

Ombudsman's Determination

Applicant	Mrs R
Scheme	Teachers' Pension Scheme (the Scheme)
Respondents	Teachers' Pensions, North Yorkshire County Council (NYCC)

Outcome

1. Mrs R's complaint against Teachers' Pensions and NYCC is partly upheld. To put matters right (for the part that is upheld) Teachers' Pensions and NYCC shall pay £1,000 to Mrs R, the cost to be met equally by NYCC and Teachers' Pensions.

Complaint summary

2. Mrs R's complaint concerns an overpayment of pension amounting to £3,078.94.

Background information, including submissions from the parties

3. From September 2008 to January 2017, Mrs R was employed as a part time tutor by NYCC on zero-hour contracts.
4. In September 2016, Mrs R decided to retire due to a lack of available work.
5. On 10 January 2017, NYCC received a partially completed retirement application form from Mrs R. NYCC returned the retirement application form to Mrs R for full completion.
6. Mrs R contacted Teachers' Pensions on 25 January 2017 to ask for information on commuting her pension into a lump sum.
7. On 26 January 2017, Teachers' Pensions wrote to Mrs R with information and forms about her benefits, trivial commutation and small pots lump sums.
8. NYCC received the fully completed retirement application form from Mrs R on 30 January 2017.
9. On 1 February 2017, NYCC sent Mrs R's retirement application form to Teachers' Pensions. This included Mrs R's recent service history. At the same time, NYCC received a request from Mrs R to update her service record for the period from

January 2016 to March 2016. This led NYCC to identify that a service history update was required for Mrs R's records from April 2015 to December 2016.

10. NYCC sent details of the update to Teachers' Pensions on 2 February 2017.
11. On 9 February 2017, Mrs R signed the declaration to convert her pension into a small pots lump sum and returned it to Teachers' Pensions.
12. On 28 February 2017, Teachers' Pensions raised a query with NYCC regarding possible duplicated service on Mrs R's records for the period from September 2009 to March 2011, and a salary query for April 2015.
13. Mrs R called Teachers' Pensions on 6 March 2017, asking for an update on her retirement benefits application.
14. In a telephone call to Mrs R on 7 March 2017, Teachers' Pensions confirmed that £5,484.23 would be paid to her as a result of her application. Teachers' Pensions also wrote to Mrs R on the same day, confirming the amount in writing.
15. Teachers' Pensions made the payment of £5,484.23 to Mrs R's bank account on 10 March 2017. On the same day, NYCC replied to Teachers' Pensions confirming a period of duplicate service should be removed from Mrs R's records and providing salary details for April 2015. Teachers' Pensions did not take any immediate action to contact Mrs R about this.
16. On 11 April 2018, Teachers' Pensions wrote to Mrs R to inform her that her benefits had been overpaid by £3,139.08. Teachers' Pensions said that NYCC had notified it that her service for September 2009 to March 2011 had been duplicated. This meant that her total pensionable service had changed from 319 days to 141 days. Teachers' Pensions said it had to recover the overpayment and asked Mrs R to arrange for repayment of the outstanding amount.
17. Mrs R complained to Teachers' Pensions and NYCC about the overpayment of her benefits.
18. In its response to Mrs R's complaint under the Scheme's Internal Dispute Resolution Procedure (**IDRP**), Teachers' Pensions did not uphold the complaint. Teachers' Pensions said that, on receipt of the retirement application from Mrs R, it asked NYCC to confirm details of her pensionable service. Teachers' Pensions said that it is standard procedure to do this at retirement as, due to the large number of members, Teachers' Pensions cannot do so at the original point of receiving service data. Teachers' Pensions explained that NYCC's review revealed that duplicate service details had been submitted for the period from September 2009 to March 2011. This meant that incorrect benefits had been calculated and paid to Mrs R, resulting in an overpayment of £3,139.08. A further review by Teachers' Pensions showed that its previous calculations were incorrect, and the amount of the overpayment was amended to £3,078.94. Teachers' Pensions apologised for the delay in informing her

about the overpayment until 11 April 2018 when it wrote to her. It also offered an award of £100 in respect of the calculation error and difficulties caused to her.

19. Teachers' Pensions' decision was upheld by the Department for Education (**DfE**). DfE encouraged Mrs R to liaise with Teachers' Pensions regarding repayment.
20. On 12 October 2018, NYCC wrote to Mrs R in response to her complaint. NYCC admitted that administrative mistakes had been made in recording her service. It said that it administered about 8,000 member records and was unable to carry out a full service history review on every member of the Scheme on an ongoing basis. However, Teachers' Pensions carries out a full detailed analysis at the point of retirement. NYCC confirmed that it had received a query from Teachers' Pensions on 28 February 2017 questioning a period of duplicate service and her salary of April 2015. NYCC had replied to Teachers' Pensions on 10 March 2017. NYCC was satisfied that the timeline showed that Teachers' Pensions had paid her benefits although there was an outstanding discrepancy. NYCC said that this was an issue for Mrs R to raise with Teachers' Pensions. NYCC said that it had identified a further error in Mrs R's records for February 2016 but that had been corrected. NYCC apologised for the historical mistakes and said that its processes had now been improved to minimise the likelihood of similar situations.
21. Mrs R says that she decided to retire in September 2016 due to a lack of any work hours, but she may not have retired when she did if she had been aware of the impact the mistake would have on her benefits. She has spent the overpaid funds on clearing her credit cards debts. She acknowledges that Teachers' Pensions is entitled to recovery of the overpayment but is disappointed at the mistakes by both NYCC and Teachers' Pensions, and the effect these have had on her.
22. Teachers' Pensions has restated its intention to recover the overpayment. It also said that Mrs R was unable to revoke her request to take the small pots option as the benefits have been paid to her.

Adjudicator's Opinion

23. Mrs R's complaint was considered by one of our Adjudicators who concluded that further action was required by Teachers' Pensions and NYCC. The Adjudicator's findings are summarised below:-
 - The Adjudicator considered whether Mrs R had a defence against recovery of the overpayment. The common defences against recovery are: change of position; estoppel and contract. The Adjudicator considered whether any of these arose in Mrs R's case.
 - The most common defence against recovery of an overpayment is referred to as "change of position"; that is, the applicant has changed his position such that it would be unjust to require him to repay the overpayment either in whole or in part. To make out a change of position defence certain conditions must be satisfied.

Broadly, the applicant must on the balance of probabilities show that because of the overpayment, which he received in good faith, he detrimentally changed his position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure was irreversible. If these elements are satisfied the Ombudsman may direct that some or all of the overpayment may be kept by the applicant.

- The Adjudicator first considered whether the Limitation Act 1980 (**the Act**) applies, which provides timescales by which an action must have commenced where a breach of the law has occurred. Ordinary breaches of contract are actionable for six years after the cause of action accrued or from when the claimant could, with reasonable due diligence, have discovered the error.
- NYCC is responsible for the administration of a significant number of members, which would have made it unlikely that it was able to identify the mistake until it was informed by Teachers' Pensions. However, NYCC should have had sufficient systems in place at the time to identify the mistake before transmitting the data to Teachers' Pensions and its mistake amounts to maladministration. NYCC says that it has now adopted different processes to minimise the possibility of a similar occurrence, but its actions would have caused significant distress and inconvenience to Mrs R.
- Teachers' Pensions also could not have identified the mistake before raising an enquiry in February 2017. Teachers' Pensions carries out a much larger act of administration than NYCC and is unable to check every Scheme member record on receipt.
- Given the size of the membership pool for both NYCC and Teachers' Pensions, the Adjudicator felt that neither party could, with reasonable diligence, have discovered the mistake and therefore the overpayment earlier than March 2017. Teachers' Pensions can only reasonably have become aware of the mistake in March 2017, so it had six years from that date to bring its claim for repayment.
- In the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch), the High Court held that the applicable cut-off date for the purposes of the Limitation Act was the date when Teachers' Pensions brought its claim during the course of the Pension Ombudsman's complaints procedure. That date was identified as being the receipt by the Pension Ombudsman of Teachers' Pensions' response to Mr Webber's complaint. The Pensions Ombudsman received Teachers' Pensions' response to Mrs R's complaint in December 2018, which serves as the date it made its claim for recovery. Teachers' Pensions has therefore made its claim in time and Mrs R does not have a limitation defence.
- The Adjudicator was satisfied that Mrs R received the overpaid funds in good faith. Mrs R was unaware of the mistake in her service records and has spent the amount in clearing her credit card debts. However, paying off existing debts would not qualify as detrimentally changing her position. This is because the debts would

always have needed to be repaid at some point and the overpayment has allowed that to happen sooner rather than later. As Mrs R spent the funds on repaying debts, the Adjudicator did not consider that to be exceptional as it would need to be if a change of position defence were to have a chance of success.

Furthermore, Mrs R left her employment due to a lack of available working hours, and not due to reliance on the incorrect amount of benefits she would receive.

There is therefore insufficient evidence that Mrs R has detrimentally changed her position in reliance on the overpaid funds.

- The Adjudicator considered that no other defences to recovery applied in Mrs R's case.
- Various administrative failings have seriously impacted on Mrs R's circumstances. NYCC's mistake caused the initial historical mistake. Teachers' Pensions' failure to take urgent action on receipt of information from NYCC confirming the mistake led to the incorrect calculation and payment of Mrs R's benefits. A further calculation mistake meant that Teachers' Pensions overstated the amount of the overpayment, causing a further erosion of confidence in its ability by Mrs R. It is clear that these mistakes have caused serious distress and inconvenience to Mrs R and the Adjudicator considered that an award was warranted in these circumstances.
- It was noted that Teachers' Pensions had offered £100 to Mrs R in recognition of its mistakes. The Adjudicator said that Teachers' Pensions and NYCC should both pay £500 each to Mrs R in recognition of the effect their mistakes had on her.

24. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs R provided numerous receipts and statements of her spending. She said that she had spent the overpayment on items such as a deposit for a car and embarked on numerous trips, some to Christmas markets and to visit family abroad. Some of these are:-

- Car hire agreement in her partner's name dated March 2018. Deposit of £1,813.25 followed by 17 monthly payments of £302.21 (total £6,950.82).
- Holiday hotel booking in partner's name for stay in Vienna for two in November 2017 - 302.40 euros.
- Booking confirmation dated 5 April 2018 for flights to Spain in May 2018 - £263. .
- Flight booking confirmation to Spain dated October 2017 - £227.13.
- Flight booking confirmation to Spain dated February 2017 - £103.96.
- UK hotel booking in October 2017 - £105.98.
- Car park booking in partner's name March 2017 - £102.99 4/3/17 – 25/3/17
- Flight confirmation for Austria in December 2016 - 77.58 euros.

- Hotel booking confirmation in partner's name in Austria dated July 2017 - 198 euros
25. Mrs R said that she spent the money in good faith without thinking that she might have to account for it, so records are not extensive. She initially said that she had spent the overpayment on clearing her credit card debt but some of that debt was accumulated in anticipation of payment of her pension.
26. Teachers' Pensions and NYCC did not make any additional comments.
27. The complaint was passed to me to consider. I note the additional points made by Mrs R but I agree with the Adjudicator's Opinion.

Ombudsman's decision

28. Under the Regulations, Teachers' Pensions is entitled to seek recovery of the overpayment.
29. Mrs R's defence is essentially one of a change of position. Mrs R says she received the payment in good faith and has changed her position in reliance on it by spending on her credit card.
30. To successfully argue a "change of position", Mrs R has to demonstrate (1) that she had received the overpayment in good faith, (2) that she had relied on the overpayment when making relevant financial decisions and (3) that she changed her lifestyle accordingly in a manner that was irreversible. If all of the above criteria are met, then the result is that it would be inequitable for the party owed (in this case, Teachers' Pensions) to seek recovery of the overpayment.
31. In terms of the first test, I accept that Mrs R had good faith. I do not find she knew there was a possibility of an overpayment but did nothing about it. In other words, there is no sign that she turned a "blind eye" to a potential overpayment in the hope that it would go unnoticed. However, I do not find that the second test is met. I do not find Mrs R can show that, but for Teachers' Pensions' mistake in overpaying her, she would not have made the trips abroad (to visit family etc) or commenced the car hire agreement.
32. Mrs R commenced the retirement application in January 2017. The spending she has highlighted is for the period December 2016 to April 2018. This means that some of the expenses were incurred before Mrs R was informed of the amount she could expect to receive. I appreciate that Mrs R says she started incurring expenses in anticipation of receiving her benefits, but her expenses add up to much more in excess of even the incorrect amount she received. This means that Mrs R would have incurred debts regardless of the overpayment. Mrs R could not therefore have relied on the overpayment in incurring all of her expenses. Mrs R has also benefitted from the trips and car that was purchased, which I note included a cancellation clause. I also note that the car hire agreement was in her partner's name so was not a debt incurred in her name.

33. I would also point out that a change of position does not simply mean that the person has incurred expenses, as it is normal that ongoing expenses would be incurred, even if only day to day living expenses. What makes it different is the exceptional nature of such expenses. Mrs R indulged in regular trips so it is difficult to regard them as exceptional, especially when they are to visit family. So, such trips are likely to have been undertaken regardless of the overpayment of £3,078.94.
34. I am not satisfied that Mrs R can establish a change of position defence in respect of the overpayments.
35. I do agree with the Adjudicator that the actions of Teachers' Pensions and NYCC have caused serious distress and inconvenience to Mrs R and an award is warranted in these circumstances.
36. Therefore, I partly uphold Mrs R's complaint.

Directions

37. Within 31 days of the date of this Determination, Teachers' Pensions and NYCC shall pay £1,000 to Mrs R. NYCC and Teachers' Pensions shall meet the cost equally. Teachers' Pensions shall give Mrs R the option of having this amount paid directly to her or to be offset against the overpayment.
38. If Mrs R chooses to have the award offset against the overpayment, Teachers' Pensions shall then recalculate the overpayment owed and notify Mrs R of the new amount.

Anthony Arter

Pensions Ombudsman
3 September 2020