

Ombudsman's Determination

Applicant	Mr Y
Scheme	Teachers' Pension Scheme (TPS)
Respondents	Cheam School Educational Trust (Cheam School) Teachers' Pensions

Outcome

1. Mr Y's complaint against Cheam School is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, Cheam School shall provide redress in respect of Mr Y's loss of defined pension benefits in respect of Period One and Period Two.

Complaint summary

2. Mr Y has complained that:
 - Cheam School's former Bursar, (the **Former Bursar**), wrongly advised him that he was not eligible to join the TPS, as he was not a qualified teacher. As a result he missed out on the opportunity to join the TPS in 2007.
 - It is unfair that he cannot be given full retrospective service in the TPS backdated to 2007.

Background information, including submissions from the parties

3. Cheam School is an "accepted school". Schedule 2: "Employments pensionable without election", of the Teachers' Pensions Regulations 2010 (the **Regulations**) says:

"Teacher employed by the proprietor of, or anyone else concerned in the management of, an accepted school (other than a teacher employed at an accepted school which is a member of COBISec and is located in a member State other than the United Kingdom) [**Paragraph 3**]."
4. Mr Y previously worked at Cheam School one day a week as a visiting music teacher. In September 2007, he re-joined Cheam School as a "pre prep" music teacher. He

also resumed working as a visiting music teacher on a part time basis. Mr Y's contract of employment, (the **Contract**), says:

"...Cheam School appoints the Teacher to the post of full-time Teacher at Cheam School, which is the Teacher's place of work, commencing on **1 September 2007**.

...

PENSION

8.1 The Teacher shall participate in the Department for Education and Employment Teachers Pension TPS under the Teachers Superannuation (Consolidation) Regulations 1988 as amended from time to time, unless the Teacher notifies Cheam School in writing of his/her intention to exercise the right to opt out. The contracting out certificate is in force in respect of the Teachers' employment."

5. A memo dated 18 September 2007, (the **Memo**), from the Former Bursar, states that Mr Y should read his Contract. If Mr Y is happy with it, he should sign and return the pages specified. The Former Bursar indicates that he will return a copy signed by Cheam School's Headmaster (the **Headmaster**) for Mr Y's records.
6. The Contract was subsequently signed by the Headmaster and Mr Y in May 2012.
7. Mr Y's personnel file does not contain any records that indicate he planned to opt out of the TPS. Cheam School does not have a contemporaneous note of Mr Y's discussions with the Former Bursar.
8. Cheam School's non-teaching staff can participate in the IAPS scheme, a defined contribution (**DC**) scheme for the Independent Association of Prep Schools. Cheam School's teachers that do not wish to join the TPS, can choose to join the IAPS scheme.
9. Mr Y applied to join the IAPS scheme on 31 December 2007, the effective date of his employment at Cheam School. The IAPS scheme was managed by Friends Provident until August 2015, when it transferred to Scottish Widows.
10. The employee and employer contributions under the IAPS scheme are 5% and 7% respectively. Cheam School has provided Mr Y with death in service and long-term sickness cover since December 2007. Until July 2015, these formed part of the benefits of the IAPS scheme. Cheam School has held a separate group policy for death in service benefits and income protection since August 2015.
11. In February 2008, Mr Y took up a teaching post at a second school, (**School Two**), while continuing to work at Cheam School.
12. Mr Y was offered membership of the TPS by School Two. In May 2008, Mr Y opted out of the TPS in respect of his employment at School Two. The opt out form (the **Opt Out Form**) warned that:

“This form should only be completed by those eligible to join the Teachers’ Pension TPS (TPS) who decide they **do not wish to be a member of the scheme**. [original emphasis] No further teaching employment will be pensionable until this election is revoked by the applicant submitting an election to opt into the TPS. Do not complete an election each time you are changing employer. You will remain opted out of the scheme unless you decide to opt back in.

For those currently in employment, sections A and B must be completed and the form sent to TP by the employer. For those not currently teaching, complete section A and send the form direct to TP. We will then confirm to you the effective date of the opt out.”

13. The declaration (the **Declaration**) in the Opt Out Form says:

“I elect for any employment I undertake from the effective date of this election not to be treated as pensionable employment. I understand that, if my election is accepted, I will not be able to claim any form of benefit from the Teachers’ Pension TPS in respect of any employment covered from the effective date of this election.

By opting out of the TPS I will forfeit the right to the following scheme benefits in respect of future service:

- + my employer contributing 14.1% of my salary towards the cost of my benefits;
- + a guaranteed pension at normal pension age;
- + the option to take a tax free lump sum;
- + pension value protected through full index linking;
- + access to ill-health benefits, should I become permanently unable to teach;
- + children’s and dependants’ pensions;
- + in-service death grant.

I have read and understood the points above.”

14. On 29 August 2008, Mr Y was sent confirmation that his election to opt out had been accepted with effect from 25 February 2008 (the **Notification**). The Notification stated that any employment from this date would not be treated as pensionable service. The Notification signposted Mr Y to Teachers’ Pensions’ website for further information.
15. On 1 May 2014, Cheam School reached its auto enrolment staging date. However, it failed to auto-enrol Mr Y into the TPS.
16. Cheam School’s staff handbook dated May 2015 (the **Staff Handbook**) states:

“Pension Schemes

Teaching Staff : It is compulsory for qualified teachers to join and to contribute to the Teachers’ Pension TPS (TPS). Automatic enrolment in the

TPS scheme and deductions from salary will start from the first day of employment. However, a teacher may elect or has previously elected in writing to the TPA to opt out of the pension scheme [SIC]. The scheme is simply described as [a] '**final salary scheme**' and takes into account length of service and the teacher's salary over the last three years of service to calculate the pension due. Further details are available on the TPA website www.teacherspensions.co.uk or the bursar. [**Section A**]"

- b. **Non-Teaching Staff, Unqualified Teachers and Qualified Teachers who have opted out of the TPS** : May apply to join the IAPS (Independent Association of Prep Schools Pension TPS) managed by Scottish Widows and administered by [XYS] Actuaries on Cheam School's behalf. The TPS is best described as a 'money purchase' pension scheme. The TPS also provides you with '*in service sickness and life cover*' at no extra cost to the employee and provides a fixed level of cover to the individual. Further details about the TPS and application forms are available from the Bursar [**Section B**]"
- c. Those members of staff who chose not to join the IAPS scheme and are not eligible for the Teachers' Pension Scheme are required to automatically enrol in the Government's sponsored NEST pension scheme. Details of the scheme are available from the Bursar or Pay & Personnel Clerk."

17. On 16 December 2016, School Two notified Mr Y that he would be enrolled into the TPS on 1 December 2016.
18. During the intervening period, Mr Y enquired with Teachers' Pensions and Cheam School regarding his eligibility to join the TPS in 2007.
19. On 18 October 2017, the Former Bursar wrote to Mr Y (the **October Letter**). He referred to Mr Y coming to see him on 17 October 2017 "to discuss matters concerning [his] personal pension contributions and the scheme to which [he] currently contribute[s] through the [Cheam School]."
20. The October Letter stated that, as at 31 October 2017, Mr Y and Cheam School had paid a total of £11,771 and £20,600 into the IAPS scheme respectively. In addition, Cheam School had paid £7,111 for death in service and long-term sickness cover.
21. The October Letter indicated that had Mr Y been enrolled in the TPS, he and Cheam School would have paid approximately £22,209 and £43,157 in pension contributions respectively. Based on Mr Y's current salary, he would be paying £291 each month in contributions.
22. Cheam School's Director of Finance and Operations, (the **Director of Finance**), joined Cheam School in November 2018. The Former Bursar retired in December 2018.

23. In the period that followed, there were various exchanges between Teachers' Pensions, Mr Y and Cheam School concerning Mr Y's membership of the TPS.
24. It was ascertained that Mr Y should have been enrolled in the TPS with effect from 31 December 2007 until February 2008 (**Period One**), and then from 1 May 2014 (**Period Two**). The intervening period: 25 February 2008 to 30 April 2014, (the **Opt Out Period**), is non-pensionable under the TPS.
25. Teachers' Pensions gave Mr Y the option to retrospectively opt out of the TPS so that Period One and Period Two could be treated as non-pensionable. Mr Y would be auto enrolled when Cheam School reached its next staging date. Mr Y was given the alternative option of paying arrears of pension contributions. Mr Y asked Cheam School to continue paying into the IAPS scheme until the matter had been resolved.
26. Teachers' Pensions has clarified that, as an "accepted school", Cheam School's employees are covered under Paragraph 3 of the Regulations. Consequently, an employee who holds a teaching post at Cheam School may contribute to the TPS irrespective of their qualifications or any other criteria. Where a post includes administrative and teaching functions, the primary duties determines which pension scheme the post holder is entitled to join.
27. Teachers' Pensions has highlighted that Mr Y's election to opt out in 2008, still held for School Two until 2016, when School Two reached its auto enrolment staging date. Before 2012, there were no provisions for members to opt out in respect of only one employment. Consequently, if Mr Y's opt out is disregarded, it would have adverse financial implications for School Two.
28. The amount of contributions payable to the TPS, as calculated by Teachers' Pensions, is set out in table 1 in the Appendix.
29. The amount of pension Mr Y would otherwise have earned in the TPS, as calculated by Teachers' Pensions, is set out in table 2 in the Appendix.

Mr Y's position

30. Mr Y's submissions are summarised below:-
 - He was approached by the Former Bursar in September 2007. The Former Bursar said that he could not join the TPS because he was a "non-qualified teacher." He accepted this in good faith. The Former Bursar told him about the IAPS scheme, which he did join.
 - He should have been given the option to join the TPS. There is no opt in or opt out form because he was not given the opportunity either way. The fact that Teachers' Pensions had not previously been aware of his employment with Cheam School further supports his case.

- He would like the correct amount of contributions paid into the TPS backdated to September 2007.
- It is clear that he was given completely misleading, wrong and inaccurate information by the Former Bursar. The Opt Out Period has not been considered for TPS membership. Teachers' Pensions should exercise discretion and allow him membership in respect of the Opt Out Period.
- He is faced with the added difficulty of having to pay arrears of member contributions. This has caused him unimaginable distress. He is in no position to fund the amount required.
- At the time he opted out of the TPS, he was acting on the "advice and supposed knowledge" of the Former Bursar. He would not have had any reason to question the Former Bursar's assertion that he was not entitled to join the TPS.
- He does not accept that the correct position should have been evident from the notes in the Opt Out Form. His understanding was very clear; and he would have assumed that the Former Bursar was familiar with the TPS rules and regulations.
- The reference to "qualified teachers" in the Staff Handbook is both misleading and incorrect.
- He had no reason to contact Teachers' Pensions until he was advised by School Two in December 2016 that he had been auto enrolled.
- He initially considered that he had been auto enrolled by mistake. So, he contacted School Two straightway. He then spoke to Teachers' Pensions; Teachers' Pensions confirmed his eligibility.
- He met with the Former Bursar in February 2017 to query why Cheam School had not given him the option to join the TPS. During what was a difficult conversation, the Former Bursar continued to maintain that he was not allowed to join the TPS as he was a "non-qualified teacher."
- He explained that he had spoken with Teachers' Pensions. The Former Bursar then said he would have to repay the money paid into the IAPS scheme and that Teachers' Pensions would pursue him for arrears of contributions, with interest.
- He was worried and felt "extremely intimidated". He paid for legal advice before deciding to contact Cheam School. It took several months for Cheam School to complete its investigation. He was then informed that Cheam School did not know how to resolve the issue.
- He contacted Teachers' Pensions again in February 2018. He was initially told that he could apply to transfer in benefits from the IAPS scheme. He was later

informed that this would not be possible, as more than twelve months had passed since he had been auto enrolled by School Two.

- After an exhaustive process, the Department for Education agreed to consider the possibility of a transfer in. It is still not clear how much he can transfer into the TPS.

Cheam School's position

31. The Director of Finance's submissions, on behalf of Cheam School, are summarised below:-

- The information available [to Cheam School] is mostly based on details held in Mr Y's personnel file and correspondence provided by Mr Y and Teachers' Pensions.
- Mr Y's conversations with the Former Bursar were not recorded. Consequently, it is not possible for Cheam School to comment on any advice the Former Bursar may have given to Mr Y in 2007.
- Cheam School has no records of conversations between Mr Y and the Former Bursar concerning Mr Y's decision to opt out of the TPS in May 2008. Cheam School is not aware of any discussions Mr Y may have had with School Two, or any other party on this issue.
- Cheam School does not appear to have any record of any correspondence or discussions Mr Y had with the Former Bursar or Cheam School about his pension between 2007 and 2017.
- Cheam School did not have a formal discussion with the Former Bursar concerning Mr Y's claims.
- The October 2017 Letter does not indicate a disagreement between Mr Y and the Former Bursar. However, the Director of Finance was not party to any conversations they may have had about the issue.
- Subsequent correspondence has been between Teachers' Pensions, Mr Y and Cheam School.
- Teachers' Pensions and the Department for Education's final view is that Mr Y's opt out, effective from February 2008, will stand and covers all employments. Cheam School has no further view on this.
- Cheam School acknowledges that it should have enrolled Mr Y into the TPS. Mr Y has been provided with alternative death in service and income protection cover in place of those that would otherwise have been provided by the TPS.

- Provided the contributions paid to the IAPS scheme will be taken into account, Cheam School accepts that it should have contributed into the TPS during Period One and Period Two.
- Cheam School would like clarity on how the value of the employer contributions, and the premiums paid for Mr Y's death in service and income protection cover (the **Premiums**), will be accounted for in any financial redress awarded to Mr Y.
- Cheam School is willing to consider offering financial support to Mr Y to help him spread the cost of the unpaid employee contributions. This will depend on the sums involved and the treatment of his existing funds in the IAPS scheme. Cheam School is willing to discuss other options.
- Cheam School is open to making a distress and inconvenience award that recognises that Cheam School has been in contact with Mr Y and Teachers' Pensions to try and resolve his dispute.

Teachers' Pensions' position

32. Teachers' Pensions' submissions are summarised below:-

- Mr Y has been employed as a teacher at Cheam School since 2007. Neither Mr Y nor Cheam School notified Teachers' Pensions that Mr Y had joined Cheam School.
- Cheam School should have enrolled Mr Y into the TPS automatically. Contributions should have been deducted from Mr Y's pay until he either left that post or elected to opt out of the TPS.
- The position ought to have been clear to Mr Y from the notes in the Opt Out Form. The Opt Out Form states that it should only be completed by those eligible to join the TPS and that Mr Y was opting out of all employment.
- Mr Y's election to opt out of the TPS is effective retrospectively from February 2008. It covered all employment that could be treated as pensionable under the TPS. This is confirmed in the Declaration, which Mr Y signed.
- As Mr Y's employment at Cheam School could be treated as pensionable, it will also be covered by his Opt Out Form. Teachers' Pensions is unable to override the Regulations.
- The Regulations allow discretion to extend the time limit for transfers in. The Department for Education accepted that Mr Y was unable to make an informed decision at the time.

- The Department for Education has agreed to consider a transfer outside of the time limit in this case.

Adjudicator's Opinion

33. Mr Y's complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of Cheam School. The Adjudicator's findings are summarised below:-

- Mr Y was notified by School Two that he had been auto enrolled. The timing of Mr Y's subsequent contact with the Former Bursar and Teachers' Pensions, supports his account that this was the point at which he became aware that Cheam School had failed to enrol him into the TPS.
- There is no documentary evidence to substantiate Mr Y's account of what he says he was told by the Former Bursar in 2007. Nor is there any evidence to corroborate Mr Y's claims regarding his conversation with the Former Bursar in February 2017, concerning Mr Y's eligibility to join the TPS.
- Other than Mr Y's application to join the IAPS scheme, Cheam School has no record of any correspondence, or discussions, between Mr Y and the Former Bursar regarding pension issues. If Mr Y had any information that could independently verify what he says he was told at the time, it is more likely that he would have provided it to The Pensions Ombudsman.
- The Adjudicator considered that Mr Y has been consistent in his account of what he claims the Former Bursar advised him in 2007. While the Adjudicator acknowledged that Mr Y is unable to prove that he was misled, the evidence tended to support his version of events. In taking this view, the Adjudicator took into account the fact that Cheam School has not provided evidence to support that Mr Y elected to opt out of the TPS. The Adjudicator noted that a second teacher, who joined in 2007, has been impacted by a similar issue.
- However, at the time of joining School Two in February 2008, Mr Y should have had sufficient reason to at least question whether his understanding of the position was correct. The Opt Out Form stated that it should only be completed by those eligible to join the TPS.
- By signing the Declaration, Mr Y elected for his employment to be treated as non-pensionable. He was also confirming that he understood that, if his election is accepted, he will not be entitled to claim any benefits from the TPS in respect of any employment covered by his opt out. The Notification also confirmed that Mr Y's employment from 25 February 2008 would not be treated as pensionable service.

- There is nothing to suggest that Mr Y had conversations with Cheam School, around the time of his election to opt out, concerning his eligibility to join the TPS.
- The reference made to “qualified teachers” in Section A of the Staff Handbook could reasonably be construed as misleading. Read in isolation, it implies that only qualified teachers should be enrolled in the TPS unless they opt out.
- While the position should have been made clearer in the Staff Handbook, Mr Y ought to have made enquiries before opting out, given the other information that was available to him. This was a missed opportunity for him to realise the error.
- Had Cheam School correctly enrolled Mr Y in 2007, it is possible that he would have remained in the TPS in respect of his pensionable employment at Cheam School and accrued continuous service in the TPS from 2007.
- School Two has not been named as a party to the complaint. Consequently, it is unlikely that the Ombudsman would decide that Mr Y’s Opt Out Form should be disregarded. If the Ombudsman were to uphold the complaint, any direction made by the Ombudsman would be framed in a way that would not impact School Two.
- To remedy any financial loss Cheam School has caused to Mr Y, Cheam School should obtain details of the actuarial cost of providing Mr Y with backdated membership in the TPS. The calculation should exclude any service pensionable with School Two.
- Cheam School should pay the necessary contribution, as calculated by the actuary (**the transfer**), to the TPS less the value of Mr Y’s funds in the IAPS scheme.
- A transfer payment from the IAPS scheme will not offset the arrears of contributions due to the TPS. Should Mr Y decide not to opt out of the TPS retrospectively, Teachers’ Pensions will require Mr Y and Cheam School to pay contributions backdated to 2007, with interest.
- The Adjudicator acknowledged that Cheam School has shown a willingness to help Mr Y to resolve his issue.
- The Adjudicator proposed that Cheam School recover the shortfall in Mr Y’s member contributions over at least the same period that the shortfall has accrued. The Adjudicator considered that it would be appropriate for Cheam School to provide Mr Y with financial support to meet those costs, if Mr Y is able to demonstrate that recovery would cause him financial hardship.

- Cheam School should make an award of £2,000 to Mr Y in respect of the severe non-financial injustice he has suffered. Mr Y should be given the option to offset the award against the arrears of member contributions.

34. The parties did not accept the Adjudicator's Opinion and made the following comments.

35. Mr Y's comments are summarised below:-

- His pension should not be disadvantaged because of the Former Bursar's "negligence". Cheam School should make up the shortfall in his benefits.
- The Adjudicator acknowledged that Cheam School should have enrolled him into the TPS on two separate occasions. Had Cheam School correctly enrolled him, he would receive the level of benefits that his participation in the TPS would have provided.
- At this stage, he is not willing to retrospectively opt out of the TPS. At least some of the benefits in the TPS will be available to him by having Cheam School put this matter right.
- If the Opt Out Period cannot be included because of the Opt Out Form, which he still maintains that he signed because he was misinformed, Cheam School should, for that period, "pay the equivalent amount of money" into the new defined contribution scheme that Cheam School established on 1 January 2020, in place of the TPS (the **New Scheme**).
- If he opts out of the TPS retrospectively, then presumably all the contributions he and School Two paid into the TPS will be refunded. He will be further disadvantaged because he will not receive the "better benefit that [the] TPS offers."
- He is very worried. He does not consider that he is "going to come out of this without being disadvantaged."

36. Cheam School's comments are summarised below:-

- Mr Y was enrolled into the IAPS scheme as at 1 May 2014. Cheam School considered that he had already been enrolled into a suitable pension scheme. Consequently, Cheam School had fulfilled its auto enrolment duties at the time.
- Since December 2016, School Two's auto enrolment date, Mr Y has had the opportunity to enrol in the TPS. At the time Mr Y raised his issue with Cheam School in February 2017, Mr Y could have joined the TPS. Mr Y has also had the opportunity of joining the TPS since the Director of Finance's appointment in November 2018.

- Cheam School accepted Mr Y's decision to remain in the IAPS scheme while this matter is being resolved. It is now evident that this may be detrimental to Cheam School's position, with Cheam School's potential liability increasing.
- Mr Y could have enrolled in the TPS in December 2016, and the issue concerning his membership dealt with separately.
- The Ombudsman should "draw a line" in any calculation in respect of Cheam School's liability as at 31 December 2016, the date Mr Y might reasonably have joined the TPS in respect of Cheam School and School Two.
- The situation has arisen over a period of approximately twelve years. A repayment plan over the same period may be "challenging" for Cheam School.
- Furthermore, Mr Y has had the opportunity to join the TPS since December 2016. Cheam School considers that a shorter repayment period would be more appropriate in the circumstances.

37. Teachers' Pensions' comments are summarised below:-

- The TPS is a statutory scheme. The regulations that govern the TPS do not contain any provisions that bind the TPS to accepting a payment that is aimed at providing backdated membership in the TPS.
- Under the TPS' provisions, Teachers' Pensions can accept, where appropriate, a payment of arrears of contributions with interest, or a transfer in of accrued pension benefits from an approved scheme.
- Mr Y has two options. Both he and Cheam School could pay the arrears of contributions, with interest, in respect of Period One and Period Two.
- Alternatively, Mr Y could request that his opt out election be backdated to 2007 and that he remains opted out from May 2014. This is in view of his concurrent membership of the IAPS scheme over that entire period.
- No arrears of contributions would be payable by either party. Mr Y could opt back into the TPS from a current date and request a transfer payment into the TPS in respect of his service in the IAPS scheme.
- Mr Y would be permitted under the TPS Regulations to purchase Additional Pension in the TPS via a one off lump sum. The facility to buy added years was withdrawn in January 2007.
- A transfer of the necessary contribution, as calculated by the actuary, would broadly achieve the same result. However, if the intention is to purchase

Additional Pension, equivalent to the annual pension that would otherwise have accrued in the TPS, the estimates should be based on the cost of the Additional Pension [(the **AP Equivalent**)].

- By buying Additional Pension, rather than making up the shortfall in the contributions, Mr Y will only accrue pension service in the CARE section of the TPS.
 - Consequently, an adjustment will need to be applied in the actuarial calculations to provide the same level of benefits that would have been available to Mr Y under the final salary section.
 - Since Cheam School is withdrawing from the TPS, it would be appropriate to use the full-time equivalent of Mr Y's employment at School Two, as there will be an ongoing salary rate [in respect of that post].
 - Teachers' Pensions is not aware how election to buy Additional Pension will be handled in any rectification exercise arising from the McCloud judgment. The Additional Pension may be affected, although the amount is unlikely to be adversely impacted. Teachers' Pensions is not currently able to advise or comment on the effect of the ruling, if any.
 - In view of this, it is worthwhile considering an alternative to purchasing Additional Pension in the TPS.
38. The McCloud and Sergeant judgment concerns the Court of Appeal decision ([2018] EWCA Civ 2844). The Court found that the way the transitional provisions had been implemented, in respect of the change from final salary to CARE benefits, amounted to unlawful direct age discrimination. On 27 June 2019, the government's application for permission to appeal the judgment was refused by the Supreme Court.
39. With the establishment of the New Scheme Cheam School withdrew from TPS in December 2019. Cheam School is paying the equivalent rate of employer contributions into the New Scheme that it paid into the TPS.
40. Cheam School offered to pay redress of £35,000 into the New Scheme (the **Offer**). The sum is broadly equivalent to the shortfall in the employer contributions in respect of Period One and Period Two. Mr Y initially indicated to The Pensions Ombudsman that he was open to considering payment of redress into the New Scheme.
41. The Adjudicator's final response to the parties' further comments are summarised below:-
- Teachers' Pensions should calculate the one off lump sum required to purchase the value of the AP Equivalent, in respect of "Period One" and "Period Two" (the **Calculation**).

- Cheam School should meet the cost of Teachers' Pensions undertaking the Calculation.
- Cheam School should pay the lump sum required to purchase the AP Equivalent, to a scheme outside of the TPS chosen by Mr Y, less the value of the employer and employee contributions paid to the IAPS Scheme in respect of Period One and Period Two.

42. The parties did not accept the Adjudicator's response and the complaint was passed to me to consider. They have provided their further comments which do not materially change the outcome. I agree with the Adjudicator's findings, except that Cheam School shall pay the contributions due for Period One. Additionally, Mr Y shall be given the option to purchase Additional Pension in respect of Period Two. I will therefore only respond to the main points made by the parties for completeness.

43. Mr Y's comments are summarised below:-

- The Offer does not take into consideration the benefits he stands to lose in the TPS. It simply does not make sense in this case not to pay into TPS.
- Teachers' Pensions confirmed Cheam School's withdrawal from the TPS would not impact his position and that he could purchase Additional Pension as a lump sum.
- Teachers' Pensions subsequently advised The Pensions Ombudsman that he could not purchase Additional Pension, as he had ceased to be in pensionable service. Teachers' Pensions overlooked the fact that he is in pensionable employment under School Two.
- He hopes that an agreeable solution can be reached. In light of the confusing and contradictory comments on the part of Teachers' Pensions, the Ombudsman should consider all aspects of his complaint.
- The Ombudsman's review should include the Opt Out Period. He will be financially disadvantaged in retirement unless his case is handled "fairly now."

44. Cheam School's comments are summarised below:-

- Cheam School requests that the Ombudsman takes into consideration its comments in response to the Adjudicator's Opinion.
- Both Cheam School and Mr Y informed Teachers' Pensions that Cheam School would be leaving the TPS on 31 December 2019. At no point was this raised as an issue by Teachers' Pensions. Furthermore, Mr Y has correspondence from Teachers' Pensions stating that his position would not be impacted by Cheam School leaving the TPS.

- Teachers' Pensions is now saying that Cheam School's withdrawal from the TPS would impact the potential options for remedy.

45. Teachers' Pensions' comments are summarised below:-

- Teachers' Pensions accepts that it overlooked the fact that Mr Y enrolled in the TPS under School Two on 1 August 2016. As Mr Y has not subsequently opted out in respect of that employment, it would be possible for Mr Y to elect to buy Additional Pension.
- There are too many variables to be applied to a hypothetical calculation of the Additional Pension and restrictions on the amount available to purchase.
- Additional Pension can be purchased in multiples of £250 per lump sum for personal benefit or for personal and partners' benefits.
- The amount of Additional Pension is a fixed amount. For the 2019/20 scheme year, the maximum amount that can be purchased is £7,000 for benefits under the CARE section of the TPS. Consequently, Mr Y would be unable to buy the full amount of the total pension of [£7,239 per annum].
- To proceed with a request to purchase Additional Pension, Mr Y would need to elect for his opt out election to be made retrospective to 1 September 2007 and agree that the opt out remains valid from 1 May 2014, in view of his concurrent membership of the IAPS for the whole period. No arrears of contributions would then be payable by either party.

Ombudsman's decision

46. I acknowledge that Mr Y has raised a new issue concerning Teachers' Pensions' alleged failure to provide him with information on request. This Determination only deals with the original complaint that was accepted for investigation. I am not considering any matters that fall outside the scope of that complaint.
47. The Regulations provide that a teacher employed in an accepted school located in the UK is eligible to join the TPS, without election. This has not been disputed.
48. Mr Y's position is that he took the decision to opt out of the TPS, relying on incorrect information provided by the Former Bursar. A decision that he allegedly would not have been taken had he received correct information.
49. In cases where a pension member claims detrimental reliance, he or she must have acted in good faith. This includes where the applicant could have discovered the error by making reasonable enquiries. The general position is that a member cannot turn a blind eye.

50. Given the sequence of events, I am not persuaded that Mr Y has satisfied the good faith test. I find that sufficient information was made available to Mr Y that ought to have given him cause to question his understanding that he was ineligible to be admitted into the TPS.
51. It was open to Mr Y to make enquiries with either School Two, the employer that had auto-enrolled him in February 2008, or Teachers' Pensions, the administrators of the TPS. Consequently, Cheam School's liability in this case is limited to making good any shortfall in pension benefits in respect of Period One and Period Two only.
52. While I acknowledge the potential adverse financial implications of Mr Y's election to opt out of the TPS, that decision cannot be unwound in these circumstances.
53. I acknowledge that Cheam School has argued that any calculation in respect of its financial liability to Mr Y should be drawn as at 31 December 2016, the date Cheam School argues Mr Y might reasonably have joined the TPS. I do not think this is right.
54. I accept that since School Two's auto enrolment date, Mr Y has had the opportunity to enrol in the TPS. But I am also mindful that Mr Y has likely suffered significant financial detriment as a result of Cheam School's failure to correctly enrol him in 2007 that he is now unable to mitigate. Cheam School's mistake in failing to enrol Mr Y into TPS at the earliest opportunity amounts to maladministration. Cheam School's subsequent failure to auto enrol Mr Y into the TPS further compounded matters.
55. I recognise that Cheam School considers that it had fulfilled its auto enrolment duties, since Mr Y was already in a qualifying pension scheme at that time. However, Cheam School should have enrolled Mr Y into the TPS in 2007; not the IAPS scheme. Cheam School missed an opportunity to identify and correct the mistake when it subsequently reached its staging date. The initial oversight on the part of Cheam School, in 2007, went unnoticed until 2017, when Mr Y raised the issue.
56. Unless the entire shortfall in both member and employer contributions are met, with interest, Mr Y will not be provided with the pensionable service that he would otherwise have accrued in the TPS during Period One and Period Two. I am mindful that Mr Y has indicated that he is unable to meet his share of the outstanding contributions. I acknowledge that the arrears are considerable.
57. While I empathise with Mr Y's financial position, it would not be reasonable in the circumstances for me to direct that Cheam School make good the shortfall in the member contributions. I have considered the fact that Cheam School's liability, in respect of the outstanding pension contributions, is limited to the employer contributions.
58. I note that Teachers' Pensions wrongly stated that due to Cheam School's withdrawal from the TPS, Mr Y did not have the option to buy Additional Pension. This likely caused Mr Y some confusion at the time. I also note that Teachers' Pensions has subsequently confirmed the correct position and has acknowledged that Mr Y

remains in pensionable employment under School Two. I am satisfied that no further action needs to be taken by Teachers' Pensions in relation to this matter.

59. To remedy Mr Y's loss of final salary benefits in respect of Period One, Cheam School shall pay the arrears of contributions amounting to £1,106 to the TPS, with interest. Cheam School shall recover the member contributions of £345, and the interest payable on those member contributions, from Mr Y's salary. The period of recovery shall be at least equal to the period that Cheam School would have deducted the contributions from Mr Y's pay but for its mistake in failing to enter him into the TPS in 2007.
60. Cheam School shall pay a one off lump sum equivalent to the transfer value of the benefits that Mr Y would otherwise have accrued in the TPS during Period Two, less the value of contributions credited to the IAPS scheme in respect of Period Two. That is, 1 May 2014 to 31 December 2019.
61. Mr Y may elect to use the one off lump sum to secure Additional Pension personal and partners' benefits in the TPS. If so, Mr Y shall agree to retrospectively opt out of the TPS with effect from 1 May 2014, in respect of his employment with Cheam School. Alternatively, Mr Y can nominate a pension arrangement outside of the TPS that is willing to accept the payment.
62. I note that the Department for Education has agreed to consider a transfer payment from the IAPS scheme. I agree that this would be a reasonable course of action.
63. In view of the circumstances of Mr Y's case, it would be appropriate for the Department for Education to allow Mr Y sufficient time to obtain regulated advice to enable him to make an informed decision and complete the transfer.
64. Cheam School shall pay an award to Mr Y to respect of the severe non-financial injustice it has caused him.

Directions

65. Within 28 days of the date of this Determination, Cheam School shall:
 - I. pay £2,000 to Mr Y in respect of the severe non-financial injustice he has suffered;
 - II. pay contributions of £1,106 to the TPS, with interest calculated in accordance with the TPS Regulations in respect of Period One;
 - III. request Mr Y's consent in writing to obtain information from Teachers' Pensions and the IAPS scheme;
 - IV. request confirmation of the value of the combined member and employer contributions held in Mr Y's pension account in the IAPS scheme, in respect of Period Two, as at the date of this Determination (the **Value**);

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- V. within a further 21 days request confirmation of the transfer value from Teachers' Pensions for Period Two, and pay to Teachers' Pensions the cost of undertaking the calculation; and
- VI. within a further 21 days of receiving confirmation of the transfer, pay an amount equal to the transfer, less the Value, to a UK registered pension arrangement that has been nominated by Mr Y to receive the payment. This includes the IAPS scheme if Mr Y wishes.

Anthony Arter

Pensions Ombudsman
13 August 2020

Appendix

Table 1: arrears of contributions payable to the TPS (excluding interest)

Period	Member Contributions	Employer Contributions
Period One	£345	£761
Opt out Period	£15,481	£29,443
Period Two	£15,210	£26,820
Total	£31,036	£57,024

Table 2: amount of pension calculated at 17 January 2020

Period	Section	Pension	Normal Pension Age
1 December 2017 to 31 March 2015	Final Salary	£4,203 per annum	65
1 April 2015 to 31 December 2019	CARE	£3,036 per annum	67
Total Pension		£7,239 per annum	