Dr N has complained that TP failed to implement his pension sharing order (**PSO**), causing an overpayment of his pension benefits.

## Background information, including submissions from the parties

4. Dr N worked as a university lecturer and became a member of the Scheme in 1993.
5. On 11 November 2008, TP received a letter from Dr N's Solicitors, Harland & Co. Solicitors, who were handling his divorce, requesting an illustration of his cash equivalent transfer value (**CETV**).
6. On 14 May 2009, a PSO was issued by a County Court which ordered that 40% of Dr N's CETV be transferred to his ex-spouse, Mrs N. It also directed that the pension sharing charges be shared 50/50 between the parties.
7. On 23 July 2009, TP received a letter from Mrs N's solicitors, Punch Robson Solicitors (**Punch Robson**) in regard to the PSO. TP subsequently wrote to Punch Robson regarding the information it required to implement the PSO. It received the required details to create a pension credit member record for Mrs N in February 2010.
8. TP then wrote to Dr N and Punch Robson in March 2010 requesting payment of the PSO administration fees. These were not received at this time and no further exchanges of correspondence took place between Dr N and TP until 2013.

9. On 26 July 2013, Dr N successfully bid at an auction for a renovation property following the sale of his marital home. The purchase price of this property was around £74,000.
10. On 18 September 2013, Dr N was sent a retirement estimate which stated that he was entitled to an annual pension of £12,432.71 and a lump sum of £37,298.12. There was no reference made within this to the PSO, which remained outstanding.
11. On 23 September 2013, TP received Dr N's application for age retirement benefits.
12. On 4 October 2013, TP sent Dr N a notification of entitlement which said that his annual pension would be an amount of £10,225.94 and a lump sum of £68,172.15, payable with effect from 22 September 2013. As with the estimate which Dr N received, no reference was made within this to the PSO. His benefits were put into payment that month.
13. On 21 October 2013, TP received a letter from Punch Robson in relation to administration fees for the PSO attaching the initial invoice, asking if these could be paid now. TP said the invoice was cancelled because payment had not been received in 2010 and that revised invoices had been issued.
14. On 8 November 2013, TP received Mrs N's share of the fees (but not Dr N's). At this point, it also wrote to Dr N requesting his share of the fees.
15. I understand that no progress was made on the matter until 18 December 2014 when Punch Robson confirmed that Mrs N would be willing to pay Dr N's share of the fees. TP said it could not agree to this course of action without Dr N's authority, or instead, the PSO could be adjusted by way of a slip rule.
16. On 20 February 2015, TP received a revised PSO from Punch Robson which said that all fees were to be met by Mrs N. TP received the outstanding fees on 12 March 2015.
17. On 30 April 2015, TP implemented the PSO and wrote to both Dr N and Mrs N in regard to the benefits they were entitled to. In its letter to Dr N, it said:

"I am writing to confirm that the Pension Sharing Order in respect of your benefits under the Teachers' Pension Scheme has now been implemented.

The Cash Equivalent Transfer Value (CETV) of your benefits amounts to £222,997.06 as at 15/07/09, the Pension Sharing Effective Date. The Order specified that 40% of the CETV must be transferred to your former spouse. I can confirm that this transfer has now taken place. Details are as follows:

Your benefits as they were at the pension sharing date, before the pension sharing reduction:

Pension: £9,186.99

Lump sum: £27,560.97

Widow's Pension £4,593.49

When you retired, these benefits were recalculated to take account of your further pensionable teaching service accrued between the Pension Share Date and your date of retirement. Your age retirement award did not take account of the Pension Sharing Order as it was not implemented at that time.

Amount of 40% “notional” reduction in your benefits after pension sharing:

Pension: £3,674.80

Lump Sum: £11,024.39

Widow’s Pension £1,837.45

...

Finally, I can confirm that your file has now been forwarded to our Benefits Team who will revise your age retirement award to take into account the effects of the Order.”

18. On 8 May 2015, TP wrote to Dr N saying that an overpayment of retirement benefits amounting to £24,353.75 had occurred as, since his original benefits had been calculated, a pension sharing order had been implemented. It attached a statement with the revised details. It said the overpayment was made up of £21,101.66 of lump sum benefit and £3,252.09 in pension.
19. Dr N queried this in a letter of 20 May 2015, where he said he did not understand why this error had occurred as TP were in receipt of all relevant details, including the court order. He said he arranged his retirement mostly over the telephone and believed the advice he was given could be relied upon.
20. On 9 June 2015, TP replied to Dr N’s concerns. The main statements within this letter are provided below:

“The PSO process commenced in 2010, however the actual order could not be implemented until all fees had been received. Teachers’ Pensions (TP) requested payment of your share of the handling fees on 1 November 2013...This letter includes a note to warn the member that where a Pension Share is set against the benefits, an overpayment of pension in payment is likely to arise. It further explains that any overpayment must be recovered.

You claimed your retirement benefits from the TPS with effect from 22 September 2013...I regret that the overpayment is legitimate and must be recovered by TP.”

21. On 8 September 2015, TP sent Dr N a letter saying:

“We have recently been trying to make contact with you to discuss the overpayment...Unfortunately we have been unsuccessful.

So as not to delay matters any further we have arranged for an interim repayment to commence at a rate of £181.63 per month by deduction from

your pension. This deduction will commence from your October pension. Please note that this is only a proposal and can be adjusted if required should you contact us prior to the 23/09/2015.”

22. On 29 November 2015, Dr N submitted his complaint to the Department for Education. He made the following points:-

- He was mentally disabled and registered as such with his General Practitioner and employer. He first became ill in 2004 due to a domestic violence incident, which had been reported to the police.
- He had been under considerable stress since TP’s letter on the overpayment as it triggered memories of the past. He had to confront matters which he had difficulty with, as well as coming to terms with his Complex Post Traumatic Stress Disorder (**CPTSD**). His private psychologist had given a statement as to his current mental health, dated 17 November 2015.
- During the court hearing of 9 May 2009, he was completely disassociated and had little to no memory of the case. He became more ill after this point waiting for treatment such that, on 3 November 2009, he signed a letter of authority for his solicitor to handle the PSO.
- Before this, he had tried very hard to finalise the divorce court order because his ex-wife had continually refused to sell the marital home, whilst he remained homeless since 2006. In September 2013, he was in a terrible state, living rough in a small boat.
- He then contacted TP regarding taking his retirement benefits. The website on which to claim benefits only gave tick boxes for the option he wished to choose. It gave no indication of outstanding court orders. According to the estimate, under option 2, he could expect a lump sum of £46,623.00.
- Expecting the above lump sum and taking into account the sale of the marital home for £69,379.34, he had budgeted an amount of £116,002.34.
- Several people had recently been trying to advise him that he must have known there was an overpayment and he had begun to believe it due to his “confused mind.” However after resting and calming himself down, he realised that he did not know of this. When he discussed his confusion with his psychologist, he informed him he could not have known and realised the state of his “real life.”

23. On 21 December 2015, the Department for Education responded under the Scheme’s internal dispute resolution procedure (**IDRP**). It said:-

- TP must implement a PSO in accordance with the Welfare Reform and Pensions Act 1999 (**the Act**). The ‘transfer day’ for the purposes of the Act was the date of Dr N’s Decree Absolute, 15 July 2009 (**the Transfer Day**). Therefore, the

apportionment of Dr N's benefits must take place from then and TP must recover any overpaid pension between that date and the date of the reduction in pension.

- TP wrote to Harland & Co. Solicitors on 1 April 2009, providing details of his CETV, and again on 15 March 2010, requesting payment for the cost of administering the PSO.
- As neither party paid the invoices, the PSO could not be implemented at that time. Hence, when Dr N applied for his benefits, TP was unable to apply the apportionment and paid these in full. The PSO had to be backdated to the Transfer Day, which is what happened when the costs for administering the PSO were paid in March 2015.
- TP had confirmed that it was not informed of Dr N's current address until his letter of 24 June 2015. Prior to this, he had provided a 'care of' address.
- Dr N had now been awarded the correct pension and would need to pay back the overpayment.

24. I understand no further exchanges of correspondence took place between Dr N and TP until 2018.

25. On 11 May 2018, Dr N's psychotherapist provided him with an explanatory letter on his condition (to be passed to anyone that it may concern). This said that Dr N had been diagnosed with CPTSD and had suffered from chronic stress and anxiety to the point of complete disassociation. It was explained that when Dr N was required to make important decisions about his finances or his future, his CPTSD would be triggered and he would become overwhelmed, making it impossible for him to think logically or rationally.

26. On 24 July 2018, TP wrote to Dr N saying that a further overpayment had arisen because of teaching work he had undertaken since he retired, amounting to £2,370.16. This purported overpayment is not part of this complaint.

27. In response to the complaint, TP said that it sympathised with the situation Dr N found himself in, but it had no authority to waive the outstanding overpayment and must recover this. It said the outstanding balance in respect to the overpayment was an amount of £17,026.82, which included an amount of £2,370.16 in respect to an overpayment accrued from Dr N's return to teaching. It said deductions were stopped when Dr N submitted his application to the Pensions Ombudsman's Office (**TPO's Office**).

28. In response to questions asked as part of the Adjudicator's investigation, TP confirmed the following:-

- In terms of whether recoupment was the only means by which it intended to recover the outstanding amount, it would prefer to discuss the options available to Dr N if he was finding it difficult to repay the overpayment. If Dr N completed a means questionnaire, the possibility of making reduced monthly deductions over a

long period of time could be considered, or, a charge being placed on his property.

- Dr N had provided some information on his financial situation but was still required to complete a means questionnaire to put forward a claim of hardship.
29. Dr N sent further information to TPO's Office regarding the background to this matter and how the overpaid funds were spent.
- Previously he had been living rough on a small boat and therefore had used a friend's 'care of address' since January 2013. Prior to this, letters were sent to the address of his former marital home and intercepted by his ex-wife.
  - In July 2013, he borrowed £6,082.78 from a friend which was used to pay £6,200 to auctioneers for the successful bid of his current home.
  - In October 2013 (which is when he received his retirement benefits from the Scheme), several transactions took place. On 7 October 2013, he received £69,379.34 from his share of the sale of his former marital home. He also paid £500 towards a car deposit.
  - On 8 October 2013, he received £68,172.15 in pension lump sum from TP.
  - On 9 October 2013, he paid his solicitors £2,963.16. Also on this date, he paid £3000 on a 'Royal Mail Offer' for a friend, part-paid the debt on his credit card with an amount of £9,999.99, and paid off a loan with funds of £26,880.16.
  - On 10 October 2013, he paid his solicitor's divorce fees of £7,400.00 and paid them a further £67,091.001 on 11 October, by way of his house purchase and fees.
  - Also on 11 October 2013, he paid £1,976.39 to change his car.
  - On 14 October 2013, he paid £141.88 for home insurance.

## **Adjudicator's Opinion**

30. Dr N's complaint was considered by one of our Adjudicators who concluded that Dr N did not have any defences to the recovery of the overpayment and TP did not make an administrative error in paying his benefits. The Adjudicator's findings are summarised below:-
- There was no dispute that there had been an overpayment; she would consider whether Dr N had any defence to the recovery of the overpaid funds. There had purportedly been two different overpayment events which had arisen, the first resulting from the PSO, and the second following what TP understood to be Dr N's return to employment. Dr N had only complained to TPO's Office about the former, so her assessment solely focused on this.

- TP had proposed to recover the remaining overpayment from Dr N by making deductions through his future pension payments. TP was seeking to remedy the overpayment by way of recoupment.
- The first defence usually considered in overpayment cases was the Limitation Act 1980. In the case of *Burgess & Ors v BIC UK Limited* [2018] EWHC 785 (Ch), Mr Justice Arnold held that equitable recoupment was not a restitutionary claim for unjust enrichment (unlike the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch)). Rather it was an equitable self-help remedy which did not involve any claim for repayment of the monies paid in the past but an adjustment of accounts in the future. Equitable recoupment, was not subject to a six-year limitation period under section 5 of the Limitation Act 1980 and so this defence did not apply in Dr N's case.
- With regard to other defences potentially available to Dr N, the most common defence to the recovery of an overpayment was referred to as "change of position." This was where the applicant had changed his position such that it would be unjust to require him to repay the overpayment either in whole or in part. To make out a change of position defence, the applicant must, on the balance of probabilities, show that because of the overpayment, which they received in good faith, they detrimentally changed their position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure must be irreversible. The Ombudsman may direct that some or all of the overpayment may be kept by the applicant if these elements were satisfied.
- Good faith was intrinsic to the defence of change of position. She would firstly need to assess whether Dr N acted in good faith in receiving the overpaid funds, or whether he might have known that there was an error.
- TP had said that Dr N should have known that the PSO had not been implemented as its correspondence had been clear on this point. Dr N had said that in November 2009, he signed a letter of authority for his solicitor to handle the PSO matter due to his state of health. Further, he had said that he was not in receipt of his mail until January 2013 when he amended his address, as these were sent to his former marital home.
- It was plausible that Dr N did not receive some of the correspondence which TP had issued concerning the PSO remaining outstanding and fees being required. However, it was also arguable that Dr N would have needed to speak to his solicitor on the situation at some point and would thereby have become aware of the outstanding PSO. Running in parallel to the above events was Dr N's poor mental health. Dr N's psychotherapist had set out that Dr N was suffering from disassociation in 2009, around the time the PSO was implemented, and that his CPTSD rendered him too overwhelmed to consider important decisions and his finances for a number of years.

- Taking into account Dr N's psychotherapist's evaluation, even if Dr N was made aware of the outstanding PSO at any time between 2009 and 2013, he did not have the capacity to process this information. Therefore, Dr N had acted in good faith when receiving the overpaid funds.
- The overpayment was mostly comprised of the lump sum (£21,101.66) Dr N had received and a small portion of his pension (£3,252.09). Dr N was asked how he saved or spent the overpaid funds and had provided a detailed breakdown of his expenditure between just before payment of his pension and March 2016, together with supporting documentation. It was clear that Dr N's finances changed drastically over a very short period in October 2013, a point he has acknowledged. Dr N had sought to stabilise his living and financial situation by purchasing a property, paying off his debts and buying himself a car.
- When considering whether an applicant had a change of position defence available to them, the general rule was that the overpaid funds must have been spent on something exceptional; the money cannot have been spent on something the applicant would have bought anyway. Dr N successfully bid for the property in question in July 2013, which was before he applied (or had been provided with a recent estimate) for his pension benefits, so it appeared that, at that time, Dr N intended to finance this purchase with the funds from the sale of his marital home. He received £69,379.34 from the sale of this and paid £67,091.00 four days later to his solicitors towards his new home. This suggested that the funds from his former home were used to help finance his new house.
- During the same period, Dr N paid off loans, credit cards and professional fees. Taking into account all of these points and the remaining expenditure for October 2013, the overpaid funds, £24,353.75 in total, appeared to go towards such payments. Therefore, Dr N had not spent the overpaid funds on anything exceptional. Instead, he used the funds to stabilise his financial situation and pay off debts. Such spending could not be considered exceptional as he would have needed to pay these off at some point anyway. Dr N did not have a valid change of position defence.
- Similarly, the defence of estoppel did not apply as the payment of debts was not sufficient to demonstrate detriment, which was the last part of the estoppel test, as there was no detriment in paying off a debt sooner rather than later.
- Whilst she did not consider that Dr N had a defence to the recovery of the overpayment, his situation was one which she had considerable sympathy with. Dr N was required to spend any funds he had very carefully to put himself in a more viable financial situation and a better state of health. Although, she was not making a formal recommendation, she felt it would only be fair for TP to take due account of the specific and unique circumstances outlined in this matter when agreeing to a repayment plan with Dr N.



- In respect of TP's decision to pay Dr N's pension in full when there was an unimplemented PSO on his account, as Dr N is a member of the Scheme, TP was obliged to pay benefits following such an application, provided that Dr N had become entitled to these. Dr N had reached his normal retirement age and had an entitlement to his full benefits where the PSO had not been implemented, so there was no administrative error on TP's part. Although, it would have been good practice for TP to alert Dr N to the outstanding PSO in the estimate or notification of entitlement it sent to him around the time his benefits were paid, this was a policy decision for TP.
- Dr N did not have a defence to recovery of the overpayment and TP did not make an administrative error in paying his benefits in the way it did. The complaint could not be upheld and TP and Dr N should enter into discussions on a mutually acceptable plan to recover the outstanding overpaid funds.

31. TP accepted the Adjudicator's Opinion. Dr N did not accept the Adjudicator's Opinion and made the following comments:-

- He was now aware of how a change of position defence worked and had previously thought he had changed his position by purchasing the house. However, it was clear now that the "real change in position" that took place was that, with the leftover funds, he embarked on a major renovation project on the house, which he estimated at the time would cost approximately £50,000. This would be funded by the remaining funds in his bank and future pay. Had the overpayment not occurred, he would have merely repaired and decorated the property at a low cost.
- In July 2013, he successfully bid on a property and borrowed the necessary funds. His motive at the time was not to be homeless anymore and his then solicitor assured him on the sale completion of the marital home. He received a copy of the register of title for the property in November 2013.
- After doing some work on the property, clearing the rear garden, inspecting the rotten woodwork etc, he realised it would be a lot of work to repair and decorate the property himself and he would need to take on some professional builders. He had the finances to employ builders in late November 2013. As at 20 December 2013, his savings were approximately £8,300 and he had £10,000 in his everyday banking account. He therefore appointed an architect to enable a full restoration and modernisation of the property.
- By February 2014, the architect's designs were ready to be submitted as part of his planning application. In April 2014 he received planning approval for an extension and other work. In May 2014, he gave two weeks' notice of demolition and the commencement of building work.

- He was at this point committed to a major building program at a great detriment to himself. He had lived in a tent in the building to protect himself from dust and debris for five years until his bedroom was ready.
- Following TP's demand for repayment, he became very stressed and needed help from his therapist to treat his stress. Within a short period of time TP began deducting monthly payments; he did not know what to do other than fund the project as best as he could.
- In March 2016, he took out a £15,000 loan which, along with his salary, he expected would allow him to fund the further costs of the renovation. By March 2017, he was at the point of a nervous breakdown, mainly due to the situation with the house and money. He was off from work for a year and when he returned, he began negotiating his retirement. He felt that he could not cope with the pressure of full-time teaching, whilst renovating with financial stress. He left work and retired in July 2018.
- The house project had become a significant burden on him. He could not sell a part finished project through auction or otherwise as he would not recover the monies already invested. The house was a shell which required significant further work including plaster board, plastering, full electricity and heating works, "plus floors kitchens and bathrooms".

32. The Adjudicator replied to Dr N with the following points:-

- She understood that Dr N's position was that the excess funds were paid towards a more extensive/expensive renovation project for his home than he otherwise would have carried out, so he had changed his position. There were certain challenges to this argument.
- The timing of the pension payments did not quite fit this narrative: the statements he had provided suggested that the funds he received from his pension in October 2013 were, in the following days, spent towards paying off debts.
- Further, the repairs carried out on the property were necessary/modest rather than lavish. It was apparent that Dr N's home had been a project; he had sought to make improvements over time. Her view was that he had sought to make the property functional and had put in place important improvements which one, objectively, would consider to be necessary rather than excessive or luxurious. Therefore, she felt it was difficult for Dr N to argue that he would have committed to a less ambitious project, as instead he had made careful decisions to make the property more habitable. Also, it seemed difficult to suggest that Dr N would have been able to carry these works out without the use of builders/professionals.
- In addition, there appeared to be a history of loan borrowing, again for necessary expenditure, on Dr N's part, so it was arguable that if he had not received the excess funds, he would have decided to instead source funds in this way. It could

be argued that Dr N had received advance funds, like a loan, but in the form of a pension, which TP was now asking him to pay back.

- As Dr N had put these payments towards improving his home, he most likely, would be able to gain from these when he sold his home. In this sense, a change of position argument was less viable as he would ultimately, hopefully, benefit from having carried out this expenditure. It remained her view that a change of position defence could not succeed.

33. Dr N subsequently made the following further comments:-

- The works carried out to the house were not repairs as the Adjudicator had stated. He had bought a derelict and run-down three-bedroom house with no wiring or heating and with unstable walls. Based on his salary and his bank balance, he decided to apply for planning permission and demolish most of the building and expand it into a five-bedroom house with two bathrooms, a summer room, and a larger kitchen. Had he known about the overpayment, he would have renovated and decorated the house as a three-bed property.
- He did clear his debts in October 2013 but he also bought his house, which left £18,300 of funds plus his salary of £2,880 a month. This was an amount roughly the same as the overpayment.
- In October 2013, his everyday banking account held an amount of £7,297.03, and he had savings of £10,000. In November 2013, the renovation of his house commenced, which mainly involved clearing up the house and removing old plaster. In December 2013, he was awaiting planning permission in respect to improvements he wanted to make to the house. These included: replacing all windows and gutting the interior of the house; removing the roof and extending it; removing the chimney and all the interior of the house; removing the side building and extending it; and removing the porch and extending it.
- In February 2014, his everyday banking account held £9,703.81 and he had £10,011.59 in savings.
- By June 2014, his everyday banking account held funds of £11,758.31 and he had savings of £23.63. In August 2014, his everyday banking account held an amount of £2,746.95 and savings of £23.65. This was as building work had commenced on his house in June so over the months he had spent money at building merchants and he had paid cash to the builders.
- Building work then stopped after the external building work became mostly complete. His April 2015 statements showed that he had £2,954.42 in his everyday banking account and £24.35 in savings. He then in May 2015 received TP's demand for £24,353.75 by post.
- The pension transfer costs should have been carried out at the point of sale. According to a TP statement, it had received a fee from Mrs N on 8 November

2013. At this juncture, 8 November 2013, he had banked about £18,000 and could have cancelled the expensive restoration he had planned, paid the transfer fee and the monies owed to TP.

- TP had made no contact with him since September 2013 and then allowed Punch Robson “to use a slip rule.”
- He had changed his position with respect to the monies he received in good faith. When the renovation spending was complete in August 2014, he had entered into a position that was and remains irreversible.
- He had to buy the house he had committed to, as well as pay debts and solicitor costs. He also did not understand why there was a gap between 4 October 2013 and 8 May 2015. This was an unjustifiable delay. Had he been informed in this period about the overpayment, he would not have opted for the major building work where he, at that point, had the financial capacity to pay the overpayment and clear this debt, as he had done with previous debts. TP had issues contacting him due to Mrs N keeping his post, but TP knew where he worked and could have contacted him via this method. By the time TP made its demand for repayment, the property was “at a point of no-return.” It was gutted and was a shell with the extension walls completed. Hence, his expenditure was irreversible. He did make enquiries about selling the house when he received TP’s demand for repayment letter. However, the offer made was below the purchase price he had paid.
- TP had not lost any money, as the percentage of his CETV that was transferred to his ex-wife was never claimed before she died.
- He had borrowed £6,082.78 in July 2013 from a friend because of the deadline for which he had to pay the auction house and where there were delays in selling the marital home. He repaid this soon afterwards. His history of loan borrowing was due to circumstances involving domestic violence and control; he did not like loans.
- He was not “re-employed” in July 2016 as suggested but automatically enrolled into a Career Average Revalued Earnings pension scheme. He had a permanent contract of employment with no gaps with his employer until July 2018, following a year off on medical grounds. Therefore, any grounds concerning re-employment by TP were incorrect. He had now finally retired, albeit earlier than his planned age of 70, to help him cope with the current situation.
- In respect to TP’s claim that a further overpayment had arisen because of teaching work undertaken “since he had retired,” TP continued to suggest that he had retired at a point when he had not. He wondered if the Ombudsman could consider this matter further.
- Following a cash settlement when he actually retired in July 2018, nearly all the monies had been depleted on the renovation project. Monies in his bank accounts amounted to £3,000 which would be used to pay building workers. His credit card

was around £6,000 debt which he had used to purchase building materials and for bills. He also paid for a monthly storage facility since about 2011, and a garage lockup.

- He lived part time with his new wife in Newcastle. His wife's business had been halted due to the current pandemic, so he had paid the bills on her flat until they could move into his renovated house. His wife had decided to live with her daughter due to the poor state of the renovated house. They would need to soon move out of Newcastle because of the financial situation.
- He was £5,000 in debt after the last building work that was carried out and his outgoings were greater than his income, which would remain the case until he had moved everything to the house, which remained inhabitable. His financial situation would remain difficult for the foreseeable future.

34. More recently, Dr N provided the following update:-

- He had released his builders because he could not afford to keep them on. He was trying to continue work on the house himself, but was conscious that he was dissociated several times in the day and must try to control this in hazardous situations, for instance when working on the roof. He had also amassed a credit card debt of £6,000 or £7,000.
- He had been living on his own in "this building site" since his wife could not join him due to the condition of the house. He felt worried about money and his isolated state. His TP pension had been reduced to £371.04 per month since November 2019; this had brought about greater hardship in trying to complete the house and make it habitable.

35. The complaint has been passed to me to consider and I have noted Dr N's additional comments, but I agree with the Adjudicator's Opinion so I will, therefore, only respond to the key points made by Dr N for completeness.

## **Ombudsman's decision**

36. TP is seeking to recover the overpayment from Dr N by reducing his future pension benefits. Although TP has framed its recovery in terms of equitable recoupment, I consider that the correct legal basis is equitable set-off.

37. Equitable set-off operates in a similar way to equitable recoupment. Equitable recoupment, however, is a principle that applies to trustees and the Scheme is a statutory unfunded scheme with no trustees and no trust, so recoupment is not available to TP.

38. Where there has been an overpayment in a statutory scheme, it can be said that there are two cross-claims between the member and manager of the scheme which can be offset. Specifically, Dr N's pension entitlement is a statutory debt owed to him by the Scheme and is liable to be offset against the overpayment, which is a debt

owed to the Scheme by Dr N. Therefore, subject to any defences to the claim which Dr N may have, it is inequitable that he can insist on his full entitlement under the Scheme without allowing the claim for the overpayment to be satisfied. It follows that TP can rely on equitable set-off as the basis for recovery.

39. Dr N has put forward arguments to explain why he satisfies a change of position defence. He considers that he changed his position through the renovation project he embarked upon for his newly purchased property. He says he would not have committed to such a project had he known that he owed a debt to TP.
40. I have considered the extensive information which Dr N has provided. It is apparent to me, as already highlighted, that several transactions took place in October 2013 when Dr N received his pension from TP, which included a £68,172.15 lump sum, but £21,101.66 of which, it transpires, was an overpayment. Dr N has said that the amount of around £18,000 left in his account after he had cleared his debts in October 2013 and which remained in his account until summer 2014, when building work on his property commenced, roughly equates to the overpayment. He contends that these funds went towards his renovation project, which would have been less ambitious but for the overpayment.
41. According to Dr N's account overview, in the month of October 2013, he received funds of around £144,000 and spent around £140,000 (the £10,000 he transferred to his savings account is included in this sum). As at 31 October 2013, Dr N had £7,297.03 left in his everyday banking account and £10,000 in his savings account. Dr N spent roughly half of his income for this month on the property purchase, and the remainder on paying off debts. I consider it highly likely that TP's lump sum payment went towards the debts/expenses Dr N incurred that month.
42. Nonetheless, considering Dr N's argument that the excess funds went towards the renovation project, Dr N engaged an architect for his renovation plans in December 2013 and I understand that at this time he was also awaiting planning permission. According to the statement dated 29 November 2013, he held £5,953.62 in his everyday banking account and £10,002.12 in his savings account.
43. Dr N says that in February 2014, the architect's designs were ready to be submitted as part of his planning application. Therefore, by February 2014, Dr N had formalised his renovation plans. As at 28 February 2014, Dr N held £9,703.81 in his everyday banking account and £10,011.59 in savings.
44. Hence, Dr N appears to have decided upon a £50,000 renovation project whilst in possession of roughly 30-40% of the funds this would require and says he expected to be able to fund the remainder of the project with his ongoing salary. However, the lack of proximity between the value of the overpayment and the available funds for his renovation plans does not persuade me that there was a causal link between the two. This could be more easily argued if, for example, Dr N planned a £24,000 renovation project at this point (with roughly the same amount available to him because of the overpayment).

45. Essentially, Dr N had planned to finance the renovation with the existing money in his accounts plus his ongoing salary. However, the former made up less than half of what he estimated the project would cost. I consider that the level of Dr N's salary which, would apparently, enable him to fund such a renovation over the years, was a more decisive factor when he initially embarked upon the renovation project. It is also likely, given the statements Dr N has made regarding his property when first purchased (for example that it had unstable walls), that Dr N had at the outset and prior to the overpayment, committed to a renovation project that would not be insignificant.
46. While Dr N's arguments support his position to a degree in the sense that he did have some funds which remained in his accounts when planning the renovation project, I do not agree with his assessment of these funds. I consider that there were an array of reasons why Dr N took on the renovation project when he did. Crucially, I do not consider that the overpayment caused Dr N to change his position. I have considerable sympathy for Dr N and acknowledge that the overpayment which has arisen is not helpful to the position in which he finds himself, but my view is that this has exacerbated the overall situation rather than been the cause of it.
47. Dr N has questioned why TP took the length of time it did to notify him of the overpayment. This is self-evident from the chronology of events in this matter. Although the PSO was issued in 2009, it was not until 2015 that the fees to implement the PSO were paid. TP implemented the PSO in April 2015 and notified Dr N of the overpayment in May 2015. I do not consider that there was any undue delay here. The delay to implementation was caused by a failure to pay the required fees, which was not the result of any action or inaction on TP's part.
48. Lastly, Dr N has provided comment on a further overpayment which purportedly has arisen, amounting to £2,370.16. This is not part of Dr N's current complaint and he should raise this through the Scheme's IDRPs should he wish to dispute this overpayment. There are time limits for bringing a complaint which Dr N might want to be mindful of.
49. I do not uphold Dr N's complaint. Dr N does not have a valid defence to the recovery of the overpaid funds and I do not find that TP made an error in how it administered his benefits.
50. In respect to the overpayment which this complaint concerns, I suggest that Dr N and TP now enter into discussions on a mutually acceptable plan to recover the outstanding overpaid funds.

**Anthony Arter**

Pensions Ombudsman  
17 March 2021