

Ombudsman's Determination

Applicant: Mrs S
Scheme: Teachers' Pension Scheme (TPS)
Respondent: Teachers' Pensions

Complaint Summary

1. Mrs S has complained that Teachers' Pensions is seeking to recover an overpayment of her widow's pension under a TPS regulation which provides for a spouse's pension payable after the member's death to cease on subsequent remarriage or cohabitation. Mrs S argues that Teachers' Pensions should not have sought to recover the overpayment on various grounds including the following:
 - she was not, on the facts, cohabiting, so Teachers' Pensions should not have ceased the payment of her pension under the regulation in question;
 - the cessation of her pension on subsequent cohabitation was in breach of the age discrimination requirements;
 - the cessation of her pension on subsequent cohabitation amounted to indirect sex discrimination because women are, on average, affected disproportionately by this regulation;
 - the cessation of her pension was in breach of the Human Rights Act 1998 because it amounted to an infringement of her right to a family life and/or amounted to deprivation of her property;
 - she has a defence to recovery of the overpayment on the grounds of change of position and/or estoppel and/or limitation;
 - Teacher's Pensions should not have ceased her Guaranteed Minimum Pension (**GMP**), or offset the GMP due after the overpayment was discovered against the alleged overpayment of her pension, because this was in breach of Section 91(6) of the Pensions Act 1995; given that there was a dispute about the recoverability of the overpayment; and
 - there was maladministration by Teachers' Pensions in relation to the steps taken to seek to recover the alleged overpayment.

Summary of the Ombudsman's Determination and reasons

2. I partially uphold Mrs S's complaint against Teachers' Pensions and find in her favour on some of the points of law referred to me. In particular, I have found the following:
 - First Finding - Teachers' Pensions was able to legitimately conclude that Mrs S was cohabiting on the basis of her completed form;
 - Second Finding - Teachers' Pensions was required to cease the pension, on being notified of Mrs S' cohabitation, during and after any period of cohabitation unless the Secretary of State determined otherwise;
 - Third Finding - it did not amount to breach of the age discrimination requirements to cease Mrs S' pension on being notified of her cohabitation because the accrual period of her late husband's pension, to which Mrs S' pension is attributable, pre-dates 1 December 2006;
 - Fourth Finding - it did not amount to indirect sex discrimination to stop Mrs S' pension on being notified of her cohabitation;
 - Fifth Finding - it is not in breach of the Human Rights Act 1998 to cease Mrs S' pension on the basis that the cessation of the pension amounts to an infringement of her right to a family life and/or amounts to deprivation of her property because her right to the pension was fixed before the Human Rights Act 1998 came into force;
 - Sixth Finding - Mrs S has a defence to the recovery of the overpayment up to the date of cessation of her pension on the grounds of change of position, but not estoppel or contract, because I am satisfied that she acted in good faith and relied to her detriment on the overpayment by increasing her standard of living over and above what it might otherwise have been. It follows that, as a matter of law, Teachers' Pensions is unable to recover any of the overpayment;
 - Seventh Finding - Teachers' Pensions should not have set off the arrears of GMP against the alleged overpayment because this was in breach of Section 91(6) of the Pensions Act 1995 and Section 159 of the Pension Schemes Act 1993 and amounts to maladministration.
3. I issued my preliminary decision on 13 May 2021 and the parties were given the opportunity to make additional submissions. Teachers' Pensions made additional submissions in relation to my sixth finding concerning change of position and my seventh finding concerning the cessation and set-off of GMP. I address these additional points in the relevant sections below. Mrs S did not make any additional submissions.

Detailed Determination

Material facts

4. Mrs S' late husband was a member of the Scheme from September 1968 to September 1999. He died while still in pensionable service. Mrs S was paid a 'short-term' pension from September to December 1999 and, thereafter, received a 'long-term' widow's pension.
5. The Teachers' Pensions Regulations 1997 (SI1997/3001) (as amended) (**1997 Regulations**) were in force at the date Mrs S' widow's pension commenced. **Regulation E30** provided:

- (1) A pension under regulation E26 payable to a surviving spouse or a nominated beneficiary ("an adult pension") is to be paid -
 - (a) from the day on which any short-term pension that became so payable under regulation E24 ceases to be payable, or
 - (b) if no short-term pension became payable, from the day after that of the death.
- (2) Subject to paragraph (3), an adult pension is payable for life.
- (3) Unless the Secretary of State determines otherwise in the particular case, and subject always to regulation E1(3)(c) and (d) (guaranteed minimum pension for surviving spouse), an adult pension is not payable during or after any marriage or period of cohabitation outside marriage ..."

6. The 1997 Regulations have since been revoked. **Regulation 94** of The Teachers' Pensions Regulations 2010 (SI2010/990) (as amended) (**2010 Regulations**) provides:

- (1) This regulation applies on the death of a person (D) if -
 - (a) D was in pensionable employment after 31st March 1972, and
 - (b) D had adult pension qualification service of -
 - (i) at least 2 years, where D was in pensionable employment at any time after 5th April 1988, or
 - (ii) at least 5 years, where D was not in pensionable employment after 5th April 1988.
- (2) ...
- (3) An adult pension is payable to D's surviving adult from the day after the date of D's death.

- (4) Except as otherwise provided in these Regulations, the pension is payable for life.
- (5) D falls within this paragraph if -
 - (a) D was not in pensionable employment after 31st December 2006, or
 - (b) D did not pay contributions under regulation C9 of TPR 1997 or regulation 19 (election to pay contributions by a person serving in a reserve force) in respect of a period after that date.
- (6) If D falls within paragraph (5), the pension ceases to be payable if D's surviving adult marries, forms a civil partnership, or lives with another person as if they were husband and wife or civil partners.
- (7) Paragraph (6) does not apply -
 - (a) if the Secretary of State determines that paragraph (6) does not apply in the circumstances of the particular case -
 - (i) to prevent cessation of a pension, or
 - (ii) to reinstate a previously ceased pension;
 - (b) to so much of any pension as is payable in respect of section 9(2B) rights to a widow or widower whose entitlement arose from a death occurring before 5th December 2005 and who forms a civil partnership or lives with another person as if they were civil partners;
 - (c) where D dies in service, as a phased retirement pensioner or as a retirement pensioner, during the first 3 months after D's death ...”

7. Part 2, Schedule 13 to the 2010 Regulations provides:

“Anything done or having effect as if done under or for the purposes of a provision of the revoked instruments¹ has effect, if it could have been done under or for the purposes of the corresponding provision of these Regulations, as if done under or for the purposes of that corresponding provision.”

8. In 2014, Teachers' Pensions began an exercise to check the current circumstances of individuals in receipt of adult beneficiaries' benefits, such as a widow's pension. It issued declarations to be completed and returned by the beneficiary. Teachers' Pensions issued a declaration to Mrs S in June 2016 (the **Declaration**). It issued reminders in August and September 2016 and received the completed form in

¹ The list of revoked instruments includes the 1997 Regulations.

October 2016. In the form, Mrs S notified Teachers' Pensions that she had been cohabiting since January 2004.

9. The Declaration stated:

"Conditions of payment of a Teacher's adult dependant's pension

If an adult dependant remarries/co-habits or enters into a civil partnership they must inform us with full details immediately. An adult dependant's pension entitlement ceases if he or she remarries or lives with another person as husband and wife. In this event, the pensioner must inform us immediately to prevent any overpayment occurring.

If you have re-married or entered into a civil partnership please provide a copy of the relevant documentation when you return this form."

10. In answer to the question: "Have your circumstances changed since your adult dependant's pension came into payment?", Mrs S ticked the "Yes" box. The Declaration then asked Mrs S to indicate her new status and she ticked the box for "Co-habiting (as Husband & Wife or Civil Partners)". In the box for the date on which cohabitation began, Mrs S wrote "Jan. 2004".
11. On 5 December 2016, Teachers' Pensions wrote to Mrs S saying that entitlement to payment of a widow's pension ceased in the event of remarriage, civil partnership or if she "live[d] with a person as a spouse or civil partner". It said payment of Mrs S' pension had continued after her cohabitation and, as a result, there had been an overpayment of pension amounting to £72,974.28 (net). Teachers' Pensions said it was obliged to seek recovery of any money incorrectly paid out of public funds; whatever the reason. It asked Mrs S to arrange repayment of the overpaid amount as soon as possible via card, BACS transfer or cheque. Teachers' Pensions said, if Mrs S would find repayment difficult or wished to discuss it further, she could contact its finance team.
12. Mrs S wrote to Teachers' Pensions on 9 December 2016. She said her husband had paid into the TPS throughout the whole of his teaching career and it was preposterous to expect her to have the amount of £72,974.28 just sitting in an account. Mrs S also said it was insensitive to send out this type of letter at that time of year. She said she had accepted the pension because she was totally unaware that being with a partner would make any difference to her entitlement. Mrs S asked why the policy had not been made clear in the past.
13. Teachers' Pensions responded, on 21 December 2016, referring Mrs S to Regulation E30. It also said that, when Mrs S had claimed her pension, it had been its practice to issue a leaflet (**Leaflet 450**) along with the claim form. Teachers' Pensions said further information had been provided in the annual newsletters which had been issued with Mrs S' P60s. It said the newsletters contained a section on the changes which it must be informed about, which included remarriage, cohabitation and civil partnerships. Teachers' Pensions provided a breakdown of the overpayment.

14. On 31 January 2017, solicitors acting for Mrs S wrote to Teachers' Pensions on her behalf. The solicitors said:-
- Mrs S had notified Teachers' Pensions that she was living with another person but this, of itself, was not sufficient to satisfy HMRC's requirements for pension purposes. There was no financial dependence or interdependence between Mrs S and her partner. The house belonged solely to Mrs S and she was solely responsible for paying all the household bills. Pure cohabitation was not sufficient to make an individual a dependant for the purposes of a pension scheme. There was no legal definition of cohabitation and it could mean different things to different people. The position was no different to Mrs S' sister moving in with her, with each being responsible for their own living costs. Mrs S' partner would not be regarded as a dependant for HMRC's purposes. On the basis that there had been no cohabiting for pension purposes, Mrs S was not legally obliged to repay any money to the Scheme.
 - Even if it were found that Mrs S was cohabiting in the pension sense of the word, the Limitation Act 1980 limited the number of years for which any overpayment of pension could be recovered to six. It cited *Webber v Department for Education* [2014] EWHC 4240 (Ch) and said Teachers' Pensions could only claim recovery for a six year period starting from when the dispute had reached The Pensions Ombudsman's Office (**TPO's Office**).
 - Mrs S had a change of position defence to the recovery of the overpayment. She did not have sufficient savings to repay any money to the TPS. She had been receiving the overpayment for 12 years and had lived accordingly. This meant the money had been spent on everyday living costs. It would be impossible and unreasonable for her to make a lump sum payment.
 - Mrs S had expected to receive her widow's pension for the rest of her life. The small print in the leaflet to the claim form stated that cohabiting would result in payment ceasing. This was vital information for Mrs S and should have been properly drawn to her attention.
 - The TPS' 'rules' had been changed such that the forfeiture rule only applied to older widows. This was clearly age discrimination. Furthermore, a rule which restricted a widow's freedom to live with another person was antiquated and a violation of her human rights.
 - A member's entitlement or accrued right to a pension under an occupational pension scheme could not be forfeited under Section 92(1) of the Pensions Act 1995. There were exceptions to this but none of them related to remarriage. It was unreasonable to impose a rule which forced a widow to forfeit a pension in contravention of the basic rules of forfeiture in pensions law.
15. Teachers' Pensions responded on 20 April 2017. It referred to Regulation E30(3) (see paragraph 5 above). Teachers' Pensions said a bereavement pack had been issued

to Mrs S, in September 1999, which included an application form, notes for completing the form and a Leaflet 450. It referred to page 5 of Leaflet 450 which stated: "Spouses [sic] pension payable for life unless spouse re-marries or cohabits". Teachers' Pensions also referred to newsletters sent to Mrs S in April 2004 (see Appendix 1) and April 2005, which included information about changes which it needed to know about. It said there was information on its website which explained that a pension was only payable if the beneficiary did not remarry, form a civil partnership or cohabit. Teachers' Pensions said the onus was on the person receiving the pension to notify it of a change of circumstances and it had no other way of knowing. It explained that it now wrote to members annually to ask them to provide a declaration of circumstances.

16. With regard to the recovery of the overpayment, Teachers' Pensions said:-

- Cohabiting meant living together as husband and wife or civil partners. Mrs S had confirmed that she had been cohabiting since January 2004.
- The limitation period did not begin to run until the plaintiff had discovered the fraud, concealment or mistake, or could, with reasonable diligence, have discovered it. Mrs S had first informed it of her cohabitation in October 2016. Therefore, it did not believe it was time barred from seeking full recovery.
- A change of position defence was unlikely to succeed because of the information it had sent to Mrs S regarding the duration of her pension and the annual reminders of changes it needed to know about.
- Mrs S was not forfeiting a pension; rather, she had ceased to be entitled to it in accordance with the statutory regulations.
- The regulations had been amended with effect from 1 January 2007. Any adult beneficiary's pension payable on the death of a member, who had been in pensionable service on or after 1 January 2007, would now continue for life regardless of the beneficiary's personal circumstances. The change was not retrospective. It applied to members in service who would contribute to the cost of the change.
- The 1997 Regulations allowed for a discretion to be exercised by the Secretary of State. If Mrs S considered that she would suffer hardship in connection with the cessation of her pension or the recovery of the overpayment, she would need to complete and return an enclosed statement of income and expenditure.
- It had raised an urgent enquiry with HMRC in connection with Mrs S' possible entitlement to a GMP, which would be payable. If there was an entitlement to a GMP, this would reduce the amount of the overpayment and would be reinstated with effect from the date Mrs S' pension was ceased.

17. On 8 May 2017, Teachers' Pensions wrote to Mrs S' solicitors saying that HMRC had confirmed that she was entitled to an annual GMP of £2,092.48. It said payment of

this would commence from 28 May 2017 and the arrears had been used to reduce the overpayment. Teachers' Pensions said it now calculated the overpayment to be £55,100.40 (net) and asked that repayment be arranged as soon as possible. It reiterated that Mrs S could contact its finance team if she would find it difficult to repay this sum.

18. In July 2017, Mrs S completed a statement of income and expenditure. This indicated that she had a monthly income amounting to £1,233, including £87 from the TPS. Mrs S' monthly expenditure amounted to £1,226.
19. On 7 August 2017, Mrs S' solicitors wrote to the Department for Education (**DfE**). In addition to the points they had previously made, the solicitors said:-
 - The TPS rule which prevented widows receiving a pension when they cohabited had been amended so that it only applied to older widows. Younger workers were, therefore, free to cohabit or remarry at any time and still receive a widow's pension; whereas, previous generations of widows risked being rendered destitute if they sought to exercise their right to a family life. This was age discrimination which had a disproportionately significant impact on older pensioners and was a breach of the Equality Act 2010. They cited *McLeod and Others v The Lord Chancellor and Secretary of State for Justice and Another* [2017] 029 PBLR (035).
 - A rule which restricted a widow's freedom to live with another person was antiquated and represented a violation of her human rights under Articles 12 and 14 of the European Convention on Human Rights (**ECHR**). They cited the application by Denise Brewster for Judicial Review (Northern Ireland) [2017] UKSC 8. The Supreme Court had decided that, although the right to a pension might not be regarded as a possession, an applicant can argue that s/he has a legitimate expectation of obtaining effective enjoyment of a pension as a property right.
 - Mrs S was married at the date of her husband's death and enjoyed a relevant status for the purposes of Article 14. There was no objective justification for the withdrawal of Mrs S' pension rights.
 - Mrs S was financially dependent on the TPS pension. Her personal arrangements were completely separate from those of her partner and she had little other source of income. She had little means to repay any amount of the alleged overpayment. They enclosed the statement of income and expenditure and requested that her pension be reinstated and the repayment be waived.
 - Correspondence between Teachers' Pensions and HMRC had indicated that Mrs S had not been properly paid the GMP element of her pension. They requested a breakdown of what she had received and what adjustments had been applied by Teachers' Pensions to offset the overpayment.
20. The DfE referred Mrs S' case back to Teachers' Pensions for further consideration. Teachers' Pensions wrote to Mrs S' solicitors, on 25 August 2017, saying:-

- With regard to Regulation E1(3)(c) and (d) of the 1997 Regulations and Mrs S' entitlement to a GMP, it had confirmed her entitlement to payment of the GMP and the subsequent reduction to the overpayment.
 - It was bound by the TPS regulations and, therefore, any HMRC requirements were not applicable. Regulation E30 of the 1997 Regulations clearly stated that an adult beneficiary's pension was not payable during or after any marriage or period of cohabitation outside marriage. Mrs S had informed it, on 14 October 2016, that she had been cohabiting since January 2004. This confirmation was sufficient for it to cease her widow's pension.
 - It had been entirely unaware of Mrs S' cohabitation until the declaration had been returned in 2016. It, therefore, rejected the suggestion that the Limitation Act 1980 applied.
 - It rejected the suggestion that cessation of Mrs S' pension amounted to discrimination or a breach of her human rights. The amendment to the TPS regulations in 2007 had been made with full consideration of relevant overriding legislation and after full consultation with relevant parties. It took account of the cost to the TPS which continued payment would represent and the fact that only members of the TPS from 2007 onwards would be able to contribute to these costs.
 - On the question of hardship, it said its policy was that recovery of any overpayment should seek to avoid hardship, but there was a distinction to be drawn between hardship and inconvenience.
 - It did not consider that the payment of compensation was appropriate because it had not been aware of the change in Mrs S' status. It did not accept that there had been any maladministration because Mrs S had been made aware of the correct position at the time of her husband's death. It would not be reinstating Mrs S' pension because it could not override the TPS regulations.
21. On 1 September 2017, Teachers' Pensions provided Mrs S' solicitors with a breakdown of the overpayment, showing the gross amount and the tax adjustment. It said Mrs S was now only due to receive the GMP element of her widow's pension and that this had been taken into account in calculating the overpayment.
22. On 21 February 2018, Mrs S' solicitors wrote to the DfE. Its submission is summarised as follows:-
- They maintained the position that Mrs S should not have to repay any of the £72,974.21 and that her widow's pension should be reinstated in full with immediate effect.
 - With regard to the start of the limitation period, they were not satisfied that the way in which Teachers' Pensions had informed Mrs S that she should notify it of any cohabitation met the requirements of due diligence.

- Mrs S was not aware that she had any obligation to inform Teachers' Pensions of her change in circumstances because this was not made clear enough in the information provided for her. This fundamentally important information about Mrs S' pension appeared in small print in a generic newsletter which Teachers' Pensions claimed to have sent to all TPS pensioners. Teachers' Pensions could not reasonably expect Mrs S to read the newsletter from cover to cover. It was unreasonable to provide an individual with such important information about their pension in the form of a standard newsletter; particularly when the print was small and could easily be missed by an elderly person with weaker eyesight. It should have been made very clear; for example, by the use of capital letters and/or highlighting.
- They referred to a previous Ombudsman's determination and Supreme Court decisions (uncited), which they considered indicated a systematic problem which Teachers' Pensions had not addressed.
- Mrs S only realised that she was meant to inform Teachers' Pensions of cohabitation when she asked it about a change of address, which was some time after her cohabitation.
- This term only affected older pensioners. Therefore, drawing it to their attention in a way which could easily be processed by an elderly person was vital.
- It was not clear what information Mrs S had received at the start of her widow's pension. Given how important it was, it would expect the information to be repeated and highlighted every year directly to each individual concerned.
- Teachers' Pensions' failure to inform Mrs S of her obligation to notify it about cohabitation meant that the limitation period for recovery began in 2004. Teachers' Pensions was out of time to recover much of the sum it was claiming.
- The six years for recovery should start from the point at which TPO's Office referred Mrs S' case to Teachers' Pensions for a response. As yet, Mrs S' case had not reached TPO's Office.
- Unlike marriage and civil partnership, there was no definition of cohabitation. This led to inconsistencies in the approach taken by Teachers' Pensions. Cohabitation was not an appropriate, proportionate or reasonable measure for Teachers' Pensions to use to determine when to stop paying a pension. For example, would an individual need to declare cohabitation with a sibling? Mrs S disputed that she had been cohabiting because the couple's finances were kept separate and she paid all the costs of running and maintaining her house.
- Teachers' Pensions had failed to respond to the point that the cohabitation rule was discriminatory on the grounds of age; the rules had been changed, from 31 December 2006, so that the widows of members who joined after this date were free to cohabit or remarry at any time without the loss of pension. This clearly had

an adverse effect on older TPS members and represented a form of age discrimination.

- Statistically, the TPS had a significantly higher number of female pensioners who were subject to the rule, which made it discriminatory on the grounds of sex. The approach taken by Teachers' Pensions was not appropriate or proportionate and the rule should be disapplied under the Equality Act 2010. It cited *McCloud*.
- Teachers' Pensions had failed to respond to the point that the rule constituted a violation of Mrs S' human rights; in that it restricted a widow's freedom to live with another person and interfered with her rights to a private and family life. The rule deprived Mrs S of a rightful possession. Following *Brewster* it was clear that a widow's pension constituted a possession under the European Convention on Human Rights. It accepted that Teachers' Pensions was bound by the TPS regulations, but the Human Rights Act 1998 overrode any such legislation. Teachers' Pensions should not be allowed to apply a rule which was incompatible with human rights. It was an overly intrusive power for Teachers' Pensions to have.

23. The DfE responded on 15 March 2018. It said:-

- Teachers' Pensions had a duty to ensure that TPS benefits were correctly awarded and that they remained in payment only while the recipient was entitled to receive them. This was to safeguard public funds. The TPS regulations which applied in Mrs S' case stated that her widow's pension ceased to be payable if she remarried, entered a civil partnership or cohabited.
- Because Teachers' Pensions was not made aware of Mrs S' change in circumstances, her pension remained in payment although she was no longer entitled to receive it. In line with guidance issued by the Treasury², Teachers' Pensions was obliged to recover any overpayment; regardless of how it had occurred.
- It did not consider that Mrs S had a limitation defence because Teachers' Pensions would not have been able to identify the debt accruing until she notified it of her change in circumstances. It had been made clear to Mrs S, in the guidance provided at the time she applied for her pension, that the pension would cease on remarriage or cohabitation. There were prompts to keep Teachers' Pensions informed in subsequent annual newsletters.
- It considered that it was commonly understood that cohabitation meant two individuals living together as though they were husband and wife or civil partners. If Mrs S had been unclear if her circumstances constituted cohabitation, it would have been open to her to confirm this with Teachers' Pensions.

² Treasury Guidance "Managing Public Money" July 2013 with annexes revised as at September 2019 – Annex 4.11

- Prior to 2007, the TPS membership, as represented by the unions, had agreed to fund partner's pensions on the basis that they would cease on remarriage or cohabitation. As part of a package of reforms introduced from 1 January 2007, the membership agreed to changes in TPS funding and the benefits package which included a partner pension for life. This was a TPS improvement which had to be paid for by the active membership going forward and was, therefore, restricted to the beneficiaries of members who had contributed to it. It did not consider that the decision not to extend this improvement to members and beneficiaries who had not contributed towards it and who had no legitimate expectation of receiving it constituted unlawful discrimination.

24. On 30 April 2018, Mrs S wrote to the DfE expressing the view that there were a number of issues raised by her solicitors which had not been addressed. The DfE responded on 23 May 2018. It said:-

- It did not accept that statutory limitation should apply in Mrs S' case or that the definition of cohabitation, applied by the TPS, was unclear. It referred to its previous response.
- It did not accept that the cessation of a spouse's pension on remarriage constituted unlawful discrimination or breached her human rights. It was a longstanding rule, which members and their beneficiaries should have been aware of. It did not stop any partner from remarrying; it simply meant that they would not continue to receive a pension, intended to compensate them for the loss of a partner's financial support, when they had acquired the support of a new partner. Where the pensioner would be put into financial hardship by the loss of the pension, the TPS regulations provided a discretion to allow the pension to continue or resume.
- It did not accept that the partners of members who left service before 2007 had been unfairly discriminated against. The TPS improvement was funded by members active from 2007 onwards; as such, it was reasonable that the improvement should only apply to the beneficiaries of the members who contributed towards it.

25. On 31 July 2018, Teachers' Pensions notified Mrs S that it had suspended action to recover the overpayment pending a decision by the Pensions Ombudsman.

26. Teachers' Pensions has confirmed that Mrs S' monthly GMP is currently £1111.95.

Summary of Mrs S' position

27. Mrs S submits:-

- Having lost her husband in 1999, she was completely unaware of the rule concerning cohabiting and the loss of pension. The issue only came about when she notified Teachers' Pensions about a change of address.
- The details and implications of this rule are hidden in the small print of Teachers' Pensions leaflets and are not sufficiently clear to avoid this issue happening again.
- There was no intention on her part to mislead or hide anything. However, she has now been landed with a very large bill.
- The reason she did not notify Teachers' Pensions of the change in her status was purely an innocent mistake. Teachers' Pensions has made a number of references to not having received notification prior to 2016 and implies there was a deliberate intention to mislead. This was not the case. Teachers' Pensions has implied that, had it been notified earlier, it might have acted differently. This implies that she is being penalised in some way.
- Even when she became aware that she had fallen foul of the TPS regulations, she did not feel that she fell into the category of cohabitee. She had not remarried or entered into a civil partnership. She does not live as man and wife; inasmuch as she is solely responsible for the upkeep of her residence and does not have the financial support of a partner.
- She received no pension at all for a period of seven months. This was partially corrected, following correspondence from her solicitors, when her GMP was reinstated. She has not been repaid any of the monies from the seven months when she received nothing.
- She has had to fund, with the assistance of her family, legal fees relating to the advice she had to seek.
- She has no means of income, other than her State pension. The situation has caused her a great deal of hardship and has significantly affected her standard of living. She has also been extremely worried and stressed about the matter.
- Whilst she does not believe that it was the intention of this rule to restrict her personal/human right to do and live as she pleases, this is the practical impact. The rule has since been amended so that widows who lose their spouse after 2006 are able to retain their pensions in full. This indicates that it was accepted that the rule was wrong and unfair. Widows like her have been penalised simply because of their age.
- Claims for the repayment of an overpayment should be made within six years of the commencement of any cohabitation. Teachers' Pensions are out of time for

recovering the majority of the overpayment. It has not adequately addressed this point.

Summary of Teachers' Pensions' position

28. Teachers' Pensions submits:-

- The policy intention behind Regulations E30 and 94 was that, in general, a widow's pension should cease if the widow entered into a new relationship and, therefore, had the financial support of a new partner. This is in common with provisions in many public sector schemes in the UK.
- At the time of Mr S' death, Mrs S would have been provided with the form needed to apply for her pension by his employer. The employer should also have provided a copy of Leaflet 450, which provides details of the benefits payable to teachers' beneficiaries. It has provided a copy of the leaflet which was available at the time and refers in particular to Section 2.5 "Duration of benefits". This states:
"Spouses pension payable for life unless spouse re-marries or cohabits"
- Mrs S began cohabiting from January 2004, but it has no record of any contact by her at that time. It has a record of Mrs S calling to update her bank details in July 2007, but there is no record of her informing it of her cohabitation at this time. Nor does it have any record of Mrs S informing it of her change in status at any subsequent time.
- Since 2004, all pensioners receive a P60 and a newsletter annually. It has provided copies of the newsletters from 2004 and 2016 (see Appendix 1). It refers to the section headed "Changes we need to know about". This states:
"if we pay you a widow or widower's pension and you remarry or live with another person as husband or wife"
- Since 2012, the wording in the newsletters has stated:
"if you receive a spouse's or civil partner's pension and you re-marry, enter a civil partnership or co-habit"
This clearly applies in Mrs S' situation.
- Mrs S therefore received instructions each year from 2004 onwards to notify it if she was remarried or cohabiting. The importance of the warning in the newsletters should have been clear to anyone reading them, but it has no record of Mrs S ever contacting it regarding this.
- It also provides information on its website which states that a widow's pension is only payable if the widow does not remarry, form a civil partnership or cohabit.
- It was reliant on adult beneficiaries notifying it of changes in their circumstances. However, it became apparent that this was not happening. It therefore decided to

undertake an exercise to check beneficiaries' current circumstances to prevent the accrual of debts where they might have forgotten to notify it of a change.

- HMRC confirmed, in May 2017, that Mrs S was entitled to payment of the GMP. This recommenced from 28 May 2017. Arrears of GMP amounting to £14,003.94 were used to reduce the amount of the overpayment to £55,100.40 (net).
- Mrs S should have been aware, from the information provided to her, that her pension would cease if she cohabited. If she had notified it at the time, her widow's pension would have ceased and the overpayment would have been avoided.
- It appreciates that Mrs S may not have taken this information in at the time of her husband's death. However, the information was provided in the expectation that she would act upon it if her situation changed at a later date.
- Mrs S' widow's pension was due to cease in January 2004 and the pension overpaid from this date must be recovered. It has requested the return of the overpayment because it considers it is legally required to pursue recovery. It does not want Mrs S to suffer excessive financial hardship and has, therefore, asked her to contact it to discuss repayment.

29. Teachers' Pensions made the following further submissions in relation to the Sixth and Seventh Findings:-

Sixth Finding

- There has been a significant departure from previous Determinations, which have consistently found that its approach, of issuing the relevant leaflet and including information in newsletters issued with P60s since 2004, was sufficient to put survivors on notice of the need to notify it about changes of circumstances, such as cohabitation. It has provided a list of previous Determinations which it considers support this position.
- Ignorance of the information contained in Leaflet 450 does not allow an adult survivor to avail themselves of a change of position defence. They are expected to take greater care in reading this leaflet.
- Mrs S has eloquently argued her case which is evidence of her capacity to read the 13 newsletters which were sent to her with her P60s and to understand the consequences, including potential overpayment.
- Whether Mrs S chose to read Leaflet 450 and the newsletters or not, the fact remains that these documents were sent and they contained important information which was not acted upon. Had Mrs S acted on the information, which was sent to her, the overpayment could have been avoided.
- Spending the pension is not a defence against recovery. Payments towards living expenses are payments which may have been incurred anyway. Saving the

overpayment or purchasing an asset is not sufficient to amount to a change of position because the assets could be realised to recoup the funds.

- Undue weight has been placed on contemporaneous indirect evidence of Mrs S' state of knowledge in 2016. The obvious point, which has previously been accepted, is that Mrs S' lack of knowledge about the overpayment was, by her own admission, because she had not read Leaflet 450 or the newsletters.
- The Sixth Finding sets a worrying precedent. Even though Mrs S received documents informing her that her pension would be affected by a change in her circumstances, she is allowed to argue that she was ignorant of the requirement (to notify Teachers' Pensions) despite being sent the information.
- Mrs S completed an income and expenditure questionnaire in July 2017, but did not include any bank statements to validate her financial position. It has not chased this information whilst the case is in dispute, but would request that this is taken into consideration.

Seventh Finding

- At the time Mrs S' pension was stopped in 2016, it had not received any notification from HMRC about the amount of inherited GMP due to her. It identified that there might be an inherited GMP as part of its analysis of her case. Under contracting-out legislation, an inherited GMP is not payable in certain circumstances. The rules regarding inherited GMPs are complex and cohabitation before State Pension Age can affect a person's entitlement; although this did not happen in Mrs S' case.
- It acknowledges that the arrears of GMP for the period December 2016 to June 2017 were off-set against the overpayment. It is currently taking action to amend this position.
- With regard to a breach of Section 91(6) of the Pensions Act 1995, its letter of 8 May 2017 to Mrs S' solicitors confirmed the reduction in the overpayment. The Pensions Act 1995 does not specify what form a certificate should take and it is of the view that its letter could be taken as the certificate. Furthermore, whilst there has been a dispute about the recovery of the overpayment, there has been no dispute about the amount which would require it to approach a competent Court.
- Whilst the Pensions Ombudsman can be regarded as a competent Court, it is unable to approach the Ombudsman until a member has been through the internal dispute resolution procedure (**IDRP**). Had the amount of the overpayment been disputed and it had approached a County Court, the case might have been taken outside the remit of the Pensions Ombudsman. The Pensions Ombudsman may wish to consider allowing disputes about the amount of an overpayment to be considered in advance of IDRPs being invoked.

- It does not consider that the incorrect offset of seven months of inherited GMP amounts to significant non-financial injustice warranting a payment of £500. It took the initiative and investigated the situation with HMRC. It clarified that there was an inherited GMP payable to Mrs S, which it had not previously been advised of.

Conclusions

30. Teachers' Pensions, on behalf of the TPS, is seeking to recover an overpayment of pension which it considers to have arisen because Mrs S ceased to be entitled to receive the pension when she began to cohabit in 2004.
31. At the time of Mrs S' husband's death, Regulation E30(3) provided:

“Unless the Secretary of State determines otherwise in the particular case, and subject always to regulation E1(3)(c) and (d) (guaranteed minimum pension for surviving spouse), an adult pension is not payable during or after any marriage or period of cohabitation outside marriage ...”
32. Regulation E30(3) has since been revoked, but the provision is preserved in Regulation 94(6) of the 2010 Regulations in respect of pensions paid by reference to members who were not in pensionable employment after 31 December 2006. Mrs S' husband ceased to be in pensionable employment in September 1999. On the face of it, so much of Mrs S' pension which does not constitute her GMP should cease “during or after ... [a] period of cohabitation”.
33. There are a number of elements to the arguments put forward by and on behalf of Mrs S. It is the case that, if Mrs S succeeds with one, it may not be necessary for me to consider all. I will, therefore, consider each element in turn as follows:-
 - Mrs S is not cohabiting for the purposes of Regulation 94.
 - Regulation 94 is discriminatory on the grounds of age under the Equality Act 2010.
 - Regulation 94 is indirectly discriminatory on the grounds of sex.
 - Regulation 94 breaches the Human Rights Act 1998 because it interferes with Mrs S' right to a private and family life.
 - Regulation 94 breaches the Human Rights Act 1998 because it interferes with Mrs S' right to the enjoyment of her property rights.
 - Mrs S has a change of position defence against the recovery of the overpayment.
 - Mrs S has a limitation defence against the recovery of the overpayment under the Limitation Act 1980 (**LA80**).
 - The steps taken to recover the overpayments (including the failure to pay Mrs S' GMP for a seven month period) is in breach of Section 91(6) of The Pensions Act

1995 because there was a dispute relating to the right to recover the overpayment.

Is Teachers' Pensions required to stop the pension and recover any overpayments?

34. The starting point in any analysis is that Teachers' Pensions, which is responsible for administering the TPS on behalf of the DfE, is required to pay benefits in accordance with the TPS regulations. That is, except to the extent that the TPS regulations are overridden by the Equality Act 2010 or the Human Rights Act 1998 requirements. Teachers' Pensions is required to cease pension payments if the TPS regulations provide for a pension to cease on cohabitation; subject to the Secretary of State not exercising his or her discretion to disapply the regulation. If any benefits are overpaid, Teachers' Pensions will generally be required to recover the overpayment from the member; subject to any valid defence in law.
35. In exercising any power under the TPS regulations, or the general law, to seek to recover overpayments Teachers' Pensions should have regard to Treasury Guidelines on recovery of overpayments. The Treasury Guidelines indicate that, in principle, public sector organisations should always pursue overpayments; irrespective of how they arise. However, the Treasury Guidelines recognise that, where overpayments are made, there may be defences in law to their recovery; such as change of position and limitation. The Treasury Guidelines also recognise that public authorities should have regard to hardship when considering whether to recover overpayments.
36. Under the particular regulation in question, a pension ceases on, during and after remarriage or cohabitation unless the Secretary of State determines otherwise. I interpret this regulation as giving the Secretary of State discretion to determine, in a particular case, that a pension can be reinstated at any time during or after cessation of the new marriage or cohabitation. I am of the view that the discretion is capable of applying retrospectively; for example, back to 2004 when Mrs S' cohabitation began.

Cohabitation

37. Mrs S' solicitors acknowledged that she had completed the Declaration indicating that she had been cohabiting since 2004. They argued that there was no commonly accepted definition of the term "cohabitation" and that TPS literature did not make the meaning clear to Mrs S. The solicitors sought to argue that Mrs S' circumstances did not amount to cohabitation for pension purposes because she and her partner kept their finances separate and she was solely responsible for the upkeep of her home, which she owned. This argument was based on HMRC's requirements for there to be an element of financial dependence or interdependence in order for an occupational pension scheme to pay a dependant's pension. If this argument is correct, it would mean that Teachers' Pensions should not have ceased Mrs S' pension.
38. I acknowledge that there is no specific definition of the word "cohabiting" in the 2010 Regulations. Nor is there a precise definition of cohabitation, cohabitee or partner in

law³. Regulation 94 refers to “[living] with another person **as if they were husband and wife or civil partners**” (emphasis added). The Declaration sent to Mrs S, in 2016, echoed the wording of Regulation 94 but also used the word “cohabiting”; adding “as Husband & Wife” in brackets after it.

39. In the absence of a specific definition, the words used in pension scheme documents are to be given their ordinary, everyday meanings. I do not find that Teachers’ Pensions are obliged to interpret Regulation 94 as needing financial dependency or interdependency in line with HMRC requirements. Teachers’ Pensions should interpret Regulation 94 by applying the commonly understood meaning of “living together as husband and wife”. Cohabitation is not a new concept and I take the view that the majority of people would now understand it to mean living together as a married couple without having gone through the formal process of getting married.
40. Mrs S seeks to argue that her living arrangements do not constitute cohabitation because she has kept her finances separate from those of her partner and she is responsible for household bills. I note that this argument was developed after Mrs S had been notified that Teachers’ Pensions were of the view that her pension had been overpaid and should have ceased in 2004. When completing the Declaration, Mrs S ticked the box to indicate that she was cohabiting “as Husband & Wife”. In my view, that gives a clear indication of how Mrs S, herself, saw her relationship at that time. The fact that Mrs S and her partner have separate financial arrangements would not be sufficient for me to find that they were not cohabiting. There are, after all, married couples who decide to keep their financial arrangements separate. Such a decision would not alter their status as a married couple.
41. I am aware that the Department for Work and Pensions (**DWP**) may undertake quite detailed assessments of household arrangements when determining entitlement to certain benefits. These assessments can include requiring evidence of the couple’s financial arrangements, but this is not the single defining characteristic of what will be accepted by the DWP as “living together as a married couple”. The DWP guidance acknowledges that there is no single template for a relationship to be seen as akin to that of a married couple. It refers to a relationship which is “not just based on economic dependency but also an emotional relationship”⁴.
42. I am not suggesting that Teachers’ Pensions should have undertaken a similarly detailed analysis of Mrs S’ relationship with her partner before deciding that she was cohabiting. I find that the wording of the Declaration chimes with the general understanding of what is meant by cohabitation and what is intended by the 2010 Regulations. Teachers’ Pensions was, therefore, entitled to rely on Mrs S’ assessment of her relationship.

³ *Jackson & others v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin)

⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/658225/dmgch11.pdf

Age Discrimination

43. Mrs S' solicitors argued that Regulation 94 is in breach of age discrimination requirements under the Equality Act 2010. This is on the grounds that the adult surviving beneficiaries of members who have pensionable service in the TPS on or after 31 December 2006 will receive their pensions for life regardless of their personal circumstances. The cessation of an adult surviving beneficiary's pension on cohabitation applies to pensions payable by reference to pensionable service prior to 1 January 2007. It is, therefore, most likely to affect older beneficiaries.
44. On 1 October 2006, the Government introduced The Employment Equality (Age) Regulations 2006 (SI2006/1031) (the **Age Regulations**) to give effect to the European Council Directive 2000/78/EC. With effect from 1 October 2010, those parts of the Age Regulations which related to pensions were revoked and replaced by the Equality Act 2010.
45. The Age Regulations prohibited age discrimination in relation to pension benefits with effect from 1 December 2006. Regulation 11 of the Age Regulations made age discrimination unlawful "except in relation to rights accrued or benefits payable in respect of periods of pensionable service prior to the coming into force of this Regulation"⁵. Mrs S' pension is payable in respect of her husband's pensionable service, which ceased in 1999; prior to the coming into force of Regulation 11. Therefore, a claim for age discrimination cannot succeed.

Indirect Sex Discrimination

46. Mrs S' solicitors argue that Regulation 94 is indirectly discriminatory on the grounds of sex. This is on the grounds that, statistically, the TPS has a significantly higher number of female pensioners to whom Regulation 94 might apply. The solicitors argued that the approach taken by Teachers' Pensions is not appropriate or proportionate and Regulation 94 should be disapplied under the Equality Act 2010.
47. Section 67 of the Equality Act 2010 provides that, if an occupational pension scheme does not include a sex equality rule, it is to be treated as including one. A sex equality rule is a provision which has the effect of modifying a term which is less favourable to an individual of one sex than to an individual of the opposite sex so that it is not less favourable. A relevant term includes any which affect the way in which members of a scheme are treated, including the effect such a term has on the benefits for dependants of members. Section 67(10) provides that it does not have effect in relation to terms relating to pensionable service prior to 17 May 1990⁶. It would, therefore, not apply to that part of Mrs S' pension which relates to her husband's pensionable service between September 1968 and May 1990.
48. In Mrs S' case, it is necessary to consider the application of Regulation 94 to her pension compared to its application to a male adult surviving beneficiary with the

⁵ This principle applies to the equivalent provision in the Equality Act 2010 by virtue of Article 3 of The Equality Act (Age Exceptions for Pension Schemes) Order 2010 (SI2010/2133).

⁶ The date of the *Barber v Guardian Royal Exchange* [1990] 2 All ER (ECJ) judgment.

same status of cohabitee in respect of the period during which the pension accrued from 17 May 1990 onwards. Male and female adult surviving beneficiaries are treated the same on cohabitation, so there is no direct sex discrimination. The question is then whether Regulation 94 indirectly discriminates against Mrs S.

49. Under Section 19 of the Equality Act 2010, indirect sex discrimination occurs where A applies to B a provision, criterion or practice (**PCP**) which is discriminatory in relation to B's sex. A PCP is discriminatory if:
- A applies, or would apply, it to persons not of the same sex as B;
 - it puts, or would put, persons of B's sex at a particular disadvantage when compared with persons not of the same sex as B;
 - it puts, or would put, B at that disadvantage; and
 - A cannot show it to be a proportionate means of achieving a legitimate aim.
50. Mrs S would have to be able to show that ceasing an adult surviving beneficiary's pension on cohabitation, under Regulation 94, put persons sharing her sex at a particular disadvantage. In addition to the PCP putting, or potentially putting, persons of the same sex as Mrs S at a disadvantage, it must also put, or potentially put, her at a disadvantage. In Mrs S' case, she has been put at a disadvantage; inasmuch as the cessation of her widow's pension has significantly decreased her income.
51. On average, female adult surviving beneficiaries live longer than male adult surviving beneficiaries after the death of their spouse or civil partner. They are more likely to be impacted by Regulation 94 inasmuch as they, potentially, have more time in which to form a new relationship. However, it is also the case that, on average, female adult surviving beneficiaries' pensions will be paid for longer than male adult surviving beneficiaries' pensions. Arguably, a female adult surviving beneficiary who lives long enough to form a new relationship and then ceases to receive a pension is no worse off, and has not been disadvantaged, than a male adult surviving beneficiary who dies without having had time to form a new relationship. I, therefore, do not consider that there has been any indirect sex discrimination.

Breaches of the Human Rights Act 1998

52. Mrs S and her solicitors have argued:-
- Regulation 94 breaches the Human Rights Act 1998 because it interferes with Mrs S' right to a private and family life (Article 8 of the ECHR).
 - Regulation 94 breaches the Human Rights Act 1998 because it interferes with Mrs S' right to the enjoyment of her property rights (Article 14 and Article 1 of the First Protocol of the ECHR).
53. The Human Rights Act 1998 came into force on 2 October 2000. Under the Human Rights Act 1998, public authorities cannot act in a way which is incompatible with the

ECHR, unless they are following statute law which they cannot interpret in such a way as to make it compatible. To the extent that the 2010 Regulations are not compatible with the Human Rights Act 1998, Teachers' Pensions must apply them in such a way as to make them compatible.

54. However, Mrs S' pension is attributable to her husband's pensionable service prior to the date on which the Human Rights Act 1998 came into force.
55. The retrospective effect of the Human Rights Act 1998 was considered recently, in a pensions context, in *Carter v Chief Constable of Essex Police* [2020] 032 PBLR. This case concerned a provision in the Police Pension Scheme under which no widow's pension was payable to a woman who had married a policeman after he had retired. In *Carter*, all the member's pension rights had accrued before the date of commencement of the Human Rights Act 1998.
56. The judge referred to a recent Supreme Court decision⁷, which had considered the related question of whether the Framework Directive 2000/78/EC has retrospective effect. In that case, Lord Kerr had noted that the position under the law in England and Wales had been described as follows:
- “If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of the law ... those who have arranged their affairs ... in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset.”⁸
57. Lord Kerr had observed that the Court of Justice of the European Union (**CJEU**) had developed two principles to establish the temporal application of European Union (**EU**) legislation: the “no retroactivity” principle and the “future effects” principle. He said:
- “... the policy behind the no retroactivity principle is thus similar to that described [above] - the need to ensure 'legal certainty' and to protect the 'legitimate expectations' of those who have relied on the law as it is previously understood. The future effects principle is simply the other side of the same coin. It is a method developed by the CJEU to avoid any retrospective effect and to ensure the immediate prospective application of legislation to ongoing legal relationships.”
58. Lord Kerr noted the principle of “no retroactivity” applied the rule/amendment in question to situations which were permanently fixed prior to it coming into force; whereas the principle of “future effects” applied the rule/amendment to situations which were continuing. With regard to the application of these principles to pensions cases, Lord Kerr observed:

⁷ *Walker v Innospec Ltd* [2017] UKSC 47, [2017] 4 All ER 1004

⁸ Bennion on Statutory Interpretation (6th Ed., 2013), at section 5.12

“The application of these principles presents a challenge when one is dealing with entitlement to an occupational retirement pension. Conventionally, the right to a pension accumulates over decades. During the time that the right is accruing, actuarial assumptions are made based on existing legal conditions, notwithstanding that the pension is payable in the future. Those assumptions are upset when, because of changes in social values, a new equal treatment provision is introduced. It is not immediately easy to identify the point at which entitlement to a pension becomes 'permanently fixed' - whether for example at the date of retirement or when the pension is paid.”

59. In the case before him, which related to the non-payment of a pension to a same sex civil partner, Lord Kerr decided that the point of unequal treatment occurred at the time that the pension fell to be paid. In that case, and in others referred to in the decision, it was possible, if unlikely, that the claimant’s circumstances might change in the interim.
60. In *Carter*, the judge considered a recent decision in the CJEU⁹, which related to non-payment of pensions to part time judges. In that case, the claimant’s service included periods both before and after the coming into force of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The CJEU had concluded:

... it must be noted that it cannot be concluded from the fact that a right to a pension is definitively acquired at the end of a corresponding period of service that the legal situation of the worker must be considered definitive. It should be noted in this respect that it is only subsequently and by taking into account relevant periods of service that the worker can avail himself of that right with a view to payment of his retirement pension ...

Consequently, in a situation in which the accrual of pension entitlement extends over periods both prior to and after the deadline for transposition of Directive 97/81, it should be considered that the calculation of those rights is governed by the provisions of that Directive, including with regard to the periods of service prior to its entry into force.

Such a situation is, in that regard, to be distinguished from the situation ... of the colleagues of the claimant who retired before expiry of the period for transposition of Directive 97/81.”

61. In *Carter*, the judge noted that the right to a widow’s pension had been extinguished many decades before the coming into force of the Human Rights Act 1998; unlike the other cases considered, where there had remained a theoretical possibility of payment of a survivor’s pension or the pension rights were still being accrued. He concluded that the claimant could not rely on the Human Rights Act 1998.

⁹ *Ministry of Justice v O’Brien* (No2) (Case C-432/17) EU:C: 2018-879

62. In Mrs S' case, her right to an adult surviving beneficiary's pension accrued prior to the coming into force of the Human Rights Act 1998. It came into payment in September 1999 and related to her husband's pensionable service between 1968 and 1999. As noted above, the Human Rights Act 1998 came into force on 2 October 2000; that is, after the date on which Mrs S's entitlement to a pension arose. At that point in time, Mrs S became entitled to a spouse's pension; that is, she became entitled to a bundle of rights to future payments, which would continue until her death or, if earlier, her remarriage or cohabitation. On that basis, Mrs S cannot rely on the Human Rights Act 1998 under the "no-retroactivity" and "future effects" principles.
63. I do not consider the fact that the Secretary of State has discretion to reinstate the pension before or after the date the cohabitation ceases affects the application of these principles. The entitlement to the pension was still fixed in 1999, at the date the pension came into payment and before the date of cohabitation in 2004.
64. I, therefore, do not need to express any view on whether the operation of Regulation 94 amounts to an interference with Mrs S' right to a private or family life or property rights.

Defences against recovery

65. Having determined that Regulation 94 cannot be disapplied on the grounds of discrimination or a breach of Mrs S' human rights, I now move to consider if she has any defence against the recovery of the overpayment.
66. In general, monies paid in error can be recovered; even if the cause of the erroneous payment was carelessness on the payer's part. The trustees or managers of a pension scheme can only pay the benefits provided for in the scheme rules or regulations. The bare bones of Teachers' Pensions' case are that Mrs S has received in the region of £55,000 more from the TPS than she is/was entitled to and accordingly this money should be repaid.
67. As recognised in the Treasury Guidelines, there can be circumstances where the recipient of an overpayment may not be required to repay some or all of the monies. These circumstances include where a defence against recovery applies under the general law and/or in some hardship cases. I will now consider whether Mrs S can rely on any defence in law against the recovery of the overpayment.
68. The most common defence in law against recovery of an overpayment is referred to as "change of position"; that is, the recipient has changed her/his position such that it would be unjust or inequitable to require her/him to repay the overpayment either in whole or in part. Lord Goff stated the principle of change of position in *Lipkin Gorman*¹⁰ in very broad terms:

"At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it

¹⁰ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548

would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.”

69. Lord Goff chose not to lay down a series of detailed rules about this defence, because he thought it more appropriate for the Courts to work matters out on a case by case basis. The balance of subsequent case law, however, does not support the view that the defence is purely discretionary¹¹. Earlier in his judgment, Lord Goff said:

“the recovery of money in restitution is not, as a general rule, a matter of discretion for the court ... where recovery is denied, it is denied on the basis of legal principle.”

70. To make out a change of position defence, it has been established that certain conditions must be satisfied. Briefly, the recipient of the overpayment must be able to show that:

- Her/his circumstances have changed detrimentally and irreversibly;
- The change of circumstances was caused by receipt of the overpayment; and
- She/he is not disqualified from relying on the defence; in particular, that she/he has acted in good faith.

71. The most obvious example of a detrimental change of circumstance is the expenditure of money. However, not all expenditure will count for the purposes of a change of position defence. For example, as a general rule, paying off a debt will not be a detrimental change of circumstance because a debt must always be repaid at some point. There is no absolute requirement that the monies have been spent on extraordinary items, such as the purchase of a car. The requirement is for there to have been a causal link between the overpayment and the expenditure. It is, therefore, possible for the defence to succeed when the monies have been used to fund a better lifestyle. The expenditure must, however, be irreversible. Where the monies have been spent on assets which have a re-sale value and a reasonable person could sell the asset without disproportionate expense or difficulty, the defence would only be available to the extent that the re-sale value was less than the initial outlay.

72. In Mrs S’ case, the evidence indicates that the monies she received over the period from 2004 to 2016 were spent on everyday living costs. The Courts have been prepared to find that, where there has been a series of overpayments, a general change of position in the form of increased outgoings is possible¹². There is Court of Appeal authority that a change of position defence is not limited to cases where the monies have been spent on specific identifiable items of expenditure. The Court of

¹¹ See Chapter 27.1 of Goff & Jones, *The Law of Unjust Enrichment* for a detailed review of the case law.

¹² *Philip Collins Ltd v Davis* [2000] 3 All ER 808. A case where two itinerant musicians with a “relaxed and philosophical propensity to overspend their income escaped liability to the extent that increases in their everyday outgoings were referable to their receipts from the claimant”.

Appeal took the view that it may not be right for it to apply too demanding a standard of proof when an honest defendant says he has spent an overpayment on improving his lifestyle but cannot produce too detailed accounting¹³. I find that, on the balance of probabilities, but for the overpayment, Mrs S would not have incurred the cost of her slightly improved lifestyle. In other words, I find that the evidence indicates that Mrs S lives within her means and her day-to-day expenditure is dictated by her income. It follows that, if a change of position defence applies, it will operate as a defence to recovery of all the past overpayments of pension.

73. I find that Mrs S satisfies the first two conditions for a change of position defence to the recovery of the overpayment. It remains for me to consider whether there is any reason why the defence might not be available to her.
74. A change of position defence is not open to an individual who acts in bad faith when changing their position. I should make it clear that bad faith, in this context, is not synonymous with dishonesty¹⁴. It can simply mean that, if the recipient knew or had grounds for believing that a payment had been made in error, but could not be sure, the defence would not be open to her/him. This includes cases where there is a degree of sharp practice, but also a case where the person might suspect that there was something amiss and could have taken simple steps to ascertain the correct position but did not do so¹⁵. In other words, the recipient cannot turn a “Nelsonian” blind eye.
75. It may be helpful, given the supplementary submissions made by Teachers' Pensions on 17 June 2021 in response to my preliminary decision, to set out the “Nelsonian knowledge” test more fully. In *Niru Battery* the test was expressed as follows:
- “...in cases where the payee has grounds for believing that the payment may have been made by mistake, but cannot be sure. In such cases good faith may well dictate that an enquiry be made of the payer. The nature and extent of the enquiry called for will, of course, depend on the circumstances of the case, but I do not think that a person who has, or thinks he has, good reason to believe that the payment was made by mistake will often be found to have acted in good faith if he pays the money away without first making enquiries of the person from whom he received it.”¹⁶

¹³ *National Westminster Bank plc v Somer UK Limited* [2002]

¹⁴ *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2002] EWHC at 135].

¹⁵ *Niru Battery Manufacturing Co v Milestone Trading* [2002] EWHC 142 (Comm) and *Webber v Department for Education (Teachers' Pensions)* [2012] EWHC 4225. Both cited in the second *Webber v Department for Education* case. The comments by Moore-Bick in *Niru Battery* on the issue of dishonesty at first instance were approved by the Court of Appeal. The *Niru Battery* test was also considered in *Abouu-Ramah* [2006] EWCA Civ 1492 at 48-49. See also Goff & Jones, *The Law of Unjust Enrichment*, Chapter 27-41-53) for a general discussion of the caselaw.

¹⁶ *Niru Battery Manufacturing Co and another v Milestone Trading Ltd and others* [2002] EWHC 1425, at paragraph 135

76. In the second *Webber v Teachers' Pensions* case Nugee J as he then was (now Lord Justice Nugee) confirmed (applying the *Niru Battery* test in a pensions context) that:

“If a person appreciates that the payment he is receiving may be an overpayment (or in other words that the payer may be mistaken), and can make a simple enquiry of the payer to check whether this is so but chooses not to do so, I do not see anything wrong in the conclusion that the defence is not open to him. He knows that there is a risk that he may not be entitled to the money, but is willing to take that risk. If it turns out that the payment was indeed an overpayment, it would be inequitable or unconscionable for such a person to deny restitution by relying on a change of position defence.”¹⁷

77. Bad faith does not, however, include acting negligently, so a careless recipient might still invoke a change of position defence¹⁸. It has been confirmed in a later case which considered the test expressed in *Niru Battery* that:

“good faith” does not go so far as to require the making of inquiries which a reasonable person would have realised should be made, but which the defendant did not in fact so realise. Mere negligence is not sufficient to establish bad faith. Where Moore-Bick J [the judge at first instance] referred to the payee having “good reason” to believe (or think), I consider that he was referring to what the payee actually knows or believes ie knowledge of circumstances which give rise to actual suspicion or doubt on the part of the payee. This is borne out by the fact that he was referring to the payee who had “grounds for believing ... but cannot be sure”. If, which I am not sure is the case, Judge Havelock-Allan QC was referring to doubts that would have been caused to the reasonable person but not to the payee himself, then I do not think that this gloss on the *Niru Battery* case is borne out by Moore-Bick J's judgment¹⁹

78. Also, in relation to a change of position defence to an unjust enrichment, it is not the role of a Court, or the Ombudsman, to consider the relative fault of the parties in deciding whether it is fair and equitable to repay the overpayment²⁰. The cases indicate that, if Mrs S was merely careless or negligent and did not have actual knowledge of the possibility of there being an overpayment which she failed to query, so that she does not meet the “Nelsonian knowledge test”, she will still be acting in good faith.

79. It is necessary, therefore, to consider the circumstances in which Mrs S continued to receive her pension. Teachers' Pensions has pointed to Leaflet 450, which it says would have been sent to Mrs S at the time she claimed her pension, and the

¹⁷ *Webber v Department for Education* [2014] EWHC 4240 (Ch) at paragraph 62

¹⁸ As noted in *Abou-Ramah* at [88]. The issue was also discussed in *Armstrong DLW GmbH v Winningham Networks Ltd* [2012] EWHC 10 (Ch); [2013] Ch at [110]. It was also acknowledged in the first and second *Teachers' Pensions v Webber* cases.

¹⁹ *Armstrong DLW GmbH v Winningham Networks Ltd* [2012] EWHC 10 (Ch); [2013] Ch at [110].

²⁰ *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 PC

subsequent annual newsletters. It argues that the information in Leaflet 450 and the newsletters would have alerted Mrs S to the fact that her pension should cease on cohabitation and she should notify them of such an event. Mrs S has said that she was completely unaware that cohabitation would lead to the loss of her pension. She has suggested that the information about cohabitation was hidden in the small print of Teachers' Pensions' leaflet and not made sufficiently clear.

80. The burden of proof is on Mrs S to show that she acted in good faith in continuing to accept her pension after 2004. It is for her to show, on the balance of probabilities, that she was unaware that her pension should cease on cohabitation. I recognise that only Mrs S, and not Teachers' Pensions, is able to provide direct evidence of her state of knowledge of the overpayment or the possibility of the overpayment. I can, nevertheless, have regard to any evidence submitted by Teachers' Pensions as to the information provided to her that her pension would cease on cohabitation. I can form a view as to whether, in the circumstances, Mrs S' evidence is credible; that is, that she did not have actual or Nelsonian knowledge of the overpayments. In considering Mrs S' actual or Nelsonian knowledge, I can also have regard to any contemporaneous evidence of how Mrs S responded to the request for repayment of the overpayment when she was first notified of it.
81. The information relating to cohabitation contained in Leaflet 450 is brief. It simply consists of one line in a table on page 5. Whilst I acknowledge that this is in a section headed "Duration of benefits", I can accept that Mrs S might not have read it at the time of claiming her pension. The death of a spouse can be an extremely stressful time and there is generally quite a lot of administration to be dealt with. I can accept that Mrs S might not have read Leaflet 450 in any detail and that she would have had little reason to return to it at a later date.
82. With regard to the annual newsletters, I find the picture is less certain. The request for Mrs S to notify Teachers' Pensions if she began to cohabit was situated on the front page of the two newsletters provided by Teachers' Pensions. In the case of the 2004 edition, it was the second item under the notification about the pensions increase for that year. In the case of the 2016 edition, it was located under a heading "Important" in bold and large font. The newsletters do not say why Teachers' Pensions wanted to be notified if Mrs S began cohabiting. However, the fact that it was asking to be notified would suggest that such a change in status was likely to have an impact on the pension being paid. It would be sufficient to alert anyone reading the request to the possibility that there might need to be an adjustment to the pension following this change in status; effectively there may have been Nelsonian knowledge. In newsletters I have seen in other cases relating to the TPS the request has been located on the second page. They have included the warning that "Failure to notify Teachers' Pensions of such changes may result in an overpayment of pension which must be recovered". Had Mrs S read the request in the annual newsletter, her failure to contact Teachers' Pensions would amount to turning a blind eye.
83. However, Mrs S is asking me to accept that not once in the 12 years from 2004 to 2016 did she read any of the newsletters sent to her each year with her P60 or, if she

did, she did not understand that she needed to notify Teachers' Pensions of any cohabitation. If that is the case, then, despite the fact that it might be said to be somewhat careless of her to have failed to read these documents, Mrs S would have a change of position defence against the recovery of the overpayment. It is, of course, entirely possible that Mrs S did not read the newsletters or, if she did read them, did not understand the requests for notification. Many pensioners do not read their benefit statements or newsletters. However, Mrs S still needs to satisfy me, on the balance of probabilities, that she did not have actual or Nelsonian knowledge.

84. I consider this to be quite a finely balanced decision. I would observe, however, that I do have some near contemporaneous indirect evidence of Mrs S' state of knowledge in 2016 from the way she responded when first notified of the overpayment on 5 December 2016. Mrs S' immediate response, on 9 December 2016, was that she said she had accepted the pension because she was totally unaware that being with a partner would make any difference to her entitlement. Mrs S asked why the policy had not been made clear in the past.
85. This does support the view that Mrs S was not aware of the regulation in question. In all subsequent email exchanges, she has consistently maintained she had no knowledge of the overpayments. I also have no other reason, on the evidence I have seen, to believe that Mrs S is not a truthful or credible witness who genuinely did not know about the existence of the regulation. She did, after all, complete the Declaration openly disclosing the fact that she had been cohabiting since 2004.
86. I find, on the balance of probabilities, that Mrs S had not read the newsletters sent to her by Teachers' Pensions or had not read them in detail. She was, thus, unaware that she should notify it when she began to cohabit in 2004. She is not barred from relying on the change of position defence, because she meets the good faith test for the purposes of the defence.
87. For the sake of clarity, I would point out that the change of position defence does not require Teachers' Pensions to reinstate Mrs S' pension in full. It only relates to the overpayment of past pension.
88. There are other defences to recovery of an overpayment which might have the effect of requiring Teachers' Pensions to continue to pay Mrs S' pension at the higher rate; namely, estoppel and contract. I do not find that the necessary conditions for these to apply have been established in Mrs S' case.
89. For an estoppel defence to exist, Mrs S would need to establish that there had been an unequivocal representation made to her that her pension would continue at the higher rate. I do not find that such a representation was made to Mrs S.
90. Nor do I find that the necessary elements to form a contract exist; namely, offer, acceptance, consideration and the intention to enter into legal relations.

91. Following the issue of my preliminary decision, Teachers' Pensions, has submitted that the approach I am taking in this case is not consistent with certain of my previous Determinations. In response, I note that:-

- All of my Determinations are very fact-specific and the question of whether an individual is acting in good faith is often a fine judgment call having regard to the surrounding evidence and my views on the credibility of the applicant's submissions.
- I am required to determine any complaint involving an infringement of a legal right or point of law in accordance with established legal principles and, broadly, to take the same approach as a court would in the same circumstances in relation to any directions I issue. My Determinations are appealable on a point of law to the High Court, so an applicant should not end up with a different decision depending on whether the dispute is referred to me or to a court²¹.
- I have reviewed the relevant authorities on the issue of good faith before issuing this decision (the bulk of which I have cited above) and I am satisfied that the test I am applying in relation to the issue of good faith is the correct legal test.
- As noted above, my conclusion on good faith is a finely balanced decision, reached having regard to the surrounding contemporaneous evidence, the documents sent to Mrs S by Teachers' Pensions and my views on Mrs S' credibility.

92. Teachers' Pensions also submitted that the approach to good faith in my preliminary decision sets a "worrying precedent" because it allows a member to argue that they were ignorant of the requirement, despite being sent the information. In response, I note that:-

- I have to apply the correct legal test in the same way as a court, and the case law (cited above) confirms that mere carelessness is not sufficient to demonstrate bad faith.
- I agree that this type of case creates challenges for me as it is the applicant who is best placed to provide evidence of what they did or did not know.
- Teacher's Pensions' submissions are based on the underlying premise that members may not always be truthful and generally read and understand all the detailed pension documentation sent to them. I do not think this is an appropriate starting point to take. Generally, I find applicants are truthful and members often struggle to understand pension matters and may not always scrutinise the fine print of every document they are sent to the same degree that a pensions professional would. I have to form a view on the credibility of the evidence as to

²¹ See *Arjo Wiggins Ltd v Henry Thomas Ralph* [2009] 079 [2009] EWHC 3198 (Ch) at [13]-[15] for a helpful summary of relevant caselaw.

the alleged lack of knowledge, having regard to the surrounding evidence of what the member has been told.

93. It is my understanding that the exercise to check the current circumstances of individuals in receipt of adult beneficiaries' benefits, run by Teachers' Pensions in 2014 (mentioned in paragraph 8 above), was undertaken because Teachers' Pensions had identified that its administrative systems were often not identifying instances of beneficiaries remarrying or cohabiting. It is also my understanding that Teachers' Pensions now require an annual certificate to confirm that a member has not remarried or co-habited²², which should avoid issues of this sort arising in the future.

Limitation

94. On the basis that I find that Mrs S has a change of position defence, I do not need to consider limitation.

Failure to pay Mrs S' Pension and GMP while there was an ongoing dispute

95. Under Section 91 of the Pensions Act 1995, where a person is entitled to a pension under an occupational pension scheme, the pension cannot be charged and no lien or set-off can be exercised in respect of it. Any agreement to effect any of those things is unenforceable. Section 91 provides for exceptions to this general position. These include, under Section 91(1)(f), a charge or lien on or set-off against the pension: "for the purpose of discharging some monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension". However, Section 91(6) provides that: "where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court".
96. I have previously confirmed that, in my view, I am a competent court for this purpose²³. I would also note that in *Burgess v BIC* [2019] 051 PBLR (026) at first instance it was common ground that Section 91(6) was a form of set-off which can apply when an overpayment is recovered by deducting or setting off the overpayment from future payments (paragraphs 164 to 166 of the judgment). The principle of equitable recoupment has no application to a non-trust based statutory scheme such as the TPS. However, to the extent that Teachers' Pensions has the power to seek to recover the money under principles of equitable set off²⁴ or otherwise, I am satisfied that Section 91(6) of the Pensions Act 1995 applies.
97. Teachers' Pensions initially ceased Mrs S' pension in its entirety at the end of December 2016. Having obtained confirmation from HMRC as to Mrs S' entitlement

²² Teachers' Pensions' letter to Mrs S' solicitors 20 April 2017.

²³ TPO factsheet, Recoupment in overpayment cases: the Pensions Ombudsman is a "competent court", April 2019 (see Appendix 2). See also *Mr D v Atkin & Co & BiC UK Pension Scheme Trustees* PO-1918 28 October 2020

²⁴ See *Mr E v Teachers' Pensions (Teachers' Pension Scheme)* PO-29198 30 November 2020 paragraphs 81-85

to a GMP, Teachers' Pensions recommenced payment of the GMP from May 2017. In addition, it reduced the overpayment by £14,003.94 relating to past payments of her GMP. This included the arrears of GMP which it should have paid to Mrs S for the period between December 2016 and June 2017.

98. Section 91 is subject to Section 159 of the Pension Schemes Act 1993 (see Appendix 3). Section 159(1) provides that every assignment of or charge on a GMP shall be void. I acknowledge that Section 159(1) does not specifically refer to offsetting, but I find that, in the circumstances, a charge includes offsetting. Teachers' Pensions was not, therefore, able to deduct any part of the overpayment from Mrs S' GMP, nor could Mrs S agree to such. I find that the offsetting of the unpaid GMP against the overpayment of Mrs S' pension is in breach of Section 159.
99. In relation to the issues with the GMP, it has been pointed out that Teachers' Pensions appeared to be unaware that Mrs S was entitled to a GMP at the time of ceasing her pension. Mrs S' solicitors suggested that Teachers' Pensions had failed to administer her pension correctly.
100. Mrs S' GMP is not a separate or additional pension. It forms part of the pension she was entitled to under the TPS regulations. Put simply, the GMP represents a minimum payment which the TPS undertook to pay in place of a pension which would otherwise have been paid by the State. Mrs S' husband paid lower National Insurance during his membership of the TPS because of this undertaking. Mrs S had been receiving her GMP from the TPS; even though it may not have been separately identified as such before 2017.
101. Following its submissions in response to my preliminary decision, I accept that Teachers' Pensions was not aware of the inherited GMP in the period up to 2016 when Mrs S's pension was stopped (an inherited GMP is not always payable), and it took steps to clarify whether Mrs S was entitled to a GMP with HMRC in 2017, having itself identified the possibility that a GMP might be payable.
102. Once Teachers' Pensions had established that there was a GMP, it reinstated the GMP from June 2017 but offset the arrears of the GMP for the period December 2016 to May 2017 against the other overpayments.
103. I remain of the view that the offsetting of the inherited GMP payments from June 2017 up to the current date was in breach of section 91(6) of the Pensions Act 1995 and also section 159 of the Pension Schemes Act 1993. I note that Teachers' Pensions are taking steps to remedy this issue and to reimburse Mrs S.

Maladministration

104. It remains for me to consider whether there has been any other maladministration on the part of Teachers' Pensions in consequence of which Mrs S has sustained injustice.

105. Mrs S has said that the actions taken by Teachers' Pensions to recover the overpayment have caused her stress and worry. She has also said that the situation has caused her a great deal of hardship and has significantly affected her standard of living.
106. Being notified of an overpayment and being asked to repay it must inevitably result in some stress on the part of the recipient of such a notice. I have no doubt that Mrs S has found the situation very worrying and that she has not found it easy to adjust to her reduced income. However, in and of itself, informing Mrs S that there had been an overpayment or that it would seek recovery does not amount to maladministration on the part of Teachers' Pensions. It was necessary for it to do so.
107. I have considered whether the manner in which Teachers' Pensions went about this unfortunate task amounts to maladministration. I note that it offered Mrs S the option to contact its finance team if she would find repayment difficult from the outset. It has also made it clear that it would be possible for Mrs S to make a hardship claim.
108. In relation to the period where Teachers' Pensions were seeking to identify with HMRC whether there was an inherited GMP, I also do not consider that there was any maladministration in failing to pay the GMP. There was, however, maladministration (comprising a breach of law) in deducting the GMP from the overpayments from the date when it was established there was an inherited GMP.

Directions

109. Within 28 days of the date of my Determination, Teachers' Pensions shall, if and to the extent that this has not already occurred, pay Mrs S the arrears of her GMP for the seven months between December 2016 and June 2017. It shall also pay Mrs S interest on the arrears as provided for under the 2010 Regulations.
110. Teachers' Pensions shall not take any steps to recover the past overpayments of pension in relation to which I have found Mrs S has a change of position defence. It shall write to Mrs S, within 28 days of the date of my Determination, confirming this position for Mrs S.
111. Within 28 days of the date of my Determination, Teachers' Pensions shall pay Mrs S £500 in respect of the significant non-financial injustice she sustained as a consequence of its failure to pay her the arrears of GMP, which she was entitled to once the existence of the GMP was established.

Anthony Arter
Pensions Ombudsman

19 August 2021

Appendix 1

2004 Newsletter

“Changes we need to know about

- Address – Bank/Building Society Change – Marital Status – Name
- If you are re-employed ...
- If we pay you a widow or widower’s pension and you remarry or live with another person as husband and wife
- If we pay your children a pension ...”

2016 Newsletter

“Important:

To ensure the correct pension is paid to you, it’s vital that we have your most up to date information on our records.

Please tell us:

- If your [*sic*] remarry, enter a civil partnership or co-habit and you are in receipt of a spouse’s ... pension, provided by a person who retired or ceased pensionable service before 1 January 2007 ...”

Statement of Income and Expenditure

In July 2017, Mrs S completed a statement of income and expenditure. This indicated that she had a monthly income amounting to £1,233, including £87 from the Scheme.

In answer to the question, “Are you: Married, Single, Cohabiting”, Mrs S circled “Single”.

Mrs S said she owned her own property, which she valued at £365,000. She said she had £1,035 in a bank account and £4,000 in a capital investment bond.

Mrs S’ monthly expenditure amounted to £1,226.

Breakdown of overpayment

Tax Year	Gross overpayment	Tax adjustment
2003/04	£713.66 (£1,016.66*)	£157.08
2004/05	£4,424.91 (£6,264.29)	£973.50
2005/06	£4,595.12 (£6,458.33)	£1,010.90
2006/07	£4,748.41 (£6,633.97)	£1,044.56
2007/08	£4,960.51 (£6,871.57)	£989.68
2008/09	£5,203.50 (£7,140.47)	£1,040.60

PO-23848

2009/10	£5,532.58 (£7,496.64)	£1,106.40
2010/11	£5,539.68 (£7,504.32)	£1,108.00
2011/12	£5,737.21 (£7,728.75)	£1,147.40
2012/13	£6,107.14 (£8,127.34)	£1,221.40
2013/14	£6,271.28 (£8,313.47)	£1,254.20
2014/15	£6,468.42 (£8,537.49)	£1,293.60
2015/16	£6,561.34 (£8,643.20)	£1,312.40
2016/17	£2,240.58 (£4,322.70)	£257.20
	£69,104.34	£13,916.92

Total (£55,187.42, less £87.02 April 2017 pension payment) £55,100.40

*The figure in brackets is the initial amount requested by Teachers' Pensions and includes the GMP.

Appendix 2

Recoupment in overpayment cases: the Pensions Ombudsman is a 'competent court'

112. The following is an extract from TPO's factsheet sets out TPO's view in response to Mr Justice Arnold's comments, in *Burgess v BIC UK Ltd* [2018] EWHC 785, that the Pensions Ombudsman is not a 'competent court' for the purpose of section 91(6) of the Pensions Act 1995:

“Background

Where the trustees of an occupational pension scheme have mistakenly overpaid benefits, they may be entitled to recover the overpayment by off-setting against future benefit payments, using the equitable 'self-help' remedy of recoupment.

But, where there is a dispute regarding the amount to be repaid, the set-off cannot be exercised, under section 91(6) of the Pensions Act 1995 (PA 1995), unless the obligation to repay has become enforceable under an order of a 'competent court' or in consequence of an award of an arbitrator.

In the case of *Burgess v BIC UK Ltd* [2018] EWHC 785, Mr Justice Arnold suggested:

- i) a Determination made by the Pensions Ombudsman was not an order of a 'competent court', because the Pensions Ombudsman is not a court; however
- ii) an order of the county court enforcing any Determination of the Pensions Ombudsman, or any direction made by the Pensions Ombudsman in a Determination, pursuant to section 151(5) of the Pension Schemes Act 1993 (“PSA 1993”) would be an order of a 'competent court'.

If this were so, the consequence would be that a direction by the Pensions Ombudsman permitting trustees to recover overpaid benefits by offsetting them against future benefit payments would be of no practical use to the trustees, unless they obtained an order from the county court in effect to 'recognise' that direction.

Our position

We regard Mr Justice Arnold's comments as obiter. That is, he was not required to decide whether the Pensions Ombudsman is a 'competent court' for the purposes of section 91(6) of the PA 1995 in view of his conclusion on the facts of the case before him. He merely gave a provisional view on the matter, which did not form part of his judgment on the issues before him. April 2019.

The court did not have the benefit of hearing full legal arguments on the issue, including from the Pensions Ombudsman himself, who was not a party in the appeal.

The following is a non-exhaustive list of reasons why the Pensions Ombudsman considers he is a 'competent court':

A Pensions Ombudsman Determination brings a dispute to an end

- The Pensions Ombudsman has jurisdiction to investigate complaints or disputes about overpayments under section 146 and determine them in accordance with section 151 of the PSA 1993.
- The Determination by the Pensions Ombudsman of the amount of the overpayment that can be recovered concludes the dispute, including also for the purposes of section 91(6) of the PA 1995.
- This is because under section 151(3) of the PSA 1993, the Determination by the Pensions Ombudsman of a complaint or dispute and any direction given by him is final and binding, subject only to an appeal on a point of law to the High Court.
- The Pensions Ombudsman is judicial, and Determinations are orders or judgments.
- There is established judicial authority, *Peach Grey & Co. v Sommers* [1995] I.C.R. 549, that tribunals with the characteristics of a court of law are properly to be regarded as courts. The Pensions Ombudsman is such a tribunal.
- The Pensions Ombudsman is a tribunal under the auspices of the Tribunals and Inquiries Act 1992 in respect of its functions under or by virtue of section 146(1)(c) and (d) of the PSA 1993 (disputes of fact or law). It is also of note that section 91(6) of the PA 1995 applies not just to an order of a competent court, but also to an award of an arbitrator, or, in Scotland, a sheriff-appointed arbiter.
- Under Rule 52.1(3)(c) of the Civil Procedure Rules, a 'lower court' is defined as 'the court, tribunal or other person or body from whose decision an appeal is brought'. Hence, the Pensions Ombudsman is a lower court for the purposes of the Civil Procedure Rules.
- The Pensions Ombudsman must decide disputes in accordance with established legal principles and, apart from in relation to his pure maladministration jurisdiction, cannot direct remedial steps to be taken that are not steps that a court of law could properly have directed to be taken.

- The Pensions Ombudsman may refer questions of law to the High Court or, in Scotland, the Court of Session: section 150(7) of the PSA 1993. April 2019 3
- Under section 150(4) of the PSA 1993, the Pensions Ombudsman may certify an offence of contempt of court to the county or sheriff court if any person obstructs the Ombudsman in the performance of his functions or is guilty of any act or omission in relation to his investigation.
- The Pensions Ombudsman's final and binding Determinations or directions cannot be overturned except by appeal on a point of law to the High Court or, in Scotland, the Court of Session: section 151(4) of the PSA 1993.

Pensions Ombudsman Determinations are enforceable

- The county court recognises the Determination for enforcement but cannot re-determine or duplicate a Determination or direction because the substance of the matter has already been heard by the Pensions Ombudsman under s.151(1) & (2) and is final s.151(3) PSA 1993.
- The Pensions Ombudsman's Determinations or directions are enforceable in the county court, section 151(5) of the PSA 1993, as if they were a judgment or order of that court. In Scotland, similarly, but termed as an extract registered decree arbitral bearing warrant for execution issued by the sheriff court. The statutory requirement under s91(6) PA 1995 is not that enforcement proceedings are brought. In practice, it seems unlikely that enforcement measures would be necessary or relevant, as recoupment is a self-help remedy for trustees.”

Appendix 3

Section 159 of the Pension Schemes Act 1993

“159 Inalienability of guaranteed minimum pensions

(1) Where

- (a) a person is entitled or prospectively entitled to a guaranteed minimum pension under an occupational pension scheme;
- (b) his entitlement is in respect of his or another person’s entitlement which was contracted out by reference to that scheme then:
 - (i) every assignment of or charge on that pension; and
 - (ii) every agreement to assign or charge that pension,shall be void.”