

## Ombudsman's Determination

Applicant	Mrs Y
Scheme	Teachers' Pension Scheme (TPS)
Respondents	Teachers' Pensions

## Outcome

1. I do not uphold Mrs Y's complaint and no further action is required by Teachers' Pensions

## Complaint summary

2. Mrs Y has complained that Teachers' Pensions is seeking to recover an overpayment of her widow's pension arising as a result of her co-habitation.

## Background information, including submissions from the parties

### Background

3. Mrs Y's husband was a member of the TPS until he retired on the grounds of ill health in August 1986. He died in January 2011. Following a period of short-term benefit, Mrs Y began receiving a long-term widow's pension from April 2011. In August 2014, Mrs Y began co-habiting.
4. The relevant regulations are The Teachers' Pension Scheme Regulations 2010 (SI2010/990) (as amended). As at January 2011, Regulation 94 provided:

"Adult pensions

- (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, ...

(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; ..."

5. In June 2016, Teachers' Pensions wrote to Mrs Y enclosing a "Dependant's Declaration Form". In its letter, Teachers' Pensions said it was aware that members and dependants sometimes forgot to advise it that their circumstances had changed. It acknowledged that asking for confirmation of Mrs Y's circumstances could be upsetting, but it was important for it to check her continuing entitlement to a pension. Teachers' Pensions asked Mrs Y to complete the enclosed form. Mrs Y did so on 22 June 2016. She indicated that she had begun co-habiting in August 2014.
6. On 18 August 2016, Teachers' Pensions wrote to Mrs Y notifying her that her widow's pension should have ceased when she began co-habiting. It said an overpayment of £4,633.85 (net) had arisen. Teachers' Pensions said it was obliged to seek recovery of any money incorrectly paid out of public funds; whatever the reason for the overpayment. It asked Mrs Y to arrange to repay the overpayment. It also said, if she would find it difficult to repay the overpayment or would like to discuss it further, she could contact its finance team.
7. Mrs Y unsuccessfully appealed to both Teachers' Pensions and the Department for Education (**DfE**). In its response to Mrs Y, the DfE said partner pensions under the TPS were funded on the basis of an estimation of what it would cost to guarantee the provisions set out in the regulations for the participating membership. It said, when partner pensions were introduced in 1972, the membership had been offered the option of partner pension cover for life but had chosen not to fund for this. The membership at that time paid only the contributions estimated as necessary to allow

partners to receive pensions until they remarried, entered a civil partnership or co-habited.

8. The DfE explained that the TPS Regulations had changed in January 2007, with the agreement of the membership, to provide partner pensions for life. This change applied to the beneficiaries of members who were in service after January 2007 and, therefore, contributing to the funding of the change. The DfE said the cost of applying the change retrospectively would have had to have been met by either the Treasury or the current membership. It said the decision not to apply the change retrospectively was taken on the grounds of cost.

### **TPS literature**

9. In 2011, Mrs Y was sent a form to complete to claim her widow's pension. She was sent a booklet entitled "Survivor and death benefits" (the **Booklet**) at the same time. Under the heading "Long-term pensions", the Booklet said:

"This pension is payable for life provided you have pensionable employment on or after 1 January 2007. If this is not the case the pension will cease if the recipient re-marries, enters into a civil partnership or co-habits."

10. Teachers' Pensions also sends out annual newsletters to individuals in receipt of a pension with their P60. These contain a section which asks that Teachers' Pensions be informed of certain changes. The 2011 newsletter said, if the individual received a pension by virtue of being a dependant of a deceased member, Teachers' Pensions should be told if they entered into "a new marriage or partnership". The 2012 newsletter and subsequent editions contained a section headed "Keep us up to date" or "Important" which asked that recipients of spouses' pensions notify Teachers' Pensions if they: "re-marry, enter a civil partnership or co-habit".

### **Mrs Y's position**

11. Mrs Y submits:-

- She remains a widow and receives no financial help from the person with whom she lives; nor does she expect to at any time.
- She was told that the TPS could not support widows in her position, but her husband could still be alive and in receipt of his full pension.
- If she lived with a sibling or a friend, her pension would still be paid, but there was no space for this on the Dependant's Declaration Form.
- The TPS regulations changed in 2007 so that widows from that date on will receive a life pension due to higher payments. The situation is recognised but not fully paid to all.
- The situation is discriminatory.

- She has always been aware of and understood the TPS regulations regarding widows' pensions. However, she feels strongly that the regulations need updating.
  - The number of those in her position will gradually diminish but, in the meantime, they should not be discriminated against.
12. Mrs Y provided a copy of a document, "A Guide to Widows', Children's and Adult Dependants' Benefits", which is dated April 1973. She explained that she and her husband had married in 1970 and that this document would have been relevant at the time her husband was paying into the TPS. Mrs Y said the phrase "civil partnership or cohabiting" would have been added at a later date. She asked if Teachers Pensions had any evidence that her husband had accepted these new terms.
13. Mrs Y says she finds it disappointing that the TPS regulations could be changed in this way leaving widows like herself without a benefit and ignoring the wording in previous guidance. She also queries what exactly Teachers' Pensions means by co-habiting.

#### **Teachers' Pensions' position**

14. Teachers' Pensions submits:-

- Mrs Y received literature at the time she applied for her widow's pension which explained that the pension would cease if she remarried, entered a civil partnership or co-habited.
- It has no record of Mrs Y contacting it in 2014, when she began to co-habit.
- Information was also provided in the annual newsletters and on its website.
- Mrs Y should have been aware, from the information provided in 2011, that her widow's pension would cease if she co-habited. It appreciates that Mrs Y may not have taken this information in at the time, but it was provided in the expectation that she would act on it if her situation changed.
- Mrs Y should also have been aware of the need to notify it of a change in her situation from the information provided to her over the years since.
- If Mrs Y had contacted it in 2014, the overpayment could have been avoided.
- It is legally required to pursue recovery of the overpayment. However, it would not wish Mrs Y to suffer any financial hardship and she has been urged to contact it to discuss repayment. It will consider the possibility of the overpayment being repaid over the same period over which it accrued; that is, 22 months.

## Adjudicator's Opinion

15. Mrs Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by Teachers' Pensions. The Adjudicator's findings are summarised below:-
- Mrs Y's husband left pensionable service in 1986. Therefore, he fell within paragraph (5) of Regulation 94 (see paragraph 7 above). Consequently, Mrs Y's pension "ceases to be payable if [she] marries, forms a civil partnership, or lives with another person as if they were husband and wife or civil partners". Mrs Y's pension should have ceased when she began co-habiting in 2014.
  - Teachers' Pensions was not aware that Mrs Y was co-habiting until she completed the Dependant's Declaration Form in 2016. Unless and until Mrs Y informed Teachers' Pensions of the change in her circumstances, it could not know that she should no longer be receiving her widow's pension. As a result, it continued to pay Mrs Y's pension and an overpayment of £4,633.85 had arisen. Teachers' Pensions was now seeking recovery of this amount.
  - The starting point when an overpayment had occurred was that monies paid in error could be recovered. However, there were circumstances in which the recipient could not be required to repay some or all of the overpayment. This was where one of the defences against recovery applied. The common defences against recovery were: change of position; estoppel by representation; and estoppel by convention. The Adjudicator considered whether any of these arose in Mrs Y's case.
  - The most common defence against recovery of an overpayment was referred to as "change of position"; that is, the recipient had changed her/his position such that it would be unjust to require her/him to repay the overpayment either in whole or in part. To make out a change of position defence certain conditions had to be satisfied. Broadly, the recipient had to be able to show, on the balance of probabilities, that:-
    - the money had been received in good faith;
    - it had been spent on something which s/he would not otherwise have bought;
    - the expenditure was irreversible; and
    - her/his circumstances had changed detrimentally.
  - If all of these elements were satisfied the Ombudsman may direct that some or all of the overpayment may not be recovered from the recipient.
  - In order to meet the requirement that the money had been received in 'good faith', Mrs Y would have to be able to show that she was not and could not have been aware of the error. Mrs Y, herself, acknowledged that she has

always been aware of and understood the conditions under which she was entitled to receive her widow's pension. In the Adjudicator's view, given the amount of information which had been made available to Mrs Y, on more than one occasion, it would be difficult to find that she was not and could not have been aware that her widow's pension should have ceased. At the very least, there was sufficient information available to Mrs Y for her to have been alerted to the need to make enquiries.

- This was not to say that Mrs Y had acted dishonestly in any way. It was simply the case that there was sufficient information made available for her such that she should have been aware of the effect of co-habitation. As a result, it was the Adjudicator's view that a change of position defence could not be made out in Mrs Y's case.
- The estoppel defences arise if there has been:-
  - an incorrect statement of entitlement; or
  - an incorrect assumption of facts or law.
- The effect of an estoppel was that the party which had made the incorrect payment would have to comply with the incorrect information or assumption; that is, they would be estopped from 'going back' on the overpayment.
- For an estoppel by representation defence to exist, there would have to have been an unequivocal representation made to Mrs Y that she would continue to receive her widow's pension after she began to cohabit. There was no evidence of such a statement being made and, indeed, the literature provided for Mrs Y made it clear that this was not the case. In the Adjudicator's view, it was not possible to find estoppel by representation. Nor did she consider that it would be possible to find any assumption of facts or law which would provide an estoppel by convention defence.
- The Adjudicator also considered whether Mrs Y's case was affected by the Limitation Act 1980 (the **Limitation Act**). This set out the periods within which a party may commence legal proceedings; such as the recovery of an overpayment. If a limitation period had expired, the claim would be "statute-barred" and it would no longer be possible for a claimant to effect recovery.
- Overpayment cases were considered to fall within Section 5 of the Limitation Act and the limitation period was six years from "the cause of action". In Mrs Y's case, this was the date on which she began to co-habit. On that basis, Teachers' Pensions would have until August 2020 in which to commence action to recover the overpayment. In fact, the Limitation Act provided for this period to be extended in certain circumstances so that it would begin to run from the date on which Teachers' Pensions became aware of the error; or could, with reasonable diligence, have become aware of it. In the Adjudicator's view, Teachers' Pensions could not have been aware that Mrs Y had begun

co-habiting until she notified it of this in June 2016. On that basis, Teachers' Pensions would have until June 2022.

- The High Court<sup>1</sup> had held that the applicable cut-off date for the purposes of the Limitation Act was the receipt by The Pensions Ombudsman (TPO) of the claimant's response to a complaint. TPO had received Teachers' Pensions' response to Mrs Y's complaint on 28 August 2018. This was well within the limitation period. Teachers' Pensions were able to recover the whole overpayment from Mrs Y.
- The Adjudicator noted that Mrs Y had suggested that the TPS Regulations discriminated against individuals in her position. She had pointed out that spouses who were in receipt of pensions relating to members who were in pensionable employment after 31 December 2006 would be paid for life regardless of subsequent co-habitation.
- It was not clear on what basis Mrs Y considered the TPS Regulations were discriminatory. There were a number of "protected characteristics" under the Equality Act 2010 (the **Equality Act**), including age, marriage and sex. These seemed to be the most likely grounds on which to argue discrimination in the circumstances.
- Direct discrimination arose if a person (A) treated another person (B) less favourably because of a protected characteristic than s/he treated others. Indirect discrimination might arise if A applied a "provision, criterion or practice" to B which was discriminatory in relation to a protected characteristic. This included any provision, criterion or practice which put B at a disadvantage compared with persons who do not share the protected characteristic. A might, however, be able to show that the provision, criterion or practice was a proportionate means of achieving a legitimate aim.
- Under Section 61 of the Equality Act, all occupational pension schemes were deemed to include a non-discrimination rule.
- In order to make her case for there being discrimination, Mrs Y needed to be able to show that she had been treated less favourably because of a protected characteristic than another; a comparator. There "must be no material difference between the circumstances relating to each case"<sup>2</sup>. Mrs Y's chosen comparator was a recipient of a widow's pension relating to a member in service after January 2007.
- In the Adjudicator's view, the necessary elements to establish direct discrimination under the Equality Act were not present. Mrs Y was not being treated differently because of her age, marital status or sex. She was treated

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<sup>1</sup> *Webber v Department for Education* [2016] EWHC 2519 (Ch)

<sup>2</sup> Section 23



differently because her husband was not in pensionable service under the TPS after January 2007.

- Indirect discrimination could arise as the result of the application of a provision, criterion or practice which put Mrs Y at a disadvantage when compared with those who did not share a protected characteristic. The Adjudicator acknowledged that the application of Regulation 94(5) was likely to affect older partners more than younger partners because it related to service in TPS before 2007. However, it was possible to justify indirect discrimination if it was a proportionate means of achieving a legitimate aim.
- The Adjudicator noted that the DfE had explained to Mrs Y that it had taken the decision not to make the 2007 change retrospective on the grounds of cost. It had explained that the additional funding required would have had to have come from the Treasury or the current membership. It had also explained that the option to provide partner pensions for life had been put to the membership in 1972 and had not been taken up. The membership at the time had, therefore, contributed on the basis that partner pensions were payable only until the partner remarried, entered a civil partnership or co-habited.
- It would be for the DfE to establish that the decision not to make the change retrospective was a proportionate means of achieving a legitimate aim. The first step would be to establish whether avoiding the burden of cost falling on the current membership and/or the Treasury was a legitimate aim. In the Adjudicator's view, there was a good chance that this would succeed. The next question would be whether the decision not to make the change retrospective was a proportionate means of achieving this. Given that the additional cost of making the change retrospective would mostly affect members who would not benefit from doing so, she thought this too seemed likely to succeed.

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

### **Ombudsman's decision**

17. Regulation 94 is quite clear that Mrs Y's pension ceases to be payable if she lives with another person as if they were husband and wife or civil partners. I note that Mrs Y has queried what Teachers' Pensions means by the term co-habits. I acknowledge that Regulation 94 does not use the term co-habiting. There is no specific legal definition of what amounts to cohabitation. However, it is generally accepted that the term refers to a couple who are not married or in a civil partnership but live together as if they were. I find that the use of the term co-habiting by Teachers' Pensions is an acceptable paraphrasing of Regulation 94.



18. Mrs Y has previously stated that she has always been aware of and understood the conditions under which she was entitled to receive her widow's pension. The information provided for her and her late husband indicated that a widow's pension would cease on re-marriage, civil partnership or co-habitation. There was sufficient information available to Mrs Y to alert her to the fact that her pension should cease when she began to co-habit. As explained by my Adjudicator, this means that the change of position defence is not available to Mrs Y.
19. I also find that Teachers' Pensions are not estopped from ceasing Mrs Y's pension. There was no unequivocal representation made to Mrs Y that she could continue to receive her pension in the circumstances. Nor can it be said that the parties proceeded on an assumption that she could. Teachers' Pensions continued to pay Mrs Y's pension because it had not been notified that she had begun co-habiting.
20. I acknowledge that the information provided in 1973 did not refer to civil partnership or co-habitation. Civil partnerships did not exist at that time and co-habitation was less common. However, both types of relationship are now an accepted part of the social background to the Scheme. It is unsurprising that the TPS Regulations have evolved over time to reflect this. Although Mrs Y feels that the changes are not altogether fair for a person in her position, they do preserve the general intention, at the time that Mrs Y's late husband was a contributing member, that a spouse's pension should cease in the event that the recipient enters into another 'marriage-like' relationship. These changes were implemented on a Scheme-wide basis and did not require individual acceptance by the members.
21. The restrictions on recovery imposed by the Limitation Act do not come into play because Teachers' Pensions is well within the time limits for taking action; even without the extension provided for in Section 32.
22. Mrs Y has pointed out that the position is different for the spouses of members who were in pensionable employment after 31 December 2006. She has suggested that the TPS Regulations discriminate against those in her position.
23. Under Section 61 of the Equality Act, all occupational pension schemes are deemed to include a non-discrimination rule. However, Article 3 of The Equality Act (Age Exceptions for Pension Schemes) Order 2010 (SI2010/2133) (as amended) provides:

"It is not a breach of the non-discrimination rule for the employer, or the trustees or managers of a scheme, to maintain or use in relation to the scheme,

  - (a) ...; or
  - (b) rules, practices, actions or decisions as they relate to rights accrued, or benefits payable, in respect of periods of pensionable service prior to 1st December 2006 that would breach the non-discrimination rule but for this paragraph."

PO-23903

24. Mrs Y's pension is payable in respect of pensionable service undertaken by her late husband prior to 1 December 2006. Therefore, the application of Regulation 94(5) and (6) would fall within the exception provided for in Article 3.
25. In any event, since Mrs Y's late husband's service in the TPS all pre-dates 1 December 2006, the implied non-discrimination rule would not apply. It was not introduced<sup>3</sup> until after Mrs Y's late husband has ceased to be in pensionable employment.
26. I find that Teachers' Pensions has correctly applied Regulation 94 and I do not uphold Mrs Y's complaint.

**Anthony Arter**

Pensions Ombudsman  
29 January 2020

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<sup>3</sup> The Employment Equality (Age) Regulations 2006 (SI2006/1030)