

Ombudsman's Determination

Applicant	Dr J Marchant
Scheme	Teachers' Pensions Scheme (TPS)
Respondent(s)	London South Bank University (LSBU) Teachers' Pensions (TP)

Complaint summary

Dr Marchant has complained that an overpayment of pension arose as a result of LSBU incorrectly submitting forms to TP and TP paying his pension incorrectly.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against LSBU to the extent that they contributed to the situation Dr Marchant finds himself in because they submitted an incorrectly completed form to TP.

The complaint should not be upheld against TP because they used the information given by LSBU and Dr Marchant when calculating Dr Marchant's pension entitlement.

DETAILED DETERMINATION

Material Facts

1. Dr Marchant was employed by LSBU and was a member of the TPS. In October 2010, LSBU (the HR Operations Manager and the Dean of the Faculty of Business) wrote to Dr Marchant stating that the University's normal retirement age was 65, which he would reach in April 2011. They asked if Dr Marchant wanted to ask to work beyond this. Dr Marchant did and LSBU wrote to him, on 15 February 2011, stating that this had been granted and a new retirement date of 31 July 2013 agreed.
2. On 16 April 2011, Dr Marchant reached the maximum reckonable service under the TPS Regulations – 45 years. Under the TPS Regulations, he should then have ceased to pay contributions (Regulation 18). However, whilst Dr Marchant could not accrue any further reckonable service, he was still in pensionable employment for the purposes of the TPS Regulations.
3. Dr Marchant has explained that he attended a presentation given by TP in July 2011 where he was informed that he had reached the maximum for reckonable service. He has explained that the TP representative suggested that he speak to LSBU's payroll department. Dr Marchant says that he did so and was advised that he could now claim his pension.
4. On 27 July 2011, TP received an application for retirement benefits based on age form relating to Dr Marchant. In Part A, which was signed by Dr Marchant, "Last date of pensionable teaching employment" was shown as 16 April 2011. Part A also included a declaration that (amongst other things) Dr Marchant had "ceased all pensionable teaching employment in England and Wales" and would "inform Teachers' Pensions if [he began] employment in teaching within the UK at any time during [his] retirement". The declaration also included a statement to the effect that Dr Marchant understood that any overpayment of benefits would be recovered. LSBU's Payroll Manager had completed Part B of the application form stating that the "Last day to which salary [would] be paid" was 16 April 2011. In his covering letter to TP, Dr Marchant said,

“Please find enclosed Application for retirement Benefits. I did not realise the situation I was in until a recent seminar at LSBU with a representative from the Teachers’ Pension Fund, in July.

I reached my 65th Birthday on 17th April 2011 and the University have offered me a contract for two more years, which I have accepted. I did not realise that my Teachers Pension would not continue to grow, therefore I have filled out the enclosed application forms.”

5. LSBU refunded Dr Marchant’s contributions.
6. TP wrote to Dr Marchant, on 23 August 2011, confirming that his pension benefits had been calculated and were about to be paid. Amongst other things, TP referred Dr Marchant to their website where they said he would find a “certificate of re-employment”, which he should complete if he returned to teaching. In the notes accompanying Dr Marchant’s Statement of Retirement Benefits, pensionable service was described as,

“This is the amount of service used in the calculation of your benefits from the [TPS]. The total includes your periods of employment for which you have paid pension contributions to the TPS, additional periods you may have purchased separately and any credit for benefits transferred-in from other pension schemes.”

7. The notes also included the statement,

“If you take up any further teaching employment or employment which is normally covered by the TP Regulations you must arrange with your employer to submit a fully completed certificate of re-employment immediately, irrespective of whether or not you are paying pension contributions. You should be aware of the following:

- + There is a limit on the amount of salary you can earn before your pension is affected.
- + We will make any necessary adjustments to your pension payments.
- + Both you and your employer are required to complete a certificate of re-employment for each tax year that you are re-employed ...
- + It is your responsibility to notify TP of any re-employment and changes to salary whilst in re-employment.

You should be aware that you will be responsible for the repayment of any overpayment of pension resulting from the failure to provide TP with a fully completed certificate of re-employment for each tax year.”

8. In July 2012, TP wrote to Dr Marchant saying that they had received information from LSBU which indicated that he had become re-employed after his retirement. He was asked to submit a Certificate of Re-employment to LSBU for them to forward to TP. A reminder was issued on 8 September 2012. Dr Marchant wrote to TP, on 24 September 2012, explaining that he had not completed a re-employment certificate because he had never retired. In response, TP confirmed that they would be seeking recovery of the overpayment. They explained that retirement benefits payable on an age basis could only be taken on cessation of all full-time teaching employment. TP explained that, whilst Dr Marchant had reached the maximum service for which contributions were payable, teaching service undertaken after this was still used to calculate average salary and entitled him to in-service death benefits.
9. TP wrote to Dr Marchant, on 15 October 2012, stating that the overpayment amounted to £149,030.10. This consists of £40,696.34 in pension payments, a lump sum of £108,132.77 and £200.99 interest paid for late payment.
10. As at 16 April 2011, Regulation 60 of the Teachers' Pension Scheme Regulations 2010 (SI2010/990) (as amended) (the **Regulations**) provided that a person satisfied the “condition for retirement” if he was “qualified for retirement benefits” and a Case applied to him. Dr Marchant qualified for retirement benefits under Regulation 54. The Cases which might apply are set out in Schedule 7 to the Regulations. Case A applies to retirement on or after reaching normal pension age (60 or 65) and requires the person to have ceased to be in pensionable employment. Part 2 and Schedule 2 of the Regulations deal with pensionable employment. In brief, pensionable employment is employment in a particular capacity by a defined employer; it is pensionable either automatically or by election depending on the capacity and/or employer. Regulation 7 sets out the circumstances when employment is not pensionable in general. So far as Dr Marchant is concerned, only Regulation 7(1) applied. That is, a person is not in pensionable employment before reaching age 18 or after reaching age 75.

11. Part 3 of the Regulations covered contributions. Regulation 18(1) requires a person in pensionable employment to pay contributions at a percentage rate of salary. However, Regulation 18(2) provides that this does not apply to a person who, like Dr Marchant, has more than 45 years of reckonable service.

Information available from TP

12. TP have a website. In 2011, the following information was available on the website:

“Retiring from the scheme

Retirement conditions for Actuarially Adjusted Benefits (often referred to as Actuarially Reduced Benefits [ARB]), Age Retirement and Phased Retirement

Q. Is it possible to take a short period off without pay (as little as one day) and then become entitled to Actuarially Reduced (ARB) or Age Benefits?

A. It is not possible for an in-service member to take a "token break" in employment in order to become entitled to benefits in the TPS. As well as meeting the other retirement conditions, e.g. qualifying service for benefits, there must be an actual cessation of employment.

If the individual is to be re-employed, this should be under a new contract of employment. Where a person is subsequently re-employed by the same employer, there should be a new contract with an expectation that the person would move to a different or changed role. If the person returns to substantively the same post, that should result from some form of recruitment process (e.g. open competition).

Q. Can I access my pension whilst in the same employment without the requirement for a cessation of employment?

A. Yes you can. You can access a proportion of your retirement lump sum and pension via phased retirement. There are certain conditions that must be applied before benefits can be taken ...

Q. Are the entitlement conditions the same for ARB and Age?

A. Although the regulations require a break in employment of at least one day and a cessation of employment, ARB requires a break in both pensionable employment and employment which is no longer pensionable (known as 'excluded employment'.)

The situation is slightly different for members who have attained Normal Pension Age (NPA), in that they can become entitled to 'Age' benefits if the member opts out of the scheme on or after NPA and enters excluded employment. They will become entitled to benefits from the date of entering excluded employment if this is on or after NPA (or in other words, the day after leaving pensionable employment). If a member applies for benefits some time after the payable date, the Age award is backdated to the payable date. The Age benefits payable are a retirement lump sum (if applicable) and pension, but the Age pension stops immediately, or at any point during the tax year depending on the amount of re-employment earnings. This is on account of the abatement provision.

Where can I find further guidance on retirement conditions?

This subject has been covered in TP News. The Spring issue of TP News set out the position regarding ARB under the heading of 'Retirement conditions' ...

The subsequent clarification regarding Age retirement is contained in the Summer issue ...

Follow this link to LGE bulletin 13, which also covers re-employment after ARB in slightly more detail ...

Below is LGE bulletin 15 which clarified the position regarding Age retirement ...

LGE Bulletin 17 provides further guidance ...

Information has also been posted on the Association of Colleges website, which can be accessed on the link below ...

Q. Why do the regulations refer to a requirement to have at least a one day break?

A. The requirement to have at least one day without pensionable or excluded employment is particularly important in respect of members with more than one employment. All employments must have ceased at the same time in order to have a payable date. The member therefore becomes entitled to benefits on the day after leaving all such employment. Please note this does not negate the requirement for a cessation in the member's employment."

Summary of Dr Marchant's Position

13. A summary of the key points in Dr Marchant's submission is provided below:

- He did not retire on 17 April 2011 and did not have a one day break in service. Nor did he have a new contract of employment. This should have been known by LSBU's Payroll Manager.
- He intends to retire when he is 70.
- TP were incorrectly advised by LSBU that he had been re-employed.
- LSBU wrongly advised him and incorrectly submitted his application for a retirement pension to TP.
- TP did not take all the relevant facts of his case into account and paid his pension by mistake.
- He assumed that TP and LSBU were correct.
- He spent the additional income by allowing for it in his general lifestyle. Now that he is being required to pay the money back, he is in a very difficult financial situation. He knows that he will get the lump sum back when he retires, but he will not get the overpayment of his pension back.
- There has never been any disagreement about repaying the monies. He agrees with repaying the lump sum of £108,000. However, TP paid him a pension of £40,000 which incurred tax of £16,000. In real terms, he has only received £24,000 which did not give him a lavish lifestyle. He employed an accountant to see if the tax could be reimbursed by HMRC with no success.
- He would like LSBU and TP to come to a mutual agreement to repay the overpayment in pension plus the accountant's and solicitor's fees he has incurred, amounting to £2,000.
- He does not accept that listening to what a member of LSBU's payroll staff may have said is not the same as taking formal advice. He has always trusted the advice given by LSBU's staff. The reason he was in the position of having reached maximum reckonable service was because he took the

advice the LSBU's chief accountant in the mid-1980s to put his savings in the pension scheme rather than the bank.

- He is not aware of a policy of making a distinction between formal and informal conversation.
- There appears to be some confusion about pensionable employment, actual employment and reckonable service.
- He tried to raise the matter with LSBU, but they were unwilling to discuss the matter with him. Had they been more approachable, he would not have had to engage the services of a solicitor, but this was the only way of getting something in writing in order to apply to the Ombudsman. A payment of £250 for the stress he has suffered would be disappointing.

Summary of TP's Position

14. A summary of the key points in TP's submission is provided below:

- The TPS is a statutory scheme and they are bound by the Teachers' Pensions Regulations 2010. They have no discretion to allow Dr Marchant to be paid age retirement benefits from April 2011.
- Dr Marchant was in pensionable employment for the purposes of the Regulations by reference to Regulations 6 and 7 and Paragraphs 6 and 7 of Schedule 2.
- Under Regulation 7, a person is not in pensionable employment before the age of 18 or after the age of 75. Therefore, all of Dr Marchant's teaching employment at LSBU is pensionable employment until he either elects for his employment not to be pensionable or he reaches age 75.
- Paragraph 1 of Schedule 7 provides for retirement on or after reaching normal retirement age under Case A. This states that, where a person ceases to be in pensionable employment, Case A applies in relation to the reckonable service in relation to which the person has reached normal pension age.

- Dr Marchant's normal pension age is 60 and he and LSBU both stated, on his application form, that he had ceased pensionable teaching employment on 16 April 2011. TP had no way of knowing that his employment had continued unbroken. They took his letter to mean that he had been offered a two year contract by which he would become re-employed at a later date.
- Dr Marchant had signed the declaration on his application form to the effect that he had ceased all pensionable teaching employment.
- Dr Marchant was asked to provide a Certificate of Re-employment if he took up further teaching employment or employment normally covered by the TPS Regulations.
- They have no record of Dr Marchant contacting them to query the necessity for a Certificate of Re-employment, to advise them that he had not had a break in employment or to notify them of any employment undertaken after receiving his retirement benefits.
- They only became aware of the situation when LSBU submitted an annual return for 2011/12 which included service and salary details for Dr Marchant. At that point, he was asked to submit a Certificate of Re-employment.
- They rely on employers to deduct contributions correctly and record service. They do not keep records of contributions deducted, as agreed by the National Audit Office in 1990, because there is no link between contributions made and benefits paid.
- LSBU should have been aware that Dr Marchant's pensionable employment ceased to be reckonable service from 17 April 2011 and should have ceased deducting contributions. Any contributions deducted in error are the responsibility of the employer to refund to the individual concerned.
- Dr Marchant no longer pays contributions, but is covered for in-service death benefits and his increased salary will be used to calculate his benefits when he finally leaves pensionable employment.
- Dr Marchant could opt out of the TPS and receive his age retirement benefits from the date of his opt out. However, he would no longer be covered for in-

service death benefits and any earnings in respect of service after opting out would be assessed for possible abatement of his pension.

- LSBU should have been aware that, whilst his contributions should have ceased when he reached 45 years' reckonable service, he would not be entitled to age retirement benefits until his pensionable employment ceased. This information is available in the Members' Guide and in Employers' Frequently Asked Questions (FAQ) on their website.
- TP are not always aware of individual's current circumstances because they rely on information supplied by employers which can be up to one year out of date.
- TP have confirmed that Dr Marchant was paid £40,696.34 (£51,869.90 gross) in the tax years 2011/12 and 2012/13. This was £24,814.61 in 2011/12 and £15,881.73 in 2012/13. Tax amounting to £11,173.56 was deducted. The lump sum and interest have been included in the overpayment as gross amounts because they are tax-free payments.

Summary of LSBU's Position

15. A summary of the key points in LSBU's submission is provided below:

- At the time Dr Marchant was asked what he wanted to do when he reached age 65, he did not say that he wanted to draw his pension. There was no reason, therefore, for them to say anything about the difference between continuing in employment and being re-employed for the purposes of the TPS.
- They reject the suggestion that they ever provided advice for Dr Marchant.
- They facilitate presentations given by TP, such as that attended by Dr Marchant in July 2011. However, they do not participate in the presentations nor do they endorse any view expressed in them.
- Their view is that the act of listening to what the speaker has to say in a presentation or in informal conversation afterwards is not the same as taking advice.

- They do not give advice to their employees and have a policy of not giving advice, which is enforced. They do not consider the act of listening to what a member of their payroll staff might say in conversation the same as taking formal advice. They do not consider it plausible that either Dr Marchant or their payroll staff would have considered the contents of such a conversation as formal advice.
- Dr Marchant did not enter into an agreement with any member of their staff to give advice and he must have known that no member of staff was qualified to give advice.
- At the time Dr Marchant applied to draw his pension, their staff believed that his “pensionable employment” would cease even though his actual employment had not.
- It is immaterial that a member of their payroll staff may have assisted Dr Marchant to complete his application form. He signed the declaration to the effect that he had ceased all pensionable teaching employment.
- TP should have queried the apparent discrepancy between Dr Marchant's letter and his application form; the two contain incompatible statements as to his continued employment. Had they done so, a satisfactory outcome could have been reached.
- It is not credible that TP did not know that Dr Marchant had not left pensionable employment when his letter stated or at least indicated that he had not left pensionable employment.
- They do not understand how Dr Marchant could have signed the declaration on the application form and ignored the information from TP about completing a certificate of re-employment. Had he sought clarification at the time, the situation could have been resolved amicably.

Conclusions

16. Dr Marchant asked LSBU if he could continue working after his 65th birthday. He has said that he intends to retire when he is 70. The evidence indicates that, in April 2011, Dr Marchant had no intention of retiring and, indeed, did not do so. He was not, therefore, eligible to receive his retirement benefits.
17. Dr Marchant says that he attended a presentation given by TP and was made aware that he had accrued the maximum reckonable service. He should not have been continuing to pay contributions. However, this did not mean that he was no longer in pensionable employment since this is defined by reference to the type of employment rather than by the amount of service accrued by the individual.
18. Dr Marchant has said that, following the presentation, he went to speak to LSBU's payroll department and was told that he could claim his pension. There is, unfortunately, no record of this conversation which might help to clarify the context in which any such comment might have been made. LSBU say that they do not give advice to employees on pensions and have a policy, which is enforced, of not doing so. They seek to make a distinction between comments made during an informal conversation and formal advice. Dr Marchant does not accept this distinction. The giving of financial advice, which this would be, is heavily regulated; more so now than in the 1980s. LSBU's Payroll Manager was not authorised to give financial advice. I accept that it is entirely possible that she may well have asked Dr Marchant whether he wanted to apply for retirement benefits or even said that he could do so. Neither of these scenarios would amount to advising Dr Marchant to apply for his retirement benefits. Whilst I am sure that Dr Marchant has given his recollection of events in good faith, it would not be appropriate to base a decision on one person's recollection alone. In the absence of any other evidence, I do not find that LSBU advised Dr Marchant to apply for his retirement benefits in 2011.
19. What is clear, however, is that Dr Marchant and LSBU's Payroll Manager completed an application form for his retirement benefits to be paid. Part A of the form was completed by Dr Marchant and Part B by the Payroll Manager. The Payroll Manager entered an end date for Dr Marchant's pensionable service of 16 April 2011. This was incorrect since he had not ceased employment with LSBU. However, the same

date was shown in Part A of the form, which Dr Marchant signed. He also signed a declaration to the effect that he had ceased all pensionable employment in England and Wales. This too was incorrect. Whilst I find that it was maladministration for LSBU to forward an incorrect application form to TP, Dr Marchant must share some responsibility for this.

20. Dr Marchant has suggested that there was confusion as to what was pensionable employment. I can accept that, having been told that he had accrued the maximum reckonable service and no longer needed to pay contributions, Dr Marchant might have been uncertain as to whether he was still in “pensionable” employment. The same might well have been true for the Payroll Manager. However, there is ample information available from TP which would have clarified this. I also note that the information supplied by TP with Dr Marchant’s statement of benefits clearly referred to his “retirement”. Dr Marchant knew that he had not retired but did not query this with TP. The statement also explained that there was a limit on the amount of salary he could earn before his pension was affected. I would have thought that this too might have prompted Dr Marchant to query whether he could continue to earn the same salary as before and receive his pension.
21. LSBU have suggested that TP should have queried the discrepancy between Dr Marchant’s form and his covering letter, in which he referred to having been offered a contract for another two years. I do not find that the content of Dr Marchant’s letter was sufficient to alert TP to the fact that he had not retired. They had received a form, signed by Dr Marchant and LSBU, stating that he had ceased pensionable employment on 16 April 2011. Dr Marchant’s letter was dated 24 July 2011 and he talked of being offered a contract which he had accepted. In association with the form in which he had signed to say he had ceased all pensionable employment, the letter reads like an offer of re-employment. I do not find that TP could reasonably have known, when they put Dr Marchant’s benefits into payment, that they were paying his benefits in error. I do not find that there has been any maladministration on their part.

22. It is the case that TP are entitled to recover the monies paid in error regardless of whether or not they were at fault in paying them. Dr Marchant accepts that he must repay the lump sum he received but argues that he should not have to repay £40,000 in respect of his pension because he would only have received £24,000 net of tax. In fact, the sum of £40,696.34 quoted by TP is the net amount for the two tax years in question.
23. I have given some thought as to whether and to what extent Dr Marchant might have a defence against the recovery of all or part of the overpayment.
24. There are certain legal defences to the recovery of overpaid pension benefits. The two which might apply in Dr Marchant's circumstances are "change of position " and "estoppel by representation". Briefly, it is necessary to consider whether Dr Marchant received a clear and unambiguous representation or promise to the effect that he was entitled to receive the payments. It is necessary then to consider whether he relied on such a representation and whether it was foreseeable that he would do so and reasonable for him to do so. The two defences differ in the extent to which they protect the recipient from recovery. Dr Marchant would be expected to be able to show that he relied on any such representation.
25. Having considered the circumstances of Dr Marchant's case, I am unable to conclude that there was a clear and unambiguous representation that he was entitled to claim his retirement benefits and continue in his employment with LSBU. Neither LSBU nor TP made any such representation. The circumstances in which LSBU's Payroll Manager completed Part B of the application form stating that Dr Marchant's pensionable employment had ceased are insufficiently clear for me to find that they amount to the kind of representation which would allow a defence against recovery to succeed.
26. I do, on occasion, direct that a person be reimbursed for legal fees incurred in pursuing a case which is found to have merit. Those occasions are rare because there are well known and easily accessed avenues for pursuing disputes over pension rights (including an application to my office) which are free. It was not necessary for Dr Marchant to engage the services of a solicitor in order to apply to

my office. I do not find that Dr Marchant's circumstances warrant a departure from my usual approach.

27. I uphold Dr Marchant's complaint against LSBU to the extent that they contributed to the situation by submitting an incorrect form to TP. I do not find that Dr Marchant suffered any direct financial loss as a consequence of the maladministration by LSBU. In view of the fact that he knew that he had not retired, it was not reasonable for him to proceed on the basis that he could take his retirement benefits without clarifying the situation. Reasonable due diligence would have led him to the information he required from TP or their website. I do accept that the period since TP requested repayment of his retirement benefits has been a stressful one for Dr Marchant. I find that LSBU contributed to the situation he finds himself in and it would be appropriate for them to pay him some modest compensation in recognition of this.
28. I do not uphold his complaint against TP since they cannot have known that the form was incorrect at that time.

Directions

29. I direct that, within 21 days of the date of this determination, LSBU will pay Dr Marchant £250.

Tony King
Pensions Ombudsman

19 January 2015